Practice Pointers for Non-PERM EB Cases

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This practice pointer was drafted in part during the government shutdown. Having labor certification unavailable made us think one more time about the advantages of processing permanent residence cases with just one federal agency, not two. Therefore, we will review the latest developments/practice suggestions for three common non-PERM categories of employment-based immigration—the National Interest Waiver; Extraordinary Ability; and Multinational Manager. The Outstanding Researcher category has been discussed in several articles, and is not undergoing the same kind of evolution as the other categories.

As a practice pointer on all types of cases, it is always helpful to revisit the regulatory authorities and submit the petition according to the regulatory requirements. Another key element is to have a review session with the applicant and their CV, and dissect the CV to makes sure that it reflects and meets the regulatory criteria. Often, a practitioner can fall into a routine of requesting documentation in support of a petition, and the core regulatory requirements may fall by the wayside. A detailed conversation during the course of the review of the CV may reveal some very valuable nuggets of information, which may have been overlooked. Also, keep in mind that CV's are often crafted according to the foreign nationals understanding of what a CV should look like for their industry, not an "immigration resume," and may leave out key and relevant components for immigration purposes.

THE NATIONAL INTEREST WAIVER (NIW)

8 CFR §204.5(K) Aliens Who Are Members of the Professions Holding Advanced

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Degrees or Aliens of Exceptional Ability[1]

The National Interest Waiver (NIW) is a very popular category foreign nationals pursue when they do not have employer support. The regulation essentially requires the applicant to satisfy a three-prong test, which is articulated in *Matter of New York State Department of Transportation (NYSDOT)*, I&N Dec. 215 (Acting Assoc. Comm'r 1998):

1. The foreign national intends to work in an area of substantial intrinsic merit;
2. The proposed benefit of the foreign national's work in the United States will be national in scope; and
3. The foreign national will serve the national interest to a substantially greater degree than would a U.S. worker having the same minimum qualifications.

The First Prong

The authors are not aware of any denial relating to the first prong of *NYSDOT*. Such unlikely fields as folk music, consumer electronic sales, graphic design, and business management all appear to qualify. With a little creativity, practitioners should be able to make an effective argument for almost any field of endeavor. Keep in mind that the language in the first prong refers to the applicant's *field*, rather than the specific work he or she performs in the United States.

The Second Prong

The second prong of *NYSDOT* raises a geographical question: whether the proposed benefit to the United States will be felt at the local or the national level. U.S. Citizenship and Immigration Services (USCIS) considers teachers, physicians, foresters, and similar occupations to offer a *local* benefit, so these cases represent a special challenge for practitioners. USCIS is unlikely to approve an NIW case for an occupation such as teacher, physician or forester unless the individual has published materials that are widely disseminated or is influencing the methods of their colleagues around the country. Notwithstanding this narrow range of professions, the second prong is relatively easy to meet. Keep in mind that this prong addresses the *proposed benefit* to the United States, which allows for some degree of speculation. *If* the foreign national succeeds at the level you predict he or she will, *will* that benefit be national or local? At this stage of the analysis, you do not have to convince USCIS that the foreign national will succeed in accomplishing the goal.

While a few brave practitioners with the right documentation have succeeded in establishing that a beneficiary's work sets new benchmarks or updates best practices in their field of endeavor nationwide (which is akin to showing an EB-1 level of influence on the field as a whole), even though the geographic impact of their work is primarily

[1] M. Kludt, *et al.*, *Recent Trends in National Interest Waiver Cases*, 18 Bender's Immigr. Bull. 741 (Jun. 15, 2013).

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local, this approach should only be undertaken when there is more than one piece of objective third-party evidence to back up such claims, not just testimonials. Lest we forget, the *NYSDOT* case itself involved a bridge engineer, the geographic area of whose intended employment was limited to New York State, but whose work in bridge design was setting new safety standards. Perhaps the prong 2 assessment and discussion would have been different had the Minneapolis bridge collapse occurred before this case was decided.

The Third Prong

In most cases, the challenge of an NIW case lies with the third prong of *NYSDOT*.[2] Practitioners must convince USCIS that replacing the foreign national with a minimally qualified U.S. worker would be detrimental to the national interest. This requires showing that the foreign national has had *some degree of influence in the field* or *a demonstrable impact on the field*, depending on which decision you read. For researchers, 20 or more independent citations to the foreign national's work seem to meet this goal fairly consistently. If you client does not have this, you will have to think more creatively.

Here are some tips for meeting the third prong of *NYSDOT*:

- Include at least seven to ten persuasive and detailed letters from objective references in the field. The content of the letters is more important than the prestige of the referee. The best reference is someone in the field who has been directly influenced by the foreign national's work
- Focus on the foreign national's accomplishments and specific impact on the field. Avoid general statements about your client's impressiveness.
- Compare your client to his or her peers within the field. For NIWs, the foreign national's achievements have more impact than those of the U.S. workers who might replace them. For example, all PhD candidates perform original research, so an original doctoral thesis would fail to meet the standard without more.
- Avoid highlighting your client's experience, skills, or education, as these are addressed by the labor certification process you are trying to waive. Similarly, avoid arguments about labor shortages. Labor certification is the answer to the issue of labor shortage.
- Avoid relying on any of the "exceptional ability" criteria to support your NIW argument. The Administrative Appeals Office (AAO) has interpreted NYSDOT as demanding that NIW require more than exceptional ability.
- If the foreign national meets any of the EB-1A criteria, include this in the presentation. Although these criteria are not required for NIW, USCIS considers them reliable indicia of an individual's influence.
- Prong three addresses the foreign national, not the position. Focus on your client's accomplishments rather than the importance of the project he or she will be doing.
- If the collaborative and/or interdisciplinary nature of the foreign national's work

[2] *Matter of New York State Department of Transportation (NYSDOT)*, I&N Dec. 215 (Acting Assoc. Comm'r 1998)

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precludes, or would be actively harmed by, a requirement of full-time employment with a single U.S. employer, document this, and explain how the need to work for more than one employer at a time is intrinsic to the benefits they will provide, and how labor certification would actively undermine that by limiting the individual to a full time job with a single employer.

- Make the apples-to-oranges argument once you have established the importance of the foreign national's contributions and accomplishments to date: labor certification does not compare them to the benefits of an equally-accomplished U.S. worker, it compares them to a minimally-qualified U.S. worker.

ALIENS OF EXTRAORDINARY ABILITY: 8 CFR §204.5(H) ALIENS WITH EXTRAORDINARY ABILITY—EB-1A

The Impact of Kazarian

Kazarian v. USCIS, 596 F.3d 1115 (9th Cir. 2010) was a watershed in EB-1A cases, and we are still watching the fallout and waiting for USCIS to establish clear guidelines for the elusive "final merits determination." Soon after *Kazarian* guidance was issued, USCIS shared the EB-1A RFE template, which is well worth reviewing as you can try to rebut those generic RFEs before they arrive on blue paper in the mail.[3]

Overall, *Kazarian* established a two prong test that now guides the adjudication of EB-1A petitions:

1. The foreign national must either have a one-time achievement on the level of the Nobel Prize or an Oscar, or must meet three of the ten regulatory criteria for EB-1As.

2. The foreign national must have established, by a preponderance of the evidence, that he or she has *sustained national or international acclaim* in the field. *Kazarian* referred to this stage of the analysis as the "final merit determination."

Kazarian prevents USCIS from holding foreign nationals to the "extraordinary ability" standard with respect to *each* criterion. Applicants instead need to show they *minimally* meet the requirement for each of three criteria. For example *one* peer review is now arguably sufficient for the "judge of the work of others" criterion. *One* published work about the foreign national meets "published work about the alien." *Two* published articles arguably meet the criterion for "authorship of published articles." *Two* exhibitions are sufficient to show display at artistic exhibitions or showcases. The AAO has restricted the latter criterion to visual artists,[4] but the authors are aware of performers and composers who have met this criterion at the service center level. USCIS has taken note of the plural

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[3] Request for Evidence Template, *published on* AILA InfoNet at Doc. No. 11012168 (*posted* Jan. 21, 2011). See also "The Kazarian Two-Step" by Rita Sostrin, *Immigration Options for Academics and Researchers*, (AILA 2011), and "Dissecting USCIS' E-1-1 RFE Template," by S. Seltzer, *et al.*, *13th Annual New York Chapter Immigration Law Symposium Handbook* (AILA 2010).

[4] *Matter of [name not provided]*, (AAO Feb. 21, 2012) and *Matter of [name not provided]*, (AAO Jan. 24, 2012).

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in some of the criterion, so practitioners must follow suit.

Working within *Kazarian*'s limitations, USCIS is now tougher on the "original contributions of major significance" criterion, because it contains subjective language USCIS can still use to mount a challenge to your case. When using this criterion, practitioners should address at least two of the foreign national's contributions, and specifically demonstrate both their *originality* and the *major significance* within the field. If your client has less than 100 independent citations to his or her work, a Request for Evidence in this category is very possible.

The "leading or critical role" criterion still poses a challenge under *Kazarian*. USCIS often argues that the foreign national's role must be leading or critical with respect to the institution as a whole, which is nearly impossible for researchers at world-renowned establishments like MIT or the Mayo Clinic. The AAO has stressed the need to show the individual has performed at a level beyond that normally expected of the position.[5] A way to show that the applicant has a role is to highlight the role that they play in their particular area of research. If the foreign national is known for a particular technique or has improved or discovered a new research protocol, this may be perceived as "leading or critical".

"Membership in associations requiring outstanding achievements" remains a rarely used criterion under *Kazarian*, as most professional organizations are fee-based rather than merit-based. The plural in "associations" makes this category especially elusive. The AAO has also rejected associations whose membership requires a particular grade point average, minimum experience or education. If the foreign national belongs to two or more professional societies whose members must be nominated by existing members and then voted in by a panel or selection committee, then the society's published admissions criteria will be helpful in meeting this criterion. The more "elite" the membership is, the more relevance it has.

The "awards" category is equally inaccessible to most applicants, as USCIS rejects any award with restriction on the scope of the competition. For example, awards limited to students, post-docs, or attendees of a specific university or conference all fail to satisfy the criterion. This can be especially challenging in fields as diverse as physics, where published research is done by large teams from multiple institutions, and advertising, where awards are seldom made to a sole individual, usually to a company.

Here are some tips for winning on the trickier criteria and the final merits review:

- Include at least seven to ten persuasive and detailed letters from objective references in the field. If you are trying for the original contributions criteria, make sure the reference letters address originality of your client's contributions and discuss their major significance within the field. References should explain how they have come to know your client's work. It is also useful to have a discussion with the referee to explain that they are, in essence, providing written

[5] *Matter of [name not provided]*, (AAO Jan. 11, 2012).

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testimony in support of an application. Giving them context of the petition will result in a relevant and meaningful letter.

- Do not rely on the reference letters alone. Include primary evidence of publications, invitations to review, media publications about your client (translated where necessary), performances, box office receipts, etc. Reference letters play the role of explaining and summarizing primary evidence, or may be relied on where primary evidence is unavailable.
- Avoid including evidence of the criteria your client does not meet. USCIS seems to gravitate toward this evidence in its decisions, particularly in the "final merits review."
- For critical/leading role, include letters or evidence showing that your client impacting the institution beyond what would normally be expected for someone in the position.
- Illustrious referees are not always the best choice, as they invite comparison between themselves and your client.

Overall, setting regulatory requirements aside, we would be remiss not to mention the ethical obligations we all have as practitioners to our clients. It is incumbent upon practitioners to exercise due diligence. Do not rush to file a case fearing you may lose the client. You will find that in some instances you may have to turn down a client because they do not satisfy regulatory requirements, and in some instances you may find you have the opportunity to put someone on the correct trajectory which will result in a successful application down the road. Be realistic in your analysis of the case. Clients will often come to you based on what they have read on the internet or heard from their friends and may not have a robust understanding of the regulations. Presenting and reviewing the regulatory requirements with your client will empower your client to ask the correct questions and provide you with relevant materials resulting hopefully in a successful petition. Also, consider how you are presenting materials to the USCIS. The more organized and comprehensive the submission is, it becomes easier for the adjudicator to review. Remember, you are telling a story about someone's career milestones—breathe life into the petition and allow the adjudicator to appreciate who your client is. At the end of the day, we are all exceptional and extraordinary in our own unique ways!

Multinational Managers & Executives

Two of the biggest changes to the EB-1(3) immigrant visa category in recent years stem from sub-regulatory guidance in the form of a policy memorandum and its amorphous online progeny, and new investigative tools available to adjudicators.

In the wake of the Donald Neufeld memorandum of January 8, 2010 (Neufeld Memo),[6] ostensibly limited to H-1B adjudications, USCIS negated decades' worth of precedent case law distinguishing between a company and an individual, and now pierces the corporate veil at will. The Neufeld Memo redefined the definition of who can be an

[6] USCIS Memorandum, "Determining Employer-Employee Relationship for Adjudication ofH-1B Petitions, Including Third-Party Site Placements" (Jan. 8, 2010), *published on* AILA InfoNet at Doc. No. 10011363 (*posted* Jan. 13, 2010).

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"employer" and an "employee," stressing above all other factors the notion that there must be others in the U.S. organization who "control" the foreign national. This redefinition has seeped into multinational manager and executive adjudications, resulting in a wave of denial decisions finding no bona fide offer of employment where senior managers and executives with a controlling stake or family-dominated ownership in a privately-held multinational organization were deemed to be engaged in "self-employment"—even where the petitioning U.S. company had existed for years and had hundreds of U.S. employees, and even where it had an independent board of directors.

The AAO decision of June 13, 2013, in Matter of *Name not Provided,* LIN 09 003 51970 [Nuance Communications, Inc.], remanding a denial of immigrant visa petition for a Multinational Manager, indicates a turning of the tide in favor of owner/managers, and reverses the dominant trend since the January 2010 Neufeld Memo.[7] The Nebraska Service Center (NSC) director's first finding in the denial was that the petitioner failed to establish that the beneficiary is an employee and not the employer, because he was a majority shareholder of both the foreign and U.S. entities. This led the NSC to conclude, "Since the evidence appears to indicate that there is no individual or board that has or will supervise the beneficiary's work, or has the authority to hire or fire the beneficiary, the beneficiary must be considered the employer and not an employee."

The AAO's response to this conclusion was blunt and unequivocal:

> The director's finding with respect to the first ground of denial is inappropriate. The beneficiary's employer-employee relationship with the foreign and U.S. entities is not an essential issue for consideration when evaluating the beneficiary's eligibility. While the statute uses the term 'employee' in the definition of manager or executive, the AAO notes that the key elements of the statutory definitions focus on the duties and responsibilities of the employee and not the person's employment status. Looking at the statutory scheme as a whole, the AAO concludes that it is most appropriate to review the beneficiary's eligibility by making a determination on his or her claimed managerial or executive employment. The AAO finds no need to further explore the issue of an employer-employee relationship between the beneficiary and his foreign and U.S. employers.

However, reliance on this case—like all such non-precedent AAO decisions—may be misplaced, since it was remanded for further consideration on other issues, and is neither designated as precedent nor is it the subject of a policy memorandum.

- The key to overcoming the offer of employment issue in this context is to show: (a) retroactively, that the senior manager or executive did not in fact have leeway to create the U.S. job for him- or herself, with proof that other shareholders and/or directors had to

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[7] USCIS Memorandum, "Determining Employer-Employee Relationship for Adjudication ofH-1B Petitions, Including Third-Party Site Placements" (Jan. 8, 2010), *published on* AILA InfoNet at Doc. No. 10011363 (*posted* Jan. 13, 2010).

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approve the position; and (b) prospectively, that they exert veto power and other measures of real voting power to control how the owner/manager or executive runs the U.S. company.

The Multinational Manager/Executive category has also been heavily impacted by adjudicators's increased reliance on VIBE, the Validation Instrument for Business Enterprises. USCIS may use this commercial database to verify or contradict a petitioner's statements about the nature, size, staffing, type of entity, relationship to other entities, and financial position of its business, but competitors can then also access that information. Since it is voluntary and privately administered by Dun & Bradstreet, not all petitioners can be convinced of the utility of participating in VIBE.

- Those petitioners who are registered in VIBE must be reminded that it is essential to update corporate data with Dun & Bradstreet prior to filing, both about the filing U.S. entity and the foreign entity where the foreign national acquired qualifying experience abroad. Mismatches between company data on the petition forms and company data as it appears in VIBE result inevitably in Requests for Evidence, which are avoidable by harmonizing the data prior to filing.

- Practitioners can help the adjudicator to avoid inadvertent VIBE-based errors, by distinguishing the actual petitioner from any similarly-named U.S. holding company, parent, subsidiary, or affiliates, so that the numbers and business descriptions match up.

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