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

Tel: 202.507.7600
Fax: 202.783.7853

www.aila.org

September 23, 2010

U.S. Citizenship & Immigration Service
Office of the Director (MS 2000)
Washington, DC 20529-2000

VIA E-Mail:scopsrfe@dhs.gov

Re: Comments on Draft Request for Evidence (RFE) Template: I-140 E11 Alien of Extraordinary Ability

Dear Sir or Madam:

The American Immigration Lawyers Association (AILA) submits these comments in connection with the draft RFE template for E11 I-140 petitions for aliens of extraordinary ability.

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 would like to take this opportunity to thank the Service for its open and transparent approach to reforming the RFE templates and for encouraging stakeholder comments. This opportunity not only allows the Service to improve its internal procedures, but also creates an opportunity for stakeholders to learn what constitutes a well-documented case and what evidence is necessary to meet the legal thresholds. It is our hope that this iterative process will ultimately result in fewer RFEs, and that those RFEs that are issued will clearly articulate the deficiencies to allow meaningful and thorough responses. The hope is also that the Service will receive fewer marginal petitions that cannot be cured through an RFE.

Preliminary Considerations

In addition to commenting on the RFE template, AILA would like to take this opportunity to suggest some mechanisms that may facilitate the adjudication of petitions filed under the E11 classification:

1. Remind examiners that the burden of proof is a "preponderance of the evidence";[1]

2. Assign experienced ISOs to E11 petitions and petitions involving similar classifications, who have a higher degree of familiarity with the proper evidentiary standards;

3. Include stakeholders in specialized training of I-140 adjudicators, similar to the California Institute of Technology/NAFSA collaboration with the California Service Center that occurred several years ago;

4. Give ISOs credit for quality, not just quantity;

5. Institute mandatory supervisory review before an E11 RFE or notice of intent to deny (NOID) is issued;

6. Provide sufficient time to respond to RFEs, consistent with the June 1, 2007 Neufeld Memorandum.[2] At present, the default appears to be 30 days, even where the petition contains sufficient initial evidence;

7. Clearly articulate petition deficiencies in the RFE.

Our suggestion to mandate supervisory review of E11 RFE cases is not made lightly. However, we do believe that it will further the congressional goal to use this classification to attract the "best and brightest" to the United States. INA §203(b)(i)(A)(iii) recognizes that E11 beneficiaries will "substantially prospectively benefit the U.S." It does not require supporting evidence to demonstrate this. Rather, it is recognized that "the 'substantial benefit' criterion is met through satisfying the other statutory requirements"[3]

[1] The burden of proof in visa petition proceedings is "preponderance of the evidence," meaning "more likely than not" true. *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 1977); *Matter of J-E*, 23 I&N Dec. 291 (BIA 2002).
[2] USCIS Memorandum, D. Neufeld, "Removal of the Standardized Request for Evidence Processing Time Frame" (June 1, 2007), *published on* AILA InfoNet at Doc. No. 07062171 (*posted* 6/21/07).
[3] Letter, Skerett, Chief, Immigration Branch, Adjudications, HQ 204-23-C (Mar. 8, 1995), *reprinted in* 72 No. 12 *Interpreter Releases* 442, 445 (Mar. 27, 1995).

AILA welcomes the draft template's format, which addresses each criterion in turn and further separates out the criterion's individual components. We also appreciate that ISOs will be required to list the documentation submitted in accordance with each criterion. However, we recommend that the Service provide a section for ISOs to explain how or why the submitted documentation was deficient. This will allow stakeholders to better understand what was lacking in the original submission and ensure that future petitions are prepared accordingly. This has been an area of major confusion over the last 15 years.

AILA would also ask that the Service incorporate our comments to the recent interim memo on evaluation of evidentiary criteria for certain I-140 petitions (PM-602-0005), in its review of the template. In particular, we are concerned with the template's statement of general eligibility, requiring that "all evidence submitted should address both parts of the analysis". This appears to apply the circular logic that the federal courts have warned against; namely, requiring a "plaintiff to prove he is a doctor of extraordinary ability in order to prove that he is a doctor of extraordinary ability."[4] As discussed in our recent comment to PM-602-0005, 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."[5] 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.

With regard to the different components of each criterion, we are concerned that the template overly complicates matters by including different permutations of these components. For example, in the section dealing with "published material about the beneficiary," the template provides three options:

1. Evidence does not establish that the published material has been published in professional or major trade publications or other major media; OR
2. Evidence does not establish that the published material is about the beneficiary and the beneficiary's specific work in the field....; OR
3. (Both 1 and 2 combined): Evidence does not establish that the published material has been published in professional or major trade publications or other major media, AND that the published material is about the beneficiary and the beneficiary's specific work in the field.

We submit that this will create confusion for ISOs who may (inadvertently or not) select the combined option (#3), even if evidence is only lacking for one component of the

[4] *Buletini v. INS*, 860 F. Supp. 1222, 1231 (E.D. Mich. 1994).
[5] *Id*. at 1234 (emphasis added). *See also Muni v. INS*, 891 F. Supp. 440, 445–46 (N.D. III 1995) (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).

criterion. It will most certainly create confusion for stakeholders. AILA suggests removing the combined options and simply allowing the ISO to include all of the relevant components, as applicable.

AILA will now comment on the individual sections of the RFE draft template:

Evidence of a One-Time Achievement

AILA appreciates the fact that in order to qualify for extraordinary ability through this singular criterion, the award must be of high caliber; that is it must be a "major, internationally recognized award."[6] The template outlines specific documentary evidence that an ISO may request to qualify an award as a major, internationally recognized award. However, AILA is concerned that the specific types of evidence that ISOs are instructed to request may not apply to some of the top awards in the world and therefore, may be misleading and overly restrictive:

- *Evidence that the award attracts worldwide competition*. The regulation requires that the award itself be major and internationally recognized. However, it does not require that it attract international competition, or that its recipients be individuals from multiple countries. For instance, the Pulitzer Prize, a major, internationally recognized award for excellence in journalism and the arts, is limited to work conducted in the United States.[7] Therefore, we ask that USCIS strike this requirement from the template.

- *Evidence that the award was reported internationally in the top media*.We recognize that major, internationally recognized awards are normally reported in the media. However, we ask that the Service keep in mind that while an award may be internationally recognized within a particular field of endeavor, it may not constitute international news, since not all fields of endeavor are of sufficient interest to the general public. Also, AILA is concerned that the request for "top" media may be confusing and limiting in the choices of evidence that a petitioner may present in order to demonstrate international recognition. Of course, it is expected that the recipient of the award would appear in the media, but this is not a requirement of the regulation. Therefore, we ask that USCIS strike this requirement from the template.

- *Evidence that the award is a familiar name to the public at large*. It is unclear what type of evidence would demonstrate the public's familiarity with a particular award. More importantly, a major, internationally recognized award in a particular field may simply be of little interest, and therefore, unfamiliar to the

[6] 8 CFR §204.5(h)(3).
[7] *See* http://www.pulitzer.org/files/entryforms/2011planofaward.pdf.

general public. For instance, the Abel Prize[8] which is considered the equivalent of the Nobel Prize in the field of mathematics, may not be known to the general public. However, it is one of the highest honors a mathematician can receive for extraordinary contributions to the field.

- *Evidence that the award includes a large cash prize*. AILA is concerned that ISOs may believe that unless an award includes a large cash prize, it would not qualify under the regulation. However, the Academy Awards of Merit given by the Academy of Motion Picture Arts and Sciences (commonly known as "the Oscars"), which is the top honor in motion pictures, has no cash prize.[9] Additionally, the Pulitzer Prize is $10,000, an amount unlikely to meet the definition of "large cash prize."[10] Therefore, we ask that USCIS strike this requirement from the template.

If an ISO is not convinced of the caliber of the award, AILA suggests that the ISO simply request additional evidence to demonstrate the award's status as a one-time achievement. AILA respectfully submits that that to determine an award's qualification as a "one-time achievement," ISOs should consider whether the award is "major" and "internationally recognized." Therefore, AILA recommends replacing the above-referenced examples with the following:

- Documentary evidence of the significance of the prize or award;
- Documentary evidence of the reputation of the organization or the panel granting the prize or award;
- Documentary evidence of the criteria used to grant the award or prize;
- Documentary evidence of the number of similar awards or prizes granted each year; and
- Listings of previous winners who enjoy international acclaim.

Receipt of Lesser Nationally or Internationally Recognized Prizes or Awards for Excellence in the Field of Endeavor

This criterion has two components. In order to meet it, the petitioner must demonstrate that:

1. The prize or award is nationally or internationally recognized; and
2. The prize or award was issued for excellence in the field of endeavor.

The template, however, splits evidentiary requests for this criterion into five sections. AILA recommends simplifying this section of the template to allow for more concise

[8] http://www.abelprisen.no/en/.
[9] http://www.oscars.org/awards/academyawards/rules/83aa_rules.pdf.
[10] http://www.pulitzer.org/files/entryforms/2011planofaward.pdf.

wording of the alleged evidentiary deficiencies, including removing the portions that appear to combine two or more components of the criterion. Specifically, we suggest that this portion of the template be split into two sections:

1. Award(s) do not appear to be nationally or internationally recognized.

    - Provide documentary evidence of the national or international recognition of the award;
    - Provide documentary evidence about the reputation of the organization granting the prizes or awards;
    - Provide documentary evidence that addresses the reputation of the award within the field;
    - The above are examples of evidence you may submit to support your petition and are not all inclusive.

2. Evidence does not establish that the basis for the award(s) was/were excellence in the field of endeavor

    - Provide documentary evidence of the criteria by which awardees are selected;
    - Provide documentary evidence of the selection process for the award;
    - Provide documentary evidence that addresses the reputation of the award within the field;
    - Provide documentary evidence that addresses the reputation of the organization that granted the award within the field;
    - Provide documentary evidence that the award was granted to the beneficiary (either individually or as part of a team);
    - Provide documentary evidence that the award recognizes excellence in the beneficiary's field of endeavor.
    - The above are examples of evidence you may submit to support your petition and are not all inclusive.

Once each of these requirements has been queried, there is no need to request further documentation. In other words, if both A and B are missing, both A and B can be requested. If either A or B is missing, then only A or B should be requested. If the petitioner is unable to satisfy either A or B, the criterion is not met, and there is no need to request both A and B under a separate heading.

We note that awards and prizes must be nationally or internationally *recognized*, though not necessarily nationally or internationally *distributed*. The template suggests that evidence of "who is considered for the prizes or awards including the geographic scope for which candidates may apply" may be requested. However, the phrase "who is considered for the prizes or awards" provides no meaningful guidance to determine what evidence should be submitted. We also note that a request for evidence of the "geographic scope for which candidates may apply" is misplaced, as awards may be

awarded by an exclusive organization or a small province, but nonetheless be recognized nationally or internationally.

The template also recommends that ISOs request evidence of "media attention … including the circulation of the media outlet." We strongly disagree with the inclusion of this language in the template, as this is precisely the type of "novel substantive or evidentiary standard" that *Kazarian* warns against. Such a requirement fails to recognize that while a prize or award may be nationally or internationally recognized within a particular field of endeavor, it may not constitute national or international news, because not all fields of endeavor are of sufficient interest to the general public. Moreover, the regulation employs the term "lesser," distinguishing it from more substantial awards that may meet the one-time achievement standard.

AILA is very concerned with the section **Academic awards not nationally or internationally recognized**, as it appears to be written for the express purpose of rejecting certain types of honors, awards, and prizes. For the reasons discussed at length in our comment to PM-602-0005, we believe that this section is prejudicial without being probative. We ask that USCIS carefully consider these comments in revising the template.

Membership in Associations that Require Outstanding Achievement

As with a number of sections in the template, this section provides a few options for ISOs to articulate the deficiencies of the evidence provided. AILA is concerned that the way in which these options are phrased builds one of the components of the criterion on to another, thereby inadvertently concealing the actual deficiency. For example, one of the options in the template states that "evidence does not establish that the beneficiary's outstanding achievements were the basis for granting memberships as judged by recognized national or international experts in their disciplines or field." This phrasing is confusing because it does not clearly indicate if the problem is (1) the lack of outstanding achievements; (2) the outstanding achievements were not related to the grant of membership; or (3) the outstanding achievements were not judged as such by recognized national or international experts in their disciplines or field.

AILA suggests more direct phrasing, tailored specifically to the evidentiary component(s) that are missing or in question. For example, the option noted above could be rephrased to simply indicate that "evidence does not establish that national or international experts in the field were involved in judging the beneficiary's outstanding achievements." This phrasing plainly states what is lacking in terms of the documentation, leaving no doubt regarding the perceived deficiency. Moreover, if the ISO has questions about more than one component, the template could allow ISOs to include more than one of these options. AILA recommends that this component be outlined as follows:

1. Evidence does not establish that the association requires outstanding achievement;

- Provide information/documentation on the minimum requirements and criteria used to qualify for the beneficiary's level of membership;
- The above are examples of evidence you may submit to support your petition and are not all inclusive.

2. Evidence does not establish that national or international experts were involved in judging the beneficiary's outstanding achievements;

   - Provide information/documentation on the association's reviewers or review panel to establish that it includes national or international experts in the field;
   - Provide information/documentation on the process by which the qualifications of potential members are reviewed;
   - The above are examples of evidence you may submit to support your petition and are not all inclusive.

3. Evidence does not establish that the association(s) are related to the beneficiary's field.

   - Provide information/documentation regarding the association's goals, mission, membership;
   - The above are examples of evidence you may submit to support your petition and are not all inclusive.

This concise phrasing will reduce the confusion that has plagued RFEs in the E11 preference category for so long. A straightforward statement identifying the deficiency in the application and indicating how the deficiency can be addressed will provide petitioners with adequate notice and an opportunity to respond.

Published Material about the Alien

AILA appreciates the simple and direct language in the template's discussion of **Evidence to establish that the published material has been published in professional or major trade publications or other major media**. However, we are concerned that the draft template unilaterally imposes novel substantive requirements on the second component. Under 8 CFR §204.5(h)(3)(ii), the published material is only required to be "about the alien" and "relating to alien's work in the field." The template imposes a far more restrictive standard, requiring that the published material be about "the beneficiary's specific work." According to the template, this means that the "published material be primarily about the beneficiary and the beneficiary's work."

There is no basis in the regulations for this requirement. Moreover, such a requirement has been repeatedly rejected by the federal courts. In *Muni v. INS*,[11] the court held that "published material about [Muni] in professional or major trade publications or other major media, relating to [his] work in the field for which classification is sought"[12] was sufficient to satisfy this criterion. The court noted that the "articles do not establish that Muni is one of the stars … but that is not the applicable standard."[13] Instead, the court found that "the articles Muni submitted, which appeared in various newspapers and hockey magazines, clearly fit this requirement"[14] A similar holding was set forth in *Racine v. INS*.[15] There, the court found that "[The] INS was not following its own regulations when it held that there are no articles which state that Racine is 'one of the best in the field.'" Like the court in *Muni*, *Racine* held that "articles [that] … demonstrate his work within the field"[16] were sufficient to meet this criterion.

This extra-regulatory requirement would appear to reject published material about collaborative work. Scientific research is a collaborative endeavor, which requires the efforts of several different people in order to be successful. If the beneficiary's name does not appear directly in the published material, it does not necessarily mean that the material is not about the beneficiary's work. Adjudicators should remember that all co-authors contribute significantly to a published article and, if that article receives media coverage, that coverage should be acceptable as evidence of meeting this criterion. Even the lead researcher or first author of an important and exciting project may not be interviewed if the research was conducted in a laboratory where someone else is the principal investigator. We recommend amending the template language of this criterion as follows:

- Evidence does not establish that the published material is about the beneficiary, relating to the beneficiary's work in the field for which the classification is sought.

    - Provide information/documentation establishing how the published material relates to beneficiary's work in the field;
    - If necessary, highlight relevant sections of such documentation;
    - The above are examples of evidence you may submit to support your petition and are not all inclusive.

We again recommend that the Service remove the combined option, but retain the individual components.

[11] 891 F. Supp. 440 (N.D. III 1995).
[12] *Muni*, 891 F. Supp. at 445.
[13] *Id*.
[14] *Id*.
[15] 1995 U.S. Dist. LEXIS 4336, at *17, 1995 WL 153319, at *6 (ND IL 1995).
[16] *Racine* at 17.

Participation as a Judge of the Work of Others

AILA is completely satisfied with the template in this section.

Original Scientific Artistic, Athletic or Business-Related Contributions of Major Significance

AILA is concerned that the template misstates the regulatory standard under 8 CFR §204.5(h)(3)(v), which requires evidence of the alien's original contributions of major significance *in* the field. The regulation does not require, as stated in the template, contributions of major significance *to* the field**.** This is a subtle yet significant difference; while the regulation requires an important contribution related to the field, the template requires a contribution that dramatically impacts the field. This again unilaterally imposes a novel substantive requirement, as reflected by the template language allowing the ISO to request "evidence that beneficiary's work has *provoked widespread commentary in the field or has been widely cited*," as well as evidence of the beneficiary's work being implemented by others. This is not to say that such evidence would not be probative, but its presence in the template may suggest to ISOs that it is required.

We are similarly concerned that the template's language regarding letters and testimonial evidence will result in a summary dismissal of submitted letters, without any explanation or indication as to how or why such letters are deficient. We appreciate that PM-602-0005 recognizes that "in certain cases, evidence submitted to establish one criterion may be sufficient to satisfy more than one criterion." This is particularly relevant here, as the beneficiary's publications, presentations, and citations to their work, etc. may also establish the originality and significance of the contributions.

As background on this issue, we note that while expert letters by themselves are not conclusive evidence of extraordinary ability, such letters often summarize and explain the documentary evidence submitted.[17] Moreover, failure to consider expert testimony and/or affidavits is a violation of due process,[18] and unchallenged expert testimony cannot be rejected outright.[19] The determination of the credibility of documentary evidence should be the same as the determination of the credibility of testimony and therefore, an adverse decision must be based on "specific, cogent reasons that bear legitimate nexus to the finding."[20] In other words, an expert letter may not be dismissed without a specific, cogent reason for finding that it is not credible evidence in support of the petition.

---

[17] *Matter of Carron*, 19 I&N Dec. 791 (BIA 1988) ("where an opinion is not in accord with other information or is in any way questionable, the Service is not required to accept or may give less weight to that evidence").
[18] *Tun v. Gonzales*, 485 F. 3d 1014 (8th Cir. 2007*); Rodriguez Galicia v. Gonzales*, 422 F. 3d 529, 538–40 (7th Cir. 2005); *Lopez-Umanzor v. Gonzales*, 405 F. 3d 1049, 1056–58 (9th Cir. 2005); *McDonald v. Gonzales*, 400 F. 3d 684,687–88 9th Cir. 2005).
[19] *Banks v. Gonzales*, 453 F. 3d 449, 453–54 (7th Cir. 2006).
[20] *Zahedi v. INS*, 222 F. 3d 1157, 1165 (9th Cir. 2000).

Moreover, we believe it would be helpful for the template to apply its individual component approach to this criterion, to ensure that stakeholders understand the deficiency and have a clear indication of how they can remedy it.

Authorship of Scholarly Articles in Professional or Major Trade Publications or Other Major Media

In its comments to PM-602-0005, AILA expressed its concern that the USCIS definition of what constitutes a "scholarly article" appears restrictive and misleading. We reiterate this concern and remind USCIS that the regulation only requires "authorship of scholarly articles in the field, in professional or major trade publications, or major media." To ensure that USCIS' evidentiary standards are consistent with this regulatory language, AILA recommends the adoption of the judicial definition of "scholarly," as set forth in *Gulen v. Chertoff:*[21] "… a work becomes scholarly by virtue of its author and its subject matter, not its intended audience." This definition properly encompasses "scholarly articles" published in media such as major newspapers, periodicals, or trade or professional publications. 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.

AILA proposes rephrasing the examples provided under the heading **Evidence does not establish that the articles are scholarly** as follows:

1. Documentary evidence that the beneficiary's articles deal with a scholarly subject matter;

2. Documentary evidence that the beneficiary's articles have been through a review process that is consistent with the publication's requirements.

As stated elsewhere in these comments, we request that USCIS delete combined evidentiary requirements for this criterion. If articles are shown to have been published "in professional or major trade publications, or major media" and are "scholarly" in nature, it is redundant to require the alien to make a combined showing of these components. Thus, AILA urges USCIS to delete the following heading and its requirements: **Evidence does not establish that the articles are scholarly and that they have been published in professional or major trade publications or other major media**.

[21] Civil Action No. 07-2148, 2008 WL 2779001 (E.D. Pa. July 16, 2008).

Display of the Beneficiary's Work in the Field at Artistic Exhibitions or Showcases

AILA reminds USCIS that this regulatory criterion is one of the few criteria that apply to a specific field of endeavor (the arts) to the exclusion of other fields. Therefore, ISOs should be instructed to consider comparable evidence submitted by petitioners who have displayed their work at exhibitions or showcases, albeit in fields other than the arts.

To evaluate evidence submitted in satisfaction of this criterion, ISOs should consider whether the work displayed is the alien's work, which may include the collaborative work product of a team. For 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. Therefore, an alien actor's appearance as a character in a television show (which has other characters played by other actors) should meet the standard.

AILA recommends that the definition of the "the beneficiary's work" be expanded to include collaborative artistic creations, exhibitions or displays. Accordingly, the template should be revised to include:

- Evidence that the work is attributable to the beneficiary, or that the beneficiary's contribution or role was integral to the work.

Further, AILA is concerned that the definition of "artistic" may be misleading or confusing. What makes an exhibition "artistic" is the fact that art is displayed, not that the venue has particular attributes. Although art galleries, museums, and film, television or theatrical productions are more common examples of artistic exhibitions and showcases, ISOs are encouraged to accept evidence of less conventional venues as equally valid. For instance, 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 of worship (e.g., Tiffany stained glass windows displayed at numerous churches around the U.S.), and Internet-based displays or productions. In short, there are many ways modern artists display their work and USCIS is urged to give due consideration to evidence of evolving forms of artistic display.

As with other sections in this template, we ask that USCIS remove combined evidentiary standards for this criterion. We recognize that the evidence of the beneficiary's work may be queried separately from the nature of the exhibits or showcases. However, if the beneficiary adduces sufficient evidence to show that the work is attributable to him or her (or that he/she was an integral part of the collaborative work), and that it was indeed artistic in nature, there is no logical reason why the beneficiary would need to take additional steps to demonstrate this criterion. Thus, AILA urges USCIS to strike the following heading and its requirements: **Evidence does not establish that the work product submitted is in fact the beneficiary's and does not establish that the**

venue(s) (virtual or otherwise) where the beneficiary's work was displayed were artistic exhibitions or showcases.

Leading or Critical Roles for Distinguished Organizations

AILA is concerned that the language in the template does not adequately explain how to fulfill the regulatory standard for this criterion, which has two components:

1. The alien has performed in a leading or critical role;
2. For organizations or establishments that have a distinguished reputation.

We agree with the language in the template stating that the beneficiary's title is not the deciding factor, and that the focus should be on the beneficiary's duties and responsibilities. However, apart from that language, the rest of the section is rather circular, requesting "details regarding why the beneficiary's performance in the role was leading or critical." This merely restates the regulatory language without providing any guidance on what was lacking in the submitted materials.

We are also concerned that the draft template requests information beyond that which is required by the regulations, thereby "unilaterally imposing novel substantive or evidentiary requirements," in contravention of *Kazarian*. For example, the template contains language requesting evidence that compares the beneficiary's performance to others who participate in the field of endeavor. Yet comparing the responsibilities of one principal investigator to another, or one senior executive to another, does not provide any insight as to whether the individual in question has performed in a leading or critical role. Rather, as the template correctly notes, the appropriate focus is on the duties and responsibilities of that individual.

Similarly, the template limits the exploration of whether an organization or establishment is "distinguished" to evidence that "documents the organization or establishment's eminence, distinction, or excellence." However, these words do not explain what it means to be distinguished, eminent, or excellent, or how to document that an organization or establishment is in fact "distinguished."

Consistent with AILA's suggestions in this comment, the RFE template may be more user friendly, for both ISOs and petitioners, if the components are separated and each addressed in turn. We also recommend language that more clearly articulates why the documentation submitted was insufficient. For example:

1. Evidence does not establish that the beneficiary has performed in a leading or critical role.

    - Provide information/documentation addressing the beneficiary's duties and responsibilities;

- Provide information/documentation regarding the beneficiary's position in the hierarchy of the organization or establishment;
- Provide information/documentation regarding the beneficiary's supervisory responsibilities;
- Provide information/documentation of the beneficiary's contributions to the organization or establishment;
- The above are examples of evidence you may submit to support your petition and are not all inclusive.

2. Evidence does not establish that the organization or establishment has a distinguished reputation.

   - Provide information/documentation regarding the organization or establishment's recognized accomplishments/achievements;
   - Provide information/documentation regarding the organization or establishment's ranking in the respective field;
   - Provide information/documentation regarding any awards, patents, or other distinctions that the organization or establishment has received;
   - Provide information/documentation regarding the organization or establishment's market share;
   - The above are examples of evidence you may submit to support your petition and are not all inclusive.

ISOs may use one or both components. Requesting evidence in this manner will provide petitioners with a clear understanding of the evidentiary standard and what is required to meet that standard.

Salary or Remuneration

We were surprised that the template departed from the guidance in PM-602-0005, which provides ISOs with three specific websites that offer federal databases of wages in specific fields. We believe that these websites are important resources to determine if a salary is high in comparison to others in the field. For example, the Department of Labor'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. Included in this database is an upper-most level, for those most experienced in the field. This would provide ISOs with a very clear parameter to determine if a salary is indeed considered "high."

Disconcertingly, in a side note, the template dismisses DOL data as not establishing on its own that a salary is "significantly" higher than others. However, the regulatory language requires evidence that the alien has "*commanded a high salary, or other significantly high remuneration* …." The language referencing "other significantly high remuneration" was meant to encompass forms of compensation other than salary alone, such as a very

high bonus or a high fee for services rendered. It does not require that the salary be *significantly* higher as compared with others, nor does it require that it be amongst the highest in the field. Therefore, the template's request for media reports of top earners in the field is overly-restrictive.

Also misplaced is the template's request for organizational justifications to pay above the compensation data, as this is not probative to a determination of whether the salary is "high" as compared to others.

We recommend that the template language read:

- Evidence does not establish that the beneficiary commands a high salary or other remuneration as compared with others in the field

    - Provide information/documentation of the beneficiary's wage or other remuneration. Evidence may include W-2s, 1099s, foreign tax documents, or contracts for services;
    - Provide information/documentation regarding the range of compensation in the field;
    - The above are examples of evidence you may submit to support your petition and are not all inclusive.

Comparable Evidence

AILA is concerned that the RFE template on the "comparable evidence" requirement represents no progress over its practice of effectively disallowing any comparable evidence for meeting E11 evidentiary standards. Where regulatory criteria do not readily apply, the regulation at 8 CFR §204.5(h)(4) provides 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.

The template on comparable evidence is fairly short and appears to reiterate the AAO's restrictive position that the submission of comparable evidence is only allowed if none of the ten criteria of 8 CFR §204.5(h)(3) apply to the beneficiary's occupation. AILA encourages USCIS to clarify that this is an inappropriate application of the comparable evidence regulation as it renders the "comparable evidence" criterion practically unusable. Additionally, it provides no meaningful guidance for what types of evidence should be submitted to show the beneficiary's eligibility, and instead directs the beneficiary to produce "evidence" to establish why the ten criteria do not apply.

An alien who has not won a major, internationally recognized award may select three (or more) criteria out of the ten available options in order to prove his or her extraordinary ability. However, some of the listed criteria are field-specific and do not readily apply to every occupation. This disqualifies aliens who do not work in those specific fields or

occupations from using these criteria and limits such aliens to a smaller list. Specifically, three of the ten criteria apply only to particular occupations:

- 8 CFR §204.5(h)(3)(vi) (evidence of authorship of *scholarly* articles) applies only to scholars;
- 8 CFR §204.5(h)(3(vii) (evidence of display of the alien's work at *artistic* exhibitions or showcases) applies only to artists; and
- 8 CFR §204.5(h)(3)(x) (evidence of commercial successes in the *performing arts*) applies only to performing artists.

Thus, an alien who is not a scholar, an artist or a performing artist (e.g., a physician) would have a choice of only seven regulatory criteria in order to prove extraordinary ability. At the same time, a scholar, or an artist working in the non-performing arts, would have to choose among eight criteria.

AILA believes that the "comparable evidence" regulation addresses the above deficiencies by allowing the submission of evidence comparable to any one or more of the criteria, or any other evidence of equally persuasive value, for establishing E11 eligibility. As one example, the "display" criterion in 8 CFR §204.5(h)(3)(vii) applies to the arts, and no criterion specifically calls for evidence of lectures and presentations, which is how scholars and academics "display" their work. "Display of work" at scholarly exhibitions is comparable to the "display of work at artistic exhibitions" because in both cases, the alien presents his work to an audience; may participate by invitation only; and invitations to display one's work are granted based on merit of achievement and competitive selection. Consequently, a scholar's display of work at a prestigious international conference is comparable to an artist's display at a widely anticipated artistic exhibition, and should be admissible evidence to satisfy the "display" criterion under the "comparable evidence" regulation.

AILA also believes that the "comparable evidence" regulation is ameliorative in nature and *permits* the use of evidence that does not naturally fall into one or more of the ten criteria, thereby expanding the alien's options for proving extraordinary ability. The logical construction of the regulation, therefore, is that if the alien does not readily meet any 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 CFR §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. Accordingly, AILA recommends that the first example in the comparable evidence template be rephrased as follows:

- Submit evidence that is comparable to any of the ten criteria not readily applicable to the beneficiary's occupation.

Note that for comparable evidence, AFM §22.2(i)(1)(6) states that the alien's prior approval of O-1 nonimmigrant status may be a relevant factor.

Overall Merits Determination

The last section of the RFE template falls short in providing specific details about the reasons a beneficiary may still be denied despite having met three of the regulatory criteria in 8 CFR §204.5(h)(3). The language regarding the overall merits determination provides neither a clear basis for rejection nor guidance on how to respond to the adjudicator's doubts. In this way it differs from the language in the rest of the template and fails to meet USCIS' goal of transparency and consistency in adjudications.

AILA suggests that the analysis articulated in *Buletini v. INS* can provide adjudicators with the framework that is lacking in this section of the RFE template. The *Buletini* court, having determined that the plaintiff met three of the ten criteria in 8 CFR §204.5(h)(3), stated:

> Once it is established that the alien's evidence is sufficient to meet three of the criteria listed in 8 CFR §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.

Under this framework, once a petitioner has satisfied three criteria, he or she has demonstrated, by a preponderance of the evidence, prima facie eligibility for the E11 classification. At that point, the burden of proof shifts to USCIS to show, by competent and substantial evidence, that the petitioner has not met the standard. This approach allows the adjudicator to raise specific questions about the petitioner's eligibility and explain those reasons in the overall merits section of the RFE. AILA also suggests that adjudicators be given further instruction within the RFE template so that they can clearly articulate the specific reasons for finding a petition to be deficient. For example:

> The evidence submitted shows that you have met the requisite three criteria for classification as an alien of extraordinary ability. According to *Kazarian* and *Buletini*, the burden of proof now shifts to USCIS to assess whether you qualify for the "final merits determination," i.e. that you are one of the top few percent and have sustained acclaim in your field of (list field of endeavor). [Note to adjudicators: Enumerate the specific concerns you have about the petition as a whole, and also list the parts of the petition that you find persuasive of sustained acclaim. What does not succeed in convincing you that the beneficiary has sustained acclaim in the field?]

Please submit additional evidence to show that you are one of the top few percent who have risen to the top of your field and that you have sustained national or international acclaim. Such evidence may include:

- Additional expert letters;
- Additional evidence relating to any of the above criteria;
- Other evidence not listed in the above criteria (comparable evidence).

Conclusion

Once again, AILA would like to thank the Service for its significant effort at reforming the RFE templates, and for encouraging stakeholder comments and meaningful consideration of those comments. We do believe that this can be a win-win situation that will lead to fewer RFEs and fewer poorly-documented petitions. We very much appreciate your consideration of the substantive comments above on the details of the draft RFE template.

Sincerely,

AMERICAN IMMIGRATION LAWYERS ASSOCIATION