

# Citizenship and Immigration Services Ombudsman

## RECOMMENDATIONS TO IMPROVE THE QUALITY IN EXTRAORDINARY ABILITY AND OTHER EMPLOYMENT-BASED PETITION ADJUDICATIONS

December 29, 2011

Our nation's immigration laws recognize the importance of attracting individuals of *extraordinary ability* from around the world to the United States to continue their work in the arts, athletics, business, education, healthcare, and sciences. Individuals who meet this standard not only contribute their diversity, drive, and spirit to serve our country, but they also add to our national competitiveness. From cancer researchers to professional athletes to musicians, experts come and contribute to our economic development, culture, and educational discoveries.

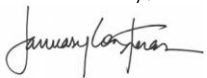
Over the years, U.S. Citizenship and Immigration Services (USCIS) has issued policy guidance to inform stakeholders on how best to prepare *extraordinary ability* petitions and to guide adjudicators on how to evaluate them. On December 22, 2010, USCIS issued a policy memorandum that provided new guidance for adjudicating certain immigrant petitions, which uses as part of its authority, the Ninth Circuit decision, *Kazarian v. US Citizenship and Immigration Services*.

Stakeholders have questioned USCIS' approach in this policy memorandum and how it is applied in adjudications. In my own interactions with employers across a range of fields, I am frequently asked what the Ombudsman's Office can do to help foster consistency and predictability in the adjudication of *extraordinary ability* petitions. Employers are not just raising individual denials and Requests for Evidence that they find concerning, but they are often making a plea to simply understand the rules.

USCIS has heard from stakeholders too, and in response, has sought public feedback through a request for *amicus curiae* briefs to the USCIS Administrative Appeals Office, and an upcoming stakeholder engagement call. This response from USCIS is a positive step, acknowledging the need to better address these concerns.

The Ombudsman's Office recognizes that adjudicators often have the responsibility of evaluating an individual's expertise in a highly technical area. There is no doubt that *extraordinary ability* adjudications can be complex and challenging. This only makes the need for clear guidance – to both the adjudicators making decisions and the individuals and employers presenting their requests – all the more important. These recommendations are done so with this objective in mind.

Most sincerely,



January Contreras  
Citizenship and Immigration Services Ombudsman

### RECOMMENDATIONS

The Ombudsman recommends that USCIS:

- 1) Conduct formal rulemaking to clarify the regulatory standard, and if desired, explicitly incorporate a final merits determination into the regulations; and
- 2) In the interim, provide public guidance on the application of a final merits determination; and
- 3) In the interim, provide ISOs with additional guidance and training on the proper application of preponderance of the evidence standard when adjudicating EB-1-1, EB-1-2, and EB-2 petitions.

### REASONS FOR THE RECOMMENDATIONS

- Stakeholders are concerned that the current I-140 policy memorandum allows for too much subjectivity in adjudicating petitions.
- Stakeholders stated in *amicus curiae* briefing to the USCIS Administrative Appeals Office (AAO) that the *Kazarian* decision does not require USCIS to implement a two-part review and that application of the I-140 policy memorandum has not resulted in a clearer adjudicatory standard.
- USCIS Immigration Service Officers lack guidance that clearly demonstrates the nature and type of evidence that typically establishes whether an individual possesses "extraordinary ability," may be classified as an "outstanding professor or researcher," or has "exceptional ability."
- USCIS has not clearly explained the objective factors that USCIS adjudicators should consider when conducting a final merits determination.



**Homeland  
Security**

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## RECOMMENDATIONS TO IMPROVE THE QUALITY IN EXTRAORDINARY ABILITY AND OTHER EMPLOYMENT-BASED PETITION ADJUDICATIONS

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*The Citizenship and Immigration Services Ombudsman, established by the Homeland Security Act of 2002, provides independent analysis of problems encountered by individuals and employers interacting with U.S. Citizenship and Immigration Services, and proposes changes to mitigate those problems.*

### EXECUTIVE SUMMARY

In this study, the Office of the Citizenship and Immigration Services Ombudsman (Ombudsman's Office) reviews<sup>i</sup> U. S. Citizenship and Immigration Services' (USCIS) policy regarding the adjudication of certain employment-based immigrant petitions filed on behalf of individuals with extraordinary ability in the sciences, arts, education, business or athletics (EB-1-1), outstanding professors and researchers (EB-1-2), and exceptional ability professionals (EB-2) in the sciences, arts, or business.<sup>ii</sup>

On March 4, 2010, the Ninth Circuit Court of Appeals issued a decision, *Poghos Kazarian v. US Citizenship and Immigration Services*, reviewing USCIS' application of the regulations governing extraordinary ability petitions.<sup>iii</sup> This was the first circuit court decision following district court cases<sup>iv</sup> and policy guidance issued in an attempt to clarify the standard for adjudications. On December 22, 2010, USCIS issued a policy memorandum entitled "Evaluation of Evidence Submitted with Certain Form I-140 Petitions; Revisions to the *Adjudicator's Field Manual (AFM) Chapter 22.2, AFM Update AD11-14*" (I-140 policy memo).<sup>v</sup> This USCIS policy guidance, applies the Ninth Circuit decision with respect to petitions filed for individuals with extraordinary ability, outstanding professors and researchers, and exceptional ability professionals. The USCIS policy guidance provides a two-part test in determining eligibility: (1) an evaluation of whether the petitioner provided the requisite evidence; and (2) a final merits determination.

Prior to and following implementation of this policy, stakeholders raised concerns about consistency in these adjudications. Recent concerns have focused on the subjective nature of a final merits determination. Stakeholders present in *amicus curiae* briefing to the USCIS Administrative Appeals Office (AAO) that the *Kazarian* decision does not require USCIS to implement a two-part review.<sup>vi</sup> They state that application of the I-140 policy memo has not resulted in a clearer adjudicatory standard.<sup>vii</sup> USCIS has been challenged in identifying an objective standard and application for a final merits determination. Immigration Services Officers (ISOs) report that the I-140 policy memo did little to change their analysis of I-140 petitions but instead changed when ISOs made a final merits determination.

Based on its findings, the Ombudsman's Office makes the following recommendations to improve fairness, consistency, and transparency in adjudications of these employment-based petitions:

- 1) Conduct formal rulemaking to clarify the regulatory standard, and if desired, explicitly incorporate a final merits determination into the regulations; and**
- 2) In the interim, provide public guidance on the application of a final merits determination; and**
- 3) In the interim, provide ISOs with additional guidance and training on the proper application of preponderance of the evidence standard when adjudicating EB-1-1, EB-1-2, and EB-2 petitions.**

## BACKGROUND

Employment-based immigration allows certain employers and individuals to petition USCIS for an immigrant visa on the basis of job skills or potential contributions to the U.S. economy. The laws governing employment-based immigration are written to enable a broad range of individuals with expertise in sciences, arts, education, business or athletics to immigrate to the United States. As a result, an employment-based application or petition is often accompanied by highly technical supporting documentation. Proper adjudication frequently requires careful application of complicated fact patterns to complex laws and regulations.

Following the enactment of the Immigration Act of 1990<sup>viii</sup> (IMMACT 90), USCIS and the courts have sought to clarify the governing law. Perhaps most notable is USCIS' December 22, 2010, policy memorandum entitled "Evaluation of Evidence Submitted with Certain Form I-140 Petitions; Revisions to the *Adjudicator's Field Manual (AFM)* Chapter 22.2, *AFM* Update AD11-14" (I-140 policy memo),<sup>ix</sup> which provides instructions on adjudicating petitions based on claims of: extraordinary ability; outstanding professor and/or researcher status; or, exceptional ability.<sup>x</sup>

Stakeholders report that petitions adjudicated under the I-140 policy memo have resulted in decisions that are unfair, opaque, and inconsistent.

**Statutory and Regulatory Framework.** There are five employment-based preference categories.<sup>xi</sup> Depending on the preference category, an individual may be immediately eligible for an immigrant visa or need to wait for a visa number to become available, with first and second preference categories generally requiring shorter waits.<sup>xii</sup>

The regulations instructs on how to review and decide petitions filed in the employment-based first and second preference categories as follows:<sup>xiii</sup>

- *Extraordinary ability (EB-1-1):* Evidence that the individual has sustained national or international acclaim that his or her achievements have been recognized in the field of expertise, and that the individual is one of that small percentage who have risen to the very top of their field. The petitioner must submit evidence of receipt of recognition for a one-time achievement or meet three of the ten criteria listed in the regulations. These include: professional publications, evidence of the beneficiary's original contribution of major significance in the field of expertise.<sup>xiv</sup>
- *Outstanding professors and researchers (EB-1-2):* Evidence that the professor or research is recognized internationally as outstanding in the academic field specified in the petition. The evidence must satisfy two of the six regulatory criteria.<sup>xv</sup>
- *Exceptional ability (EB-2):* Evidence that the individual is a professional holding an advanced degree or an alien of exceptional ability in the sciences, the arts, or business. The evidence must satisfy three of the six regulatory criteria.<sup>xvi</sup>

**USCIS Guidance Prior to the I-140 Policy Memorandum.** Prior to the issuance of the I-140 policy memo, the Adjudicator's Field Manual (AFM) and agency policy provided general guidance on how to adjudicate a petition and apply the pertinent regulatory requirements.

In 1992, the then Director of the Northern Service Center, James Bailey, sought guidance on adjudication standards for I-140 petitions for individuals with extraordinary ability and outstanding professors and researchers.<sup>xvii</sup> Director Bailey identified two schools of thought:

One school of thought is that the phrase, “Such evidence shall consist of” means that if the evidence submitted meets two of the criteria listed, the alien qualifies for the classification. The other opinion is that the regulation means that at least two kinds of evidence must be submitted, but the evidence must demonstrate that the alien stands out from the regular, garden-variety type of professor or researcher.<sup>xviii</sup>

The Director was concerned that too many professors and researchers could minimally meet the regulation, when in fact the individual does not meet the legislative intent.

Acting Associate Commissioner of Examinations Lawrence Weinig issued a letter in response. He stated:

The evidentiary lists were designed to provide for easier compliance by the petitioner and easier adjudication by the examiner. The documentation presented must establish that the alien is either an alien of extraordinary ability or an outstanding professor or researcher. If this is established by the meeting [of] three of the criteria for extraordinary aliens or two of the criteria for outstanding professors or researchers, this is sufficient to establish the caliber of the alien. There is no need for further documentation on the question of the caliber of the alien. However, please note that the examiner must evaluate the evidence presented. This is not simply a case of counting pieces of paper.<sup>xix</sup>

The letters acted as unofficial guidance for adjudicating EB-1 petitions until the issuance of the I-140 policy memo rescinded all prior guidance.

In 1995, legacy INS, issued a proposed rule,<sup>xx</sup> which added the following language to the EB-1 regulations:

Sec. 204.5 Petitions for employment-based immigrants.

(i)(4) If the above standards do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence to establish the beneficiary's eligibility. Meeting three of the evidentiary standards listed in paragraph (i)(3) of this section is not dispositive of whether the beneficiary is an alien of extraordinary ability. The petitioner has the burden of proof to establish that he or she is an alien of extraordinary ability.<sup>xxi</sup>

The proposed rule received public comment but was never finalized and promulgated.

The federal courts and the AAO also issued numerous decisions discussing employment-based adjudications, which established supplementary legal guidance interpreting the pertinent regulations and indicating how they should be applied in particular circumstances.<sup>xxii</sup>

The following are two examples of court decisions interpreting the regulations: In *Matter of Price*,<sup>xxiii</sup> the AAO limits the agency's review of the submitted documentation to the regulatory text and prohibits moving beyond the regulations. In *Buletini v. INS*, a Michigan District Court, citing to the Weinig letter, held that:

It is an abuse of discretion for an agency to deviate from the criteria of its own regulation. 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 (emphasis added).<sup>xxiv</sup>

These cases, along with others, created a framework that petitioners and ISOs alike used to explain how an individual met the regulatory requirements or lacked the requisite evidence.<sup>xxv</sup> All of the cases come to the same general conclusion: the petitioner must demonstrate that the beneficiary meets the regulatory requirements for the preference category sought and the adjudicator is limited to the requirements set forth in the regulation when evaluating the submitted evidence.

**The *Kazarian* Ruling.** On March 4, 2010, the Ninth Circuit Court of Appeals issued a decision in *Poghos Kazarian v. US Citizenship and Immigration Services*. This decision reviewed the manner in which USCIS adjudicates extraordinary ability petitions. In *Kazarian*, the Ninth Circuit, echoing prior decisions in federal districts, held that USCIS is prohibited from “unilaterally imposing novel substantive or evidentiary requirements beyond those set forth at 8 C.F.R. section 204.5.”<sup>xxvi</sup> The Ninth Circuit court, in its application of the regulations, stated, “If the petitioner has submitted the requisite evidence, USCIS determines whether the evidence demonstrates both a ‘level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor,’ 8 C.F.R. § 204.5(h)(2), and ‘that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise.’ 8 C.F.R. § 204.5(h)(3).”<sup>xxvii</sup> The Ninth Circuit never fully addressed the real-world application of its two-part analysis, having determined that Poghos Kazarian failed to prove that he satisfied part one of the test.<sup>xxviii</sup>

**USCIS’ I-140 Policy Memorandum.** Following the *Kazarian* decision, on December 22, 2010, USCIS issued a policy memorandum entitled “Evaluation of Evidence Submitted with Certain Form I-140 Petitions; Revisions to the Adjudicator’s Field Manual (AFM) Chapter 22.2, AFM Update AD11-14” (I-140 policy memo).<sup>xxix</sup> The I-140 policy memo applies to the adjudication of Form I-140, Immigrant Petition for Alien Worker, filed for: individuals of extraordinary ability in the sciences, arts, education, business or athletics (EB-1-1); outstanding professors or researchers (EB-1-2); and individuals of exceptional ability in the sciences, arts, or business (EB-2).<sup>xxx</sup> The I-140 policy memo was followed by a new template for Requests for Evidence (RFEs) and Notices of Intent to Deny (NOIDs) for EB-1-1 petitions.<sup>xxxi</sup>

Citing the *Kazarian* decision, the I-140 policy memo instructs ISOs to use a two-part analysis – as referenced, but not applied by the Ninth Circuit in that case. USCIS stated that the I-140 policy memo is intended to eliminate the “piecemeal consideration of extraordinary ability and [shift] the analysis of overall extraordinary ability to the end of the adjudicative process when a determination on the entire petition is made (the final merits determination).”<sup>xxxii</sup>

When applying part one of the analysis, the ISO is instructed to: “Determine whether the petitioner or self-petitioner has submitted the required evidence that meets the parameters for each type of evidence listed at 8 CFR 204.5(h)(3).”<sup>xxxiii</sup> USCIS Office of Chief Counsel (OCC) confirmed that, “the ‘quality and caliber’ should be considered in the part one analysis only when the specific prong being reviewed contains a qualitative element.”<sup>xxxiv</sup> At this stage, the ISO is not expected to determine whether the individual is one of that small percentage who have risen to the top of the field or if the individual has sustained national or international acclaim.<sup>xxxv</sup>

Part two – a final merits determination – instructs the ISO to “determine whether the evidence submitted is sufficient to demonstrate that the beneficiary or self-petitioner meets the required high level of expertise for the immigrant classification....”<sup>xxxvi</sup> The evidence submitted by the petitioner must demonstrate that the individual

has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise, indicating that the individual is one of that small percentage who has risen to the very top of the field of endeavor.<sup>xxxvii</sup> USCIS OCC confirmed that for part two of the case analysis “the quality of the evidence must be considered.”<sup>xxxviii</sup>

If the petitioner does not meet this burden in a final merits determination, the ISO “must articulate the specific reasons as to why the USCIS officer concludes that the petitioner, by a preponderance of the evidence, has not demonstrated that the [individual has met the regulatory requirements].”<sup>xxxix</sup> The I-140 policy memo does not go into further detail explaining what qualifies as a “specific reason” for denying a petition. Throughout the adjudication, the petitioner bears the burden of establishing his/her claim by a preponderance of the evidence – meaning that the evidence submitted by the petitioner establishes that it is more likely than not that the individual meets all pertinent statutory and regulatory requirements.<sup>xl</sup>

**USCIS Implementation of the I-140 Policy Memorandum.** USCIS Headquarters is currently updating materials related to the adjudication of I-140 petitions, via the USCIS Policy Review Initiative, and plans to update its national standard operating procedures, but at this time the I-140 policy memo is the primary governing guidance.<sup>xli</sup>

In August 2010, approximately eight months after the issuance of the *Kazarian* decision, USCIS began training its ISOs on how to apply the policy.<sup>xlii</sup> USCIS held roundtable discussions with adjudicators, but ISOs report that the discussions were often limited to hypothetical examples and not pending cases, which according to the ISOs would have assisted in applying the policy.<sup>xliii</sup>

Training materials provide questions to consider when reviewing documentation submitted for each regulatory criterion.<sup>xliv</sup> They provide examples of what fails to meet a final merits determination.<sup>xlv</sup> Training materials also remind ISOs that the legal standard of proof is preponderance of the evidence. Training materials do not provide examples of evidence that would meet the regulatory standard of extraordinary ability, outstanding professor/researcher status, or exceptional ability, by a preponderance of the evidence. The I-140 policy memo is silent on how to apply objective standards in a final merits determination.

In the initial months of implementation, USCIS Headquarters reviewed RFEs issued pursuant to the I-140 policy memo before they were issued.<sup>xlvi</sup> USCIS Headquarters reported that changes were made to the approach or emphasis of RFEs but could not identify that any decision was overturned or RFE withdrawn in this review.<sup>xlvii</sup> USCIS Service Center Operations is not tracking decisions received from stakeholders requesting review of the policy or how many of the submitted decisions have been submitted to the service centers for review, either from the AAO or stakeholders.<sup>xlviii</sup>

**AAO’s Request for *Amicus Curiae*.** On August 18, 2011, the AAO requested *amicus curiae* briefs addressing the current I-140 policy memo.<sup>xlix</sup> USCIS sought to uphold its commitment “to actively engaging our stakeholders as we develop policies and procedures.”<sup>l</sup> The AAO’s request was prompted by a case decision issued in 2009, pre-dating the I-140 policy memo.

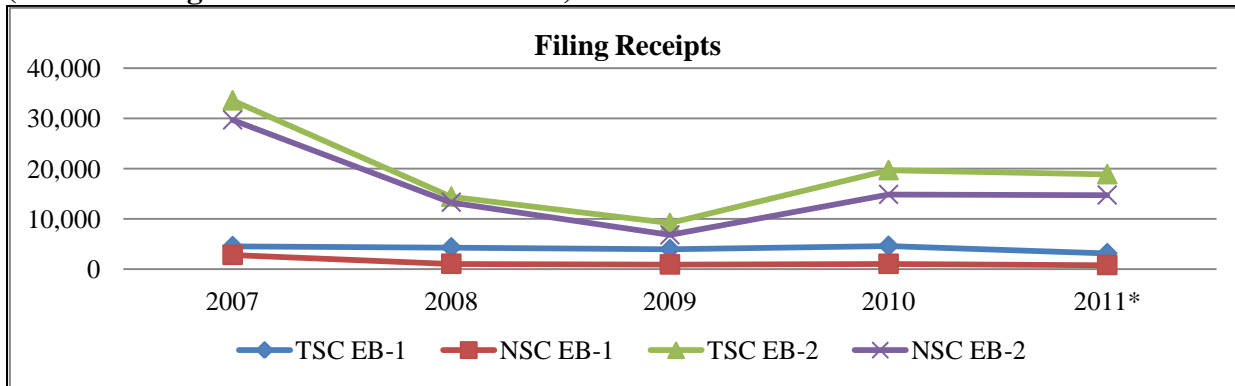
**Adjudicatory Consequences of the New Policy.** Reports from ISOs on the success and sufficiency of the I-140 policy memo and training have varied. ISOs frequently stated that their approach in considering what meets the regulatory requirements evolves over many years and is derived from experience.<sup>li</sup> Generally, ISOs reported that although the I-140 policy memo established a new two-part test, it did not materially change the analysis of petitions.<sup>lii</sup> Some ISOs indicated that the I-140 policy memo assists them in organizing and drafting a denial decision, and found the guidance to be adequate.<sup>liii</sup> Other ISOs indicated that they do not have a clear understanding of how to make a final merits determination.<sup>liv</sup>

**Customer Impact.** Stakeholders report that adjudications under the I-140 policy memo continue to be inconsistent, making it difficult to advise individuals and employers on how to file a successful petition. At a national immigration attorney conference, stakeholders addressed these issues with USCIS Director Alejandro Mayorkas, stating that denials often indicate that adjudicators relied upon their subjective interpretations of the evidence submitted in support of petitions, rather than focusing on whether the evidence satisfies the applicable regulatory criteria. Director Mayorkas acknowledged these concerns and committed to reviewing how adjudicators are applying the new I-140 policy memo, with specific focus on the manner in which ISOs conduct a final merits review analysis.<sup>lv</sup>

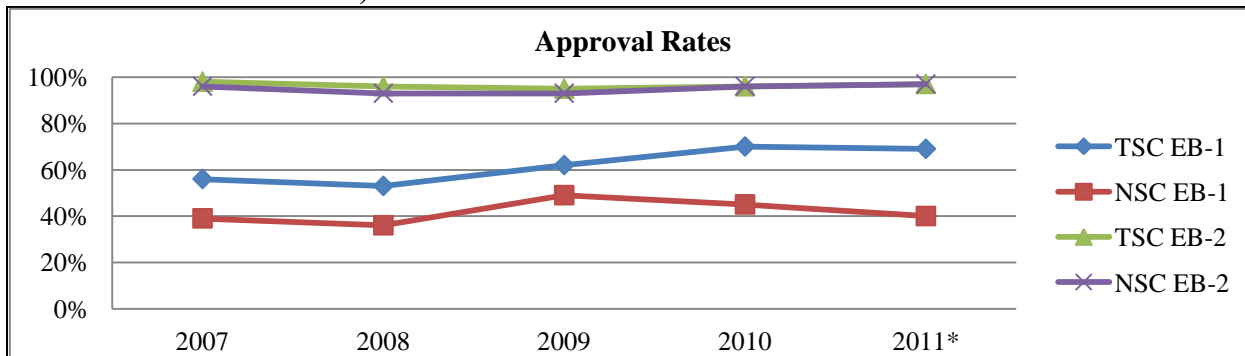
Additionally, stakeholders have asserted that the I-140 policy memo relies on an expanded interpretation of the *Kazarian* decision, which results in the imposition of exactly the type of novel, extra-regulatory requirements that the Ninth Circuit cautioned against. Stakeholders argue that the I-140 policy memo replaces former guidance with discretion.<sup>lvi</sup>

**First and Second Preference Adjudications Data.** USCIS provided the Ombudsman’s Office data on EB-1-1, EB-1-2, and EB-2 adjudications, including receipts and approvals for the Texas (TSC) and Nebraska (NSC) Service Centers. USCIS has experienced a slight downturn in EB-1 and EB-2 filings over the past five years for both EB-1 and EB-2 (not including National Interest Waiver petitions), with approval and denial rates remaining consistent.<sup>lvii</sup> Stakeholders report that inconsistent adjudications have had a chilling effect on petition filings, which may explain why receipt levels have dropped over the past five years and approval rates have remained constant, but other factors, including economic conditions, may attribute to this change in filings.

**USCIS Receipts for Extraordinary Ability and Exceptional Ability Petitions (Not including National Interest Waivers)**



**USCIS Approval Rates for Extraordinary Ability and Exceptional Ability Petitions (Not including National Interest Waivers)**



Source: Data from USCIS Office of Performance and Quality (Aug. 10, 2011). \*All 2011 data includes FY 2011, Quarters 1 and 2 only.

USCIS does not maintain data on the number of RFEs or NOIDs that are issued for EB-1 and EB-2 petitions using the I-140 policy memo.<sup>lviii</sup> USCIS is not collecting data on appeals or motions filed for denial decisions using the I-140 policy memo, nor are they collecting information on AAO decisions that overturn these service center decisions.<sup>lix</sup>

## ANALYSIS & RECOMMENDATIONS

### 1) Conduct formal rulemaking to clarify the regulatory standard, and if desired, explicitly incorporate a final merits determination into the regulations.

The Administrative Procedure Act (APA) prescribes the process for agency rulemaking and was written to bring regularity and predictability to the decisions made by executive branch agencies.<sup>lx</sup> Generally, the APA ensures that the public has an opportunity to provide input in how federal statutes are applied by the executive agencies charged with their enforcement. The various rulemaking procedures set forth in the APA provide the public with:

- A notice of proposed rulemaking published in the Federal Register;
- The opportunity to submit, in writing, data, views, or arguments pertaining to the proposal;
- A statement of the agency's reason for proposing the rule and the legal authority upon which the proposed rule is based; and
- A 30-day notice before the new rule goes into effect.<sup>lxi</sup>

The use of the APA rulemaking process would assist both adjudicators and stakeholders to clarify the adjudicatory standard for EB-1-1, EB-1-2, and EB-2s. APA rulemaking provides the opportunity to submit written comments to the proposed rule and requires a statement from the agency explaining how it responded to the public comments. The APA rulemaking process would provide substantive standards for ISOs to use in adjudications, and for individuals and employers to use in preparing petitions. USCIS could promulgate regulations to formally establish an objective two-part *Kazarian*-derived test laid out in the I-140 policy memo as the standard by which evidence offered in support of all EB-1-1, EB-1-2, and EB-2 petitions must be evaluated. If public comment is negative, USCIS can incorporate reasonable suggestions into a revised rule that accommodates legitimate stakeholder concerns.

### 2) In the interim, provide public guidance on the application of a final merits determination.

A clearly delineated objective standard for evaluating the totality of the supporting evidence is essential to any two-part evidentiary test. Otherwise, the adjudication can become overly subjective and possibly circular.

USCIS has not clearly articulated the objective factors that ISOs should consider when conducting a final merits determination. When conducting research in support of this recommendation, the Ombudsman's Office asked USCIS how it makes its final merits determination. Some ISOs indicated that the determination is primarily based on his or her own experience adjudicating petitions.<sup>lxii</sup> Supervisors stated that the determination is made based on the totality of the circumstances.<sup>lxiii</sup> USCIS SCOPS referred to the aforementioned training on the I-140 policy memo, but referred questions regarding the specific steps followed, and factors considered, during a final merits determination to the USCIS OCC.<sup>lxiv</sup>

USCIS Headquarters acknowledged that subjectivity is a part of a final merits determination and pointed to the AFM in support of its position.<sup>lxv</sup> The AFM states:



Even in non-discretionary cases, the consideration of evidence is somewhat subjective. For example, in considering an employment-based petition, the adjudicator must examine the beneficiary's employment experience and determine if the experience meets or exceeds, in quality and quantity, the experience requirement stated on the labor certification by the employer. However, a subjective consideration of facts should not be confused with an exercise of discretion. Like an exercise of discretion, a subjective consideration of facts does not mean the decision can be arbitrary, inconsistent or dependent upon intangible or imagined circumstances.<sup>lxvi</sup>

In order to effectively and fairly apply the current I-140 policy memo, adjudicators need guidance that demonstrates the nature and type of evidence that typically establishes whether an individual possesses "extraordinary ability," may be classified as an "outstanding professor or researcher," or has "exceptional ability." Guidance must explain that an adjudication may include a limited subjective analysis, but cannot involve discretion. Guidance must explain how to apply subjectivity without leading to arbitrary or inconsistent adjudications. Clear guidance would enhance the quality and consistency of adjudications, and lead to fairer, more predictable outcomes.

**3) In the interim, provide ISOs with additional guidance and training on the proper application of preponderance of the evidence standard when adjudicating EB-1-1, EB-1-2, and EB-2 petitions.**

Additional training materials clarifying what constitutes proof of: extraordinary ability; outstanding professor/researcher status; and exceptional ability, by a preponderance of the evidence, would greatly assist ISOs in making consistent decisions.

The I-140 policy memo contains numerous examples of what does not constitute proof of extraordinary ability. However, it does not provide adjudicators with affirmative examples of the type of evidence that satisfies the governing law; outstanding professor/researcher status; and, exceptional ability. Although these categories are too broad for USCIS to produce any type of exhaustive list of examples, solid training materials containing approvable examples, from which adjudicators could extrapolate, would significantly improve the quality adjudications. Affirmative examples could be developed by expanding upon the brief descriptions of the various criteria used by USCIS.

## CONCLUSION

Stakeholders are concerned that the current I-140 policy memo allows for too much subjectivity for adjudicating petitions. Rulemaking provides the forum for USCIS to hear stakeholder concerns and issue a formal public response. In the interim, additional guidance to the public and USCIS adjudicators is needed to clarify and make objective the application of any final merits determination.

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<sup>i</sup> The Ombudsman's Office reviewed past USCIS adjudications, including Requests for Evidence and denial decisions. The Ombudsman's Office met with: attorneys who routinely file extraordinary ability (EB-1-1), outstanding professors and researchers (EB-1-2), and exceptional ability professionals (EB-2) petitions to gauge their experience and response to the I-140 policy memo; Immigration Services Officers, Supervisory Immigration Services Officers, and trainers at the Nebraska and Texas Service Centers; USCIS Service Center Operations staff; the Office of Policy and Strategy at USCIS Headquarters; Office of Chief Counsel at USCIS Headquarters; and USCIS Administrative Appeals Office.

<sup>ii</sup> INA § 203(b)(1)(A)-(B) and (2); 8 C.F.R. 204.5(h)-(k)(2011).

<sup>iii</sup> 596 F.3d 1115 (9th Cir. 2010).

<sup>iv</sup> *Matter of Price*, 20 I&N Dec. 953 (Assoc. Comm. 1994); *Buletini v. INS*, 860 F. Supp. 1222, 1233 (E.D. Mich. 1994); *Muni v. INS*, 891 F. Supp. 440 (N.D. Ill. 1995); *Racine v. INS*, 1995 U.S. Dist. LEXIS 4336 (N.D. Ill. Feb 16, 1995); *Grimson v. INS*, 934 F. Supp. 965 (N.D. Ill. 1996); *Russell v. INS*, 2001 U.S. Dist. LEXIS 52 (E.D. Ill. Jan 4, 2001); *Gulen v. Chertoff*, 2008 U.S. Dist. LEXIS 54607 (E.D. Pa. July 16, 2008).

<sup>v</sup> USCIS Policy Memorandum, “Evaluation of Evidence Submitted with Certain Form I-140 Petitions; Revisions to the Adjudicator’s Field Manual (AFM) Chapter 22.2, AFM Update AD11-14” (Dec. 22, 2010) (accessed on Dec. 19, 2011 at:

<http://www.uscis.gov/USCIS/Laws/Memoranda/i-140-evidence-pm-6002-005-1.pdf>). USCIS released an interim memorandum for public comment on August 20, 2010 (accessed Dec. 21, 2011 at:

<http://www.uscis.gov/USCIS/Outreach/Interim%20Guidance%20for%20Comment/Kazarian%20Guidance%20AD10-41.pdf>). The I-140 policy memorandum rescinded and superseded all previously published USCIS policy guidance regarding EB-1 adjudications.

<sup>vi</sup> *Amicus curiae* briefs provided to the Ombudsman’s Office.

<sup>vii</sup> *Id.*

<sup>viii</sup> Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (effective Oct. 1, 1991).

<sup>ix</sup> USCIS Policy Memorandum, “Evaluation of Evidence Submitted with Certain Form I-140 Petitions; Revisions to the Adjudicator’s Field Manual (AFM) Chapter 22.2, AFM Update AD11-14.” (Dec. 22, 2010) (accessed on Dec. 19, 2011 at:

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<sup>x</sup> *Id.*

<sup>xi</sup> INA § 203(b).

<sup>xii</sup> The U.S. Department of State determines the employment preference numerical limits for FY 2011 in accordance with the terms of INA § 201. Generally, the worldwide employment-based preference limit is 140,000 (accessed July 19, 2011 at:

[http://www.travel.state.gov/visa/bulletin/bulletin\\_5518.html](http://www.travel.state.gov/visa/bulletin/bulletin_5518.html)). First preference visas are allocated 28.6% (40, 040) of the available employment-based worldwide visas.

<sup>xiii</sup> According to the regulations, the submitted evidence must demonstrate the beneficiary qualifies by a preponderance of the evidence, or a more likely than not. See *Matter of Chwathe*, 25 I&N Dec. 369 (AAO 2010).

<sup>xiv</sup> 8 C.F.R. § 204.5(h)(2011).

<sup>xv</sup> 8 C.F.R. § 204.5(i)(2011).

<sup>xvi</sup> 8 C.F.R. § 204.5(k)(2011).

<sup>xvii</sup> Letter from Director of the Northern Service Center, James Bailey (June 18, 1992); Letter from Acting Associate Commissioner of Examinations Lawrence Weinig (July 30, 1992); Published in 69 Interpreter Releases 1049 (Aug. 24, 1992).

<sup>xviii</sup> *Id.*, at 1049.

<sup>xix</sup> *Id.*, at 1052.

<sup>xx</sup> 60 Fed. Reg. 29771, 29775 (June 6, 1995).

<sup>xxi</sup> 60 Fed. Reg. 29780.

<sup>xxii</sup> *Matter of Price*, 20 I&N Dec. 953 (Assoc. Comm. 1994); *Buletini v. INS*, 860 F. Supp. 1222, 1233 (E.D. Mich. 1994); *Muni v. INS*, 891 F. Supp. 440 (N.D. Ill. 1995); *Racine v. INS*, 1995 U.S. Dist. LEXIS 4336 (N.D. Ill. Feb 16, 1995); *Grimson v. INS*, 934 F. Supp. 965 (N.D. Ill. 1996); *Russell v. INS*, 2001 U.S. Dist. LEXIS 52 (E.D. Ill. Jan 4, 2001); *Gulen v. Chertoff*, 2008 U.S. Dist. LEXIS 54607 (E.D. Pa. July 16, 2008).

<sup>xxiii</sup> This is the only precedent decision for extraordinary ability petitions from the Administrative Appeals Office. See 8 C.F.R. § 103.3(c)(2011).

<sup>xxiv</sup> 860 F. Supp. 1222, 1233 (E.D. Mich. 1994). See also, *Muni v. INS*, 891 F. Supp. 440 (N.D. Ill. 1995) (the court reminded legacy INS that it “abuses its discretion when its decision (a) is made without rational explanation, (b) inexplicably departs from established policies, or (c) rests on an impermissible basis such as race discrimination).

<sup>xxv</sup> ISOs report that before the revised templates, decision letters varied considerably. Information provided by USCIS (Aug. 3, 2011).

<sup>xxvi</sup> 596 F.3d at 1121 (citing *Love Korean Church v. Chertoff*, 549 F.3d 749, 758 (9th Cir. 2008)).

<sup>xxvii</sup> 596 F.3d 1115; 8 C.F.R. 204.5(h)(2)-(3)(2011). Opinions have differed on whether this finding requires a two-part test. See *Matter of Price*, 20 I&N Dec. 953 (Assoc. Comm. 1994); *Buletini v. INS*, 860 F. Supp. 1222, 1233 (E.D. Mich. 1994); *Muni v. INS*, 891 F. Supp. 440 (N.D. Ill. 1995); *Racine v. INS*, 1995 U.S. Dist. LEXIS 4336 (N.D. Ill. Feb 16, 1995); *Grimson v. INS*, 934 F. Supp. 965 (N.D. Ill. 1996); *Russell v. INS*, 2001 U.S. Dist. LEXIS 52 (E.D. Ill. Jan 4, 2001); *Gulen v. Chertoff*, 2008 U.S. Dist. LEXIS 54607 (E.D. Pa. July 16, 2008).

<sup>xxviii</sup> Readings of the decision differ amongst the legal community. See *Amicus curiae* briefs provided to the Ombudsman’s Office.

<sup>xxix</sup> USCIS Policy Memorandum, “Evaluation of Evidence Submitted with Certain Form I-140 Petitions; Revisions to the Adjudicator’s Field Manual (AFM) Chapter 22.2, AFM Update AD11-14.” (Dec. 22, 2010) (accessed on Dec. 19, 2011 at:

<http://www.uscis.gov/USCIS/Laws/Memoranda/i-140-evidence-pm-6002-005-1.pdf>).

<sup>xxx</sup> The I-140 policy memorandum rescinded and superseded all previously published USCIS policy guidance regarding EB-1 adjudications.

<sup>xxxii</sup> See USCIS Request for Evidence Template, I-140 E11Alien of Extraordinary Ability (accessed Dec. 20, 2011 at: [http://www.uscis.gov/USCIS/Outreach/Draft%20Request%20for%20Evidence%20\(RFE\)%20Template%20for%20Comment/E11\\_RF\\_E\\_Template\\_1-10-11.pdf](http://www.uscis.gov/USCIS/Outreach/Draft%20Request%20for%20Evidence%20(RFE)%20Template%20for%20Comment/E11_RF_E_Template_1-10-11.pdf)).

<sup>xxxiii</sup> USCIS Policy Memorandum “Evaluation of Evidence Submitted with Certain Form I-140 Petitions; Revisions to the Adjudicator’s Field Manual (AFM) Chapter 22.2, AFM Update AD11-14,” p. 3.

<sup>xxxiii</sup> *Id.*

<sup>xxxiv</sup> Information provided by USCIS (Oct. 18, 2011).

<sup>xxxv</sup> USCIS Policy Memorandum, “Evaluation of Evidence Submitted with Certain Form I-140 Petitions; Revisions to the Adjudicator’s Field Manual (AFM) Chapter 22.2, AFM Update AD11-14,” p. 5. (Dec. 22, 2010) (accessed on Dec. 19, 2011 at: <http://www.uscis.gov/USCIS/Laws/Memoranda/i-140-evidence-pm-6002-005-1.pdf>).

<sup>xxxvi</sup> *Id.*, p. 3.

<sup>xxxvii</sup> *Id.*, p. 13.

<sup>xxxviii</sup> Information provided by USCIS (Oct. 18, 2011).

<sup>xxxix</sup> USCIS Policy Memorandum, “Evaluation of Evidence Submitted with Certain Form I-140 Petitions; Revisions to the Adjudicator’s Field Manual (AFM) Chapter 22.2, AFM Update AD11-14,” p. 14. (Dec. 22, 2010) (accessed on Dec. 19, 2011 at: <http://www.uscis.gov/USCIS/Laws/Memoranda/i-140-evidence-pm-6002-005-1.pdf>).

<sup>xl</sup> *U.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987) (if the petitioner submits relevant, probative, and credible evidence that leads USCIS to believe that the claim is “probably true” or “more likely than not,” the applicant or petitioner has satisfied the standard of proof).

<sup>xli</sup> Information provided by USCIS (July 27, 2011).

<sup>xlii</sup> USCIS released an interim memorandum for public comment on August 20, 2010 and posted the final memorandum on December 22, 2010 (accessed Dec. 20, 2011 at:

<http://www.uscis.gov/USCIS/Outreach/Interim%20Guidance%20for%20Comment/Kazarian%20Guidance%20AD10-41.pdf>).

USCIS Headquarters provided NSC training on August 24, 2010 and TSC training on August 26, 2010. Additional roundtable discussions were held in January 2011 and continue on a bi-weekly basis. Information provided by USCIS (Aug. 15, 2011).

<sup>xliii</sup> Information provided by USCIS (Aug. 3, 15, 2011, and Oct. 18, 2011).

<sup>xliv</sup> Information provided by USCIS (Aug. 3, 2011).

<sup>xlv</sup> *Id.*

<sup>xlvi</sup> Information provided by USCIS (Aug. 15, 2011).

<sup>xlvii</sup> Information provided by USCIS (Aug. 24, 2011).

<sup>xlviii</sup> Information provided by USCIS (Oct. 18, 2011).

<sup>xlix</sup> USCIS Administrative Appeals Office: Request for Amicus Curiae Briefs (accessed Sept. 22, 2011 at:

[http://www.uscis.gov/USCIS/Outreach/Feedback%20Opportunities/Amicus%20Briefs/Amicus\\_Brief\\_Request\\_081611%20v2.pdf](http://www.uscis.gov/USCIS/Outreach/Feedback%20Opportunities/Amicus%20Briefs/Amicus_Brief_Request_081611%20v2.pdf)).

<sup>i</sup> *Id.*

<sup>ii</sup> Information provided by USCIS (Aug. 3 and 15, 2011).

<sup>iii</sup> *Id.*

<sup>iiii</sup> *Id.*

<sup>lv</sup> *Id.*

<sup>lv</sup> American Immigration Lawyers Association, National Conference, San Diego, California (June 17, 2011).

<sup>lvi</sup> *Amicus curiae* briefs provided to the Ombudsman’s Office.

<sup>lvii</sup> Information provided by USCIS (Aug. 10, 2011).

<sup>lviii</sup> Information provided by USCIS (Aug. 24, 2011).

<sup>lix</sup> Information provided by USCIS (Aug. 3 and 15, 2011).

<sup>lx</sup> 5 U.S.C. 551 (1946); Pub. L. No. 404, 60 Stat. 237, Ch. 324, §§ 1-12 (1946).

<sup>lxi</sup> 5 U.S.C. 553 (b)-(d). See *A Guide to Federal Agency Rulemaking*, Jeffrey S. Lubbers (2006).

<sup>lxii</sup> Information provided by USCIS (Aug. 3 and 15, 2011).

<sup>lxiii</sup> *Id.*

<sup>lxiv</sup> Information provided by USCIS (Aug. 24, 2011).

<sup>lxv</sup> Information provided by USCIS (Oct. 18, 2011).

<sup>lxvi</sup> Adjudicator’s Field Manual, Ch. 10.15 (2011).