# How to Handle RFEs for the Extraordinary Worker

*by Laya R. Kushner, Linda Rose, David Ware, Karin Wolman*

**Laya R. Kushner** received her B.A. from State University of New York at Binghamton (1991) and her J.D. from the University of Baltimore (1994). Ms. Kushner is a third generation attorney practicing immigration law, and a member of the bars of the State of North Carolina, State of New York and the U.S. Supreme Court. Ms. Kushner has lectured to the immigration bar and various organizations on immigration issues for artists and entertainers and currently chairs AILA's ACES committee.

**Linda Rose** is a graduate of the University of Hawaii William S. Richardson School of Law. She has practiced exclusively immigration law since 1986. She is the managing member of Rose Immigration Law Firm, PLC. Based in Nashville, the firm emphasizes work in the arts and entertainment fields, and represents a significant client-base with O-1, P-1, EB-1, and NIW petitions. She has also served on the ACES (athletics, culture, entertainment, and sciences) committee.

**David Ware** is a 1981 graduate of the University of Texas School of Law. He has practiced exclusively in the area of immigration and nationality law since 1982, with a consistent academic focus. Mr. Ware is active in AILA, NAFSA, AIEA and NACUA, and is a frequent speaker and author on immigration topics. He currently serves on AILA's DOL Committee.

**Karin Wolman** is a graduate of Columbia (BA 1987) and UCLA (JD 1990). She is a sole practitioner in New York devoted to employment-based immigration in business, health, design and the arts, and has worked with extraordinary aliens since the O-1 visa category was introduced. Ms. Wolman is a frequent speaker on immigration topics in business, the arts and naturalization, moderates the O & P and E visa forums on AILA InfoNet, and serves on AILA's ACES Committee.

**********

Even with strong documentation and a carefully crafted cover letter, Extraordinary Ability, Outstanding Researcher, and National Interest Waiver petitions often result in a Request for Evidence (RFE). How you respond once the RFE arrives makes all the difference. In this article, we provide you with food for thought and strategies in response to some of the most typical RFE statements (or misstatements) made by U.S. Citizenship and Immigration Services (USCIS).

## PROCESSING THE INFORMATION – WHAT DO THEY WANT AND IS IT REQUIRED?

After you read an RFE for the first time, read it again and assess it from the perspective of an examiner. Then distribute it to another attorney in your office to get his or her impression. Some offices distribute RFE copies to the multiple members of the legal team to gain as many perspectives as possible.

Under each header or point that demands some form of response, assess whether the legal standard stated in the RFE is accurate, or if it misstates what is required by the law and regulations. There are plenty of places where RFE templates resurrect *ultra vires* legal standards rejected in proposed regulations that were never finalized, or from defunct sub-regulatory authority such as the legacy Immigration and Naturalization Service (INS) Operations Instructions. Also, critically re-read your initial cover letter and exhibit list with respect to items from the USCIS perspective: Did you connect the dots adequately

between the regulatory criterion in question and the evidence that shows your client meets that legal standard?

## DID THEY READ WHAT YOU SENT?

Under each point, if the RFE states the legal standard correctly, check to see if the examiner recites correctly the facts. Does it contain jarring references to industries, fields or proper names that have nothing to do with the case, which may be holdovers from a previous case reviewed? If the RFE refers accurately to facts or items of evidence submitted in your case, assess whether it applies them correctly, or whether it attributes evidence to the wrong regulatory criterion.

Make a procedural assessment first: Under the header or item in question, does the RFE ask for a type of evidence you did not submit, does it state the inadequacy or nonexistence of something you did submit, or does it vaguely insinuate insufficiency of items you submitted without saying so outright, or without explaining how or why your evidence was insufficient? If the RFE deems the evidence insufficient, is it applying more restrictive criteria than the regulations allow?

Make a substantive assessment next: Refute the challenge as stated in the RFE, explaining how that evidence shows the correct legal standard has been met. Where there is new evidence to supplement items initially submitted, provide two exhibit lists: one itemizing initial exhibits; another detailing new evidence proffered in the RFE response.

Adjudicators face volume quotas; they work against the clock. Remember, you have better training and resources than the person who generated the RFE, and you have more time to devote to answering it than he or she devoted to writing it. While it is tempting to sit and stew on the RFE for several days before sending it to the client and arranging a time to discuss it, or offering a written breakdown, you will raise the client's estimation of you immensely if you send the RFE and form a game plan quickly.

Where specific pieces of evidence are mentioned in the RFE, this indicates the adjudicator has read some of the supporting documents and perhaps even reviewed the exhibit list. This is a better starting position than trying to explain a kitchen-sink RFE that regurgitates all the regulatory criteria without naming any specific deficiencies, where your options may be limited to wholesale reorganization of all the initial evidence. Another positive point to make to the client is to identify strong pieces of evidence of which there is no mention in an RFE claiming the applicable criterion has not been met. When an RFE claims a criterion was not met, but is silent as to existence of the strongest piece of applicable evidence, that implies that either the examiner missed it completely, or could not think of a way to discount or dismiss it.

## MAP OUT THE RESPONSE

Lead with any criteria the RFE concedes have been met. This indicates at least some of your presentation was read and understood, and offers the least painful point of

introduction when responding to USCIS and explaining the RFE to your client.

Once you have analyzed the points raised in the RFE, identify what elements and arguments in response will go in the petitioner's letter, which is considered evidence, and what will go in the attorney letter, which is not. Arguments about what facts are demonstrated by the evidence, and connecting those facts to the applicable law and regulatory criteria, may be presented in the attorney letter, memorandum of law, and/or in the petitioner's response. They must, however, be supported by documentary evidence.[1]

Legal arguments, however, present a different challenge. Some of most universal pure legal arguments for an RFE response include the standard of proof, the prohibition on inventing new rules, and the prohibition on rejecting expert testimony without a specific and objective basis for doing so.

Below we provide ammunition for responding to USCIS when it attempts to shift the burden of proof or require the wrong standard of proof. There are many sources for RFE policy and the standard of proof, but several are highly quotable. A June 3, 2013 USCIS Policy memorandum[2] clarifies the agency preference for avoiding RFEs, and what the standard of proof means in this context. It notes that the Adjudicator's Field Manual (AFM) was revised to read as follows:

> RFEs should, if possible, be avoided. Requesting additional evidence or returning a case for additional information may unnecessarily burden USCIS resources, duplicate other adjudication officers' efforts, and delay case completion.
>
> Initial case review should be thorough. Evidence or information not submitted with the application, but contained in other USCIS records or readily available from external sources should be obtained from those sources first rather than going back to the applicant for information or evidence.[3]

The memorandum goes on to clarify where they are appropriate:

> Under 8 CFR §103.2(b)(8),"[an RFE], "is to be used when the facts and the law warrant. At the same time, an RFE is not to be issued when the evidence already submitted establishes eligibility or ineligibility in all respects for the particular benefit or service. An unnecessary RFE can delay case completion and result in additional unnecessary costs to both the government and the individual.[4]

It then reaffirms that "in all respects" does NOT mean, 'by clear and convincing evidence'-

---

[1] Bear in mind the attorney's letter or memorandum in itself is not evidence. Supporting evidence can include third-party letters, media articles, photographs, website print-outs, and official statistical reports.
[2] USCIS Memorandum, "Requests for Evidence & Notices of Intent to Deny," (June 3, 2013), AILA InfoNet Doc. No. 13061247.
[3] *Adjudicator's Field Manual*, ch. 10.5(a)(2), rev. June 2007.
[4] *Id.*

"In each case, officers must:

- Understand the specific elements required to demonstrate eligibility for the particular application, petition, or request.
- Understand the standard of proof that applies to the particular application, petition, or request. In most instances, the individual has the standard of proving eligibility by a preponderance of the evidence. *Under that standard, the individual must prove it is more likely than not that each of the required elements has been met.* (emphasis added)
- Review all the evidence to determine whether each of the essential elements has been satisfied by the applicable standard of proof. "

A USCIS memorandum from 2006 remarks, "even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "probably true" or "more likely than not, the applicant or petitioner has satisfied the burden of proof."[5]

The *Kazarian* memo[6] also reiterates the preponderance standard in the Extraordinary Ability, Outstanding Researching and NIW context, and refers back to case law requiring only a greater than 50% chance of an occurrence taking place. "USCIS officers are reminded that the standard of proof for most administrative immigration proceedings, including petitions filed for Aliens of Extraordinary Ability, for Outstanding Professors or Researchers, and for Aliens of Exceptional Ability is the "preponderance of the evidence" standard."[7]

When at least three regulatory criteria for an EB-1 or O-1 are satisfied, the burden of proof should shift to USCIS:

> 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.[8]

USCIS quietly disagrees with the burden-shifting rule, and claims that *Buletini* and its brethren are not binding on the Service, although not explicitly overruled by *Kazarian*.[9] The burden-shifting argument can still be made in an RFE reply, but be sure to make it in

---

[5] USCIS Memorandum, M. Aytes, "Interoffice Memorandum," (Jan. 11, 2006), AILA InfoNet Doc. No. 06021014, *citing U.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987).

[6] USCIS Memorandum, "Evaluation of Evidence Submitted with Certain Form I-140 Petitions; Revisions to the *Adjudicator's Field Manual* (AFM) ch. 22.2," PM-602-0005.1 (Dec.22, 2010).

[7] *Id.*, at 4.

[8] *Buletini v. INS*, 860 F. Supp. 1222, 1234 (E.D. Mich. 1994); see also *Muni v. INS*, 891 F. Supp. 440, 445 (1995).

[9] USCIS Service Center Operations-AILA Teleconference Minutes (May 25, 2011), AILA InfoNet Doc. No. 11052580 at Question #5.

context of the two-step analysis introduced by *Kazarian*, which has no identifiable benchmarks at all for the adjudicator's "final merits determination." [10]

If that two-step analysis appears in an O-1B RFE, remind the adjudicator that neither the *Kazarian* decision nor the subsequent policy memo revising the *AFM* applied to O-1 petitions, and these cannot be construed to mandate a "final merits determination" under either of the lower standards for O-1B classification, namely "extraordinary achievement" in film and television, or "distinction" in the arts.

Whenever an RFE makes up new rules or stretches an interpretation of the regulations beyond their elastic potential, quote what we consider to be the best sentence in *Kazarian:* "USCIS may not unilaterally impose novel substantive or evidentiary requirements beyond those set forth in the regulations."[11]

## AWARDS – SEPARATE RULES FOR "ONE TIME" AND "LESSER" AWARDS

When responding to an RFE for an O-1 or EB-1 petition based on the "major national or international award" sole criterion,[12] do not respond with alternative evidence supporting several of the other enumerated criteria, as this weakens your case and validity of the sole criterion as a basis for the classification. Per the USCIS's recommendations, they want more extensive background about the award, the size and qualifications of the candidate pool, details on any nomination process or qualifying rounds, the selection process and renown of judges, the award judging criteria, and the identity of past winners.[13]

Be mindful that RFEs often mistakenly state the high sole criterion standard in lieu of the "lesser national or international awards" criterion as one of three or more types of evidence. In *Buletini*, the court said "the award need not have significance outside one country,"[14] and found the Director's refusal to accept a national award under the lesser standard [15] to be both a misunderstanding of law and an abuse of discretion.

## TESTIMONIAL LETTERS—THE RULE ON EXPERT OPINION

Where an RFE ignores or dismisses testimonial letters, or broadly claims that the petition includes "no evidence" of the beneficiary's original contributions or their significance in the field of endeavor, the *Skirball*[16] decision is useful for this purpose far beyond the P-3 context. The AAO opined:

> USCIS may reject an expert opinion letter, or give it less weight, if it is not in accord with other information in the record or if it is in any way

---

[10] *Kazarian v. USCIS*, 596 F.3d 1115, 1121 (9th Cir. 2010).
[11] *Id.*, at 1122.
[12] at 8 CFR §214.2(o)(3)(iv)(A) or §204.5(h)(3).
[13] USCIS Memorandum, D. Neufeld, "Removal of the Standardized Request for Evidence Processing Time Frame" (June 1, 2007), AILA InfoNet Doc. No. 07062171.
[14] *Buletini v INS*, 860 F. Supp. 1222, 1231 (1994).
[15] 8 CFR §204.5(h)(3)(i).
[16] *Matter of Skirball Cultural Center*, 25 I&N Dec. 799 (May 15, 2012).

> questionable.... In the present matter, the director did not question the credentials of the experts, take issue with their knowledge of the group's musical skills, or otherwise find reason to doubt the veracity of their testimony. The AAO finds the uncontroverted testimony to be reliable, relevant and probative as to the specific facts in issue. Accordingly, the expert testimony satisfies the evidentiary requirement.[17]

Show that testimony is from recognized experts in the field of endeavor. Letters should be accompanied by the writer's CV, attest to the authenticity of the beneficiary's skills, explain the basis for the writer's knowledge, and speak to the beneficiary's ability or significant contributions in field of endeavor. Some qualifications can be summed up in the exhibit list entry—*e.g.*, "Exhibit 1A. Additional letter from Dr. Taylor, Endowed Chair of Particle Physics, Harvard, explaining why Dr. Smith is one of the top scientists in the world in the area of quantum coupling."

However, none of those legitimate requirements can justify objections to testimonial letters sometimes seen in RFEs, such as, "All of these letters are from persons who know you," or, "All the writers seem to share your nationality." Such assertions do not inherently contradict the writer's experience, expertise, knowledge of subject matter, nor do they cast any doubt on credibility.

## PUBLICATIONS ABOUT THE BENEFICIARY

Diverse complaints appear in RFEs to challenge or dismiss the published articles about a beneficiary's work, and most are unfounded and *ultra vires*. The regulatory standard is that such publications must relate to his or her work in the field for which classification is sought. A requirement that the articles must state the worker's extraordinariness is circular, and an abuse of discretion.

Requirements that every publication must be one of national or international distribution or readership are also unfounded: an RFE that dismisses a pile of press coverage of the beneficiary's work as "local or regional," can be overcome with the observation that the articles come from a geographic range of cities and regions where the beneficiary did not live or work regularly, but where the media have nonetheless found his or her achievements newsworthy, which in and of itself demonstrates the widespread nature of the beneficiary's professional renown.

The strongest response to such an RFE is found in *Muni v. INS*,[18] where 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"[19], 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." Instead, the court found that "the articles Muni submitted, which appeared in various newspapers and

---

[17] *Id.*, at 805–06.
[18] *Muni v. INS*, 891 F. Supp. 440 (N.D. Ill 1995).
[19] *Id.*, at 445.

hockey magazines, clearly fit this requirement." (*Id.* at 445) A similar holding was set forth in *Racine v. INS*.[20] 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" *were sufficient* to meet this criterion.

## SCHOLARLY PUBLICATIONS BY THE BENEFICIARY

A common RFE objection to a publication list and reprints of the beneficiary's peer-refereed publications in academic, medical or scientific fields says:

> Publishing is very common in academia, and merely publishing articles is not indicative of outstanding ability. It must be shown that such publications were in prestigious venues, or received with acclaim, in order to meet the regulatory standard.

Such a challenge is wrong on three counts: 1) it invents a novel and more restrictive standard than that stated in the regulations; 2) it ignores the most basic aspects of peer review and journal publication, which typically require all accepted articles to detail work that is new, original, of intrinsic value to peers in the field, and not previously published; 3) it invokes circular reasoning of exactly the type condemned in *Muni* and *Buletini*, demanding proof that each publication must say the worker is extraordinary, in order to constitute acceptable proof that the worker is extraordinary.

In business cases, where the beneficiary's work may be published in newspapers or trade periodicals, USCIS has been known to dismiss them all because they are not in a peer-reviewed journal. USCIS has claimed that for an article to be deemed "scholarly," it must have footnotes, endnotes or bibliography. This puts the cart before the horse, relying on style and formatting at the expense of substance. Formal reference elements, commonly found only in scientific and academic journals and in books, do not appear at all in several types of periodicals enumerated in the final regulation. The criterion for scholarly published work[21] expressly includes reference to articles published **"in professional or major trade publications, or major media."** This regulatory language is specific, and hence it cannot be construed as surplusage.

"Major media" includes broad-spectrum business periodicals in print or online editions; broadsheet daily newspapers; weekly news magazines, industry-specific blogs, and online news aggregator sites. These media, distributed widely beyond national boundaries, nearly always omit formal reference elements such as footnotes, endnotes and bibliographies, due to their formatting and editorial requirements. USCIS should follow the plain meaning of its own regulation, as well as dictionary and case law definitions of this term, and should consider articles as "scholarly" based on their content rather than their form. As explained in *Gulen v. Chertoff*,[22] ***"a work becomes scholarly***

[20] *Racine v. INS,* 1995 U.S. Dist. LEXIS 4336, at *17, 1995 WL 153319, at *6 (ND IL 1995
[21] 8 CFR §214.2(o)(3) and §204.5(h)(3)(vi).
[22] 2008 U.S. Dist. LEXIS 54607 (E.D. Pa. July 16, 2008).

***by virtue of its author and its subject matter, not its intended audience."*** This definition is particularly important when assessing the nature of published articles in general news or business media, or non-academic trade periodicals, whose editorial constraints preclude the use of reference elements.

Since USCIS commonly exceeds its own regulatory standards by adopting an unfounded assumption that all publications are worthless until proven otherwise, any challenges to publications by or about the beneficiary should be met with copious evidence of each periodical's standards of publication, impact factor if it is a refereed journal, circulation or distribution figures, and publisher's statement of who its intended audience is. These wholly objective items can be bolstered with expert testimony detailing a particular journal's renown and influence on the field of endeavor.

## LEADING OR CRITICAL ROLE FOR A DISTINGUISHED ORGANIZATION OR PRODUCTION

Per the O-1 regulations, aliens engaged in the field of arts include not only the principal creators and performers but include those "essential persons connected with the artistic production." *Aliens engaged in the field of arts include not only the principal creators and performers but other essential persons such as, but not limited to,* directors, set designers, lighting designers, sound designers, choreographers, choreologists, conductors, orchestrators, coaches, arrangers, musical supervisors, costume designers, makeup artists, flight masters, stage technicians, and animal trainers. Therefore, by the Immigration's own regulation, extraordinary ability in the "arts" includes "those essential persons connected to the artistic production." Moreover, according to the congressional record associated with the intent of the O-1 category,[23] the term "arts" should include "not only principal creators and performers, but other essential persons, since there is legislative support for this suggestion at *137 Cong. Rec. S18247 (daily ed. Nov. 26, 1991)*, this suggestion will be adopted." Moreover, "it should be noted that it is not feasible to list every occupation in the regulation which can be considered to fall within the very broad field of arts."[24]

## EVIDENCE OF CRITICAL OR COMMERCIAL SUCCESS

New indicators of critical and commercial success must be integrated into any industry for it to remain relevant, and for the Service's regulations to remain reflective of their original intent, to broaden American exposure to those who are extraordinary in the arts, in whatever creative field they appear, and as communications media change faster than regulations. Therefore, indicators of a beneficiary's public following on social media such as Facebook, Twitter, YouTube, Instagram, Vimeo, and Sound Cloud should be considered as evidence of critical and commercial success, since these social media platforms have been developed in part to help those who seek to reach a wide audience to develop and monetize a fan base.

---

[23] 59 Fed. Reg. 41818.
[24] *Id.*, at 41819.

Likewise, it is important for USCIS to recognize that new media have risen proportionally in importance to the public as old media have declined due to economic changes. The large-scale closure and reduction in size and staffing of newspapers has resulted in fewer critical reviews in traditional media.

## CONCLUSION

The RFE challenges and effective responses detailed here are merely some of the ones seen most often in the world of high-preference employment-based immigration. Practitioners must remain vigilant, as USCIS seems endlessly inventive in devising new ways to define all evidence downward to insignificance.