Mobility: Immigration alert

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United States

USCIS issues policy guidance to clarify eligibility for Extraordinary Ability and Outstanding Professor/Researcher immigrant visa classifications

Executive summary

On 12 September 2023, U.S. Citizenship and Immigration Services ("USCIS") updated its Policy Manual to clarify how its officers ought to evaluate evidence to determine eligibility for Extraordinary Ability and Outstanding Professor or Researcher first preference, employment-based immigrant visa classification ("EB-1"). The guidance instructs reviewing USCIS officers on how to assess eligibility based on comparable evidence provided by petitioners. It also provides more structure in adjudication by outlining a step-by-step analysis framework for reviewing officers with an emphasis on how the evidence ought to be evaluated during each step.

Background

To be eligible for classification as a foreign national of extraordinary ability, the evidence must demonstrate extraordinary ability in the sciences, arts, education, business, or athletics through sustained national or international acclaim and recognition for achievements. Persons with extraordinary ability in these fields may self-petition for first preference immigrant visa classification (EB-11) without a job offer or PERM labor certification from the U.S. Department of Labor.

To demonstrate sustained national or international acclaim and recognition of achievements in the field, the EB-11 petition must include evidence of a one-time achievement (major internationally recognized award) or evidence demonstrating satisfaction of at least three (3) out of 10 regulatory criteria (or comparable evidence if any of the criteria do not readily apply). This includes, but is not limited to, evidence of awards, major contributions, commercial success and other evidence.

By contrast, classification as an Outstanding Professor or Researcher (EB-12) requires a job offer for tenure or tenure track teaching or a permanent research position at a university, institution of higher education, or private employer. The U.S. employer must petition for such a Professor or Researcher, although a testing of the labor market first through the PERM labor certification process is not required. Further, evidence is only required for two (2) out of six (6) regulatory criteria (or comparable evidence if any of the criteria do not readily apply). However, that evidence must demonstrate that the foreign national has been recognized internationally as outstanding in the academic field; unlike the EB-11 classification, national recognition is insufficient.

Analysis

The revised policy guidance contains helpful examples of positive evidence that may satisfy the relevant evidentiary criteria or qualifying comparable evidence to satisfy the above noted evidentiary requirements.

- In particular, the Policy Manual provides examples of qualifying comparable evidence that USCIS officers may consider in support of petitions for persons working in science, technology, engineering and mathematics (STEM) fields, especially when one of the listed criteria does not readily apply to the foreign

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national's occupation. For example: if the publication of scholarly articles is not readily applicable to a person working in industry rather than academia, a petitioner might demonstrate that presentation of work at a major trade show is of comparable significance to publication.

- The Policy Manual also provides a step-by-step analysis framework for officers to follow, the first of which is to determine if the presented evidence objectively meets the regulatory criteria. The second step involves the Final Merits Determination, which requires an officer to consider the petition in its entirety to determine eligibility for the visa classification. Officers are instructed to consider any potentially relevant evidence in the record at this stage, regardless of whether it fits the regulatory criteria or was submitted as comparable evidence. Officers may not determine eligibility based on the evidence they think the petition ought to include and deny if that evidence is absent, provided other persuasive evidence that satisfies the regulatory standard was submitted.

What this means

Because the EB-11 and EB-12 classifications are reserved for high-priority foreign workers, USCIS often interprets the regulatory requirements strictly and narrowly to ensure the available visa numbers will be allocated only to workers who would benefit the United States with their extraordinary or outstanding abilities. While this is an admirable goal, it has unfortunately led to many unnecessary and burdensome requests for evidence ("RFEs"), notices of intent to deny ("NOIDs"), and even denials for obviously eligible foreign nationals.

The updated guidance appears to recognize the need for a course correction so that USCIS officers understand that a narrow interpretation of the regulations can result in erroneous findings of ineligibility, a loss to the foreign national and (if applicable) their U.S. employer, but also a possible loss to the country as a whole. With PERM labor certification processing times at historic highs, the EB-1 category has increasingly become an attractive alternative. We are hopeful that this policy change will result in seeing greater consistency in the adjudication of these petitions and a reduction in erroneous RFEs, NOIDs, and denials.

We will continue to monitor and review future developments. For additional information, or if you wish to discuss this further, please contact your EY Law LLP professional.

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