

Extraordinary Ability: The Direct Path for the Highly Qualified

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Congress decided that it is in the nation's interest to attract foreign nationals with particular talents and accomplishments. So Congress created a direct path to permanent residence for these highly qualified foreign nationals, who are called "Priority Workers." A major benefit is that the Priority Worker category avoids Labor Certification and its attendant mandatory requirements for recruitment and payment of prevailing wage. While the Labor Certification process entails an objective standard (i.e. the minimum requirements for the job), for most Priority Workers the standard is primarily subjective: notable accomplishment and talent. Understandably, Congress set the evidentiary bar quite high for Priority Workers.

There are three Direct Path Categories for these employment-based immigrant visas, commonly known as EB-1 Priority Workers:

- EB-1A, Workers of extraordinary ability in the sciences, arts, education, business or athletics,
- EB-1B, Outstanding academics and researchers, and
- EB-1C, Certain multinational organizational executives and managers.

In addition there is the National Interest Waiver category for certain professionals, known as EB-2.

- Statute: INA § 203(b)(1)(2), 8 U.S.C. § 1153(b)(1)(2);
- Regulations: 8 C.F.R. § 204.5(a)? 8 C.F.R. § 204.5(a)?(j)(k)

I. EB-1A Extraordinary Ability in the Sciences, Arts, Education, Business or Athletics

Required Elements:

1. The alien has EXTRAORDINARY ABILITY in the sciences, arts, education, business, or athletics, meaning 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, which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation.

Receipt of a top award, e.g. Pulitzer, Oscar, Grammy, in the field fulfills this requirement. Absent such award, the person qualifies if she can document that she has achieved THREE of the following distinctions in the field of endeavor:

1. Receipt of lesser national or international awards for excellence.
2. Membership in associations which require outstanding achievements as conditions of membership, as judged by national or international experts.
3. Published material about the person in trade publications or major media.
4. Evidence of participation in an expert panel as a judge of others' works.
5. Original artistic, scholarly or scientific contributions of major significance.
6. Authorship of scholarly articles.
7. Display of her work at artistic exhibitions or showcases in more than one country.
8. Performance in a lead, starring or critical role for organizations or establishments with distinguished reputations.
9. Having commanded a high salary or other significantly high remuneration.
10. Commercial success in the performing arts as shown by box office receipts, or record/publishing sales and income.
11. Or other comparable evidence if the first 10 do not readily apply to the person's occupation.

2. The alien seeks to enter the United States to continue WORK in the area of extraordinary ability. The petition must be accompanied by clear evidence that the alien is coming to the United States to continue work in the area of

expertise. Such evidence may include letter(s) from prospective employer(s), evidence of prearranged commitments such as contracts, or a statement from the beneficiary detailing plans on how he or she intends to continue his or her work in the United States.

3. The alien's entry into the United States will substantially BENEFIT prospectively the United States.

Comment 1. The major one-time achievement (such as a Nobel, Pulitzer, Olympic Gold, Oscar, Emmy, Grammy) award will satisfy the test for extraordinary ability per se. Absent that, as most cases are, the 10+-part evidentiary test is designed to encompass all of the prescribed fields of endeavor: sciences, arts, education, business, or athletics. Some of the evidence categories clearly fit into one field over the others. It is rare for any applicant to muster evidence for more than four or five categories. Only three are needed; however, it is a test of quality, and merely having one press interview, writing one scholarly article or making one seminar presentation will rarely impress the BCIS examiner.

Comment 2. This category is one of the rare few which allows for a self-petition by the foreign national. Thus, although an employer can petition for an EB-1A worker of extraordinary ability, the foreign national can self-petition without an employer's offer or sponsorship.

Comment 3. Another advantageous aspect compared with Labor Certification is that no minimum number of hours must be worked or minimum amount of prevailing wages be paid.

Comment 4. Professionals will not qualify for EB-1 extraordinary ability status unless their profession can be characterized as being in the arts, sciences, business, education, or athletics.

Comment 5. The regulations do not prescribe the evidence to prove the substantial prospective benefit to the nation. In practice the national benefit is usually demonstrated by the evidence showing extraordinary ability, such as enhancing American culture, science, medicine, economy, and the like.

Comment 6. Assessing talent is inherently subjective. Fortunately, the examiners and the 10+-part regulatory test focus on the recognition of that talent rather than the talent itself. As a result, one of the most creative and satisfying endeavors for the practitioner can be strategizing the case and guiding the client to develop evidence of recognition. Many experienced practitioners in this area have seen a talented and accomplished client achieve greater success, prominence and opportunities purely via their efforts in trying to qualify for this evidentiary test by seeking out opportunities to speak at conventions, act as a judge of the work of others, write articles, exhibit their work, etc.

II. EB-1B: Outstanding Professors and Researchers.

There is a separate category for outstanding professors and researchers.

Required Elements:

Pursuant to 8 U.S.C. 1153(b)(1)(B), a foreign national professor and/or researcher will qualify if

- (1) she is recognized internationally as outstanding in a specific academic area,
- (2) has at least 3 years of experience in teaching or research in the academic area, and
- (3) seeks to enter the United States
 - a) for a tenured position (or tenure-track position) within a university or institution of higher education to teach in the academic area, or
 - b) for a comparable position with a university or institution of higher education to conduct research in the area, or
 - c) for a comparable position to conduct research in the area with a private employer, if the particular employer department employs at least three persons full-time in research activities and has achieved documented accomplishments in an academic field.

Required Evidence

1. The evidence must show that the professor or researcher is RECOGNIZED INTERNATIONALLY as outstanding in the academic field specified in the petition. Such evidence shall consist of documentation at least two of the following:

- (A) the alien's receipt of major prizes or awards for outstanding achievement in the field;
 - (B) the alien's membership in associations in the academic field which require outstanding achievements of their members;
 - (C) Published material in professional publications written by others about the alien's work in the academic field.
 - (D) the alien's participation, either individually or on a panel, as the judge of the work of others in the same or an allied academic field;
 - (E) the alien's original scientific or scholarly research contributions to the academic field; or
 - (F) Evidence of the alien's authorship of scholarly books or articles (in scholarly journals with international circulation) in the academic field;
2. Evidence that the alien has AT LEAST THREE YEARS OF EXPERIENCE in teaching and/or research in the academic field.
3. A written OFFER OF EMPLOYMENT from a prospective United States employer in the field.

Comment 1. Again, it is the quality of the evidence that counts. Case decisions suggest that having one's scholarly paper cited as a footnote by other papers is not enough; there must be discussion of the work cited indicating its importance. And BCIS (now BCIS) examiners, perhaps unfairly given the rather closed world of researchers, tend to discount testimonial letters from superiors and colleagues as self-interested.

Comment 2. Due to unfamiliarity with a scientific subject matter or a complicated technical field, it can be difficult for a practitioner to assess the stature of the client in the field. Techniques: 1) seek out the broadest array of testimonial letters, especially from experts who know the work and not the person, 2) research the organizations, their reputations, and their standards for admission, publishing papers, choosing judges, etc.

III. EB-1C: Certain Multinational Executives and Managers.

Required Elements

A petition for a multinational executive or manager must include from the prospective employer in the United States a written job offer, which may be a letter which states that the foreign national is to be employed in the United States in a managerial or executive capacity. The letter must clearly describe the duties to be performed by the alien. That letter and the accompanying evidence must demonstrate that:

- 1) the employee worked at least one of the three years preceding the application (or if in the U.S. working for the business under a temporary work visa, then in at least one of the three years preceding that entry) on a full time basis for the business outside the U.S.,
- 2) the foreign business is a parent, branch, subsidiary or affiliate of the U.S. company,
- 3) the U.S. company has been in business for at least one year,
- 4) the employee so worked as an executive, manager, or manager of a special function,
- 5) the employee is being transferred indefinitely to fill such a position, and
- 6) the foreign business will continue in the employee's absence.

Comment 1. The evidence of most of the required elements lies in the corporate records, such as certificates of incorporation, share records, minutes, leases for locations, financial statements, tax returns, payroll records, business brochure, corporate divisional and personnel hierarchical charts of each entity (or consolidated if that is the case) showing the structure, ownership and reporting links, and key executive/management positions.

Comment 2. The difficulty even for large organizations otherwise qualified for this category usually is in proving to the BCIS examiner that the foreign national meets the restrictive definitions of manager and executive:

Executive capacity means an assignment within an organization in which the employee primarily:

- (A) Directs the management of the organization or a major component or function of the organization;
- (B) Establishes the goals and policies of the organization, component, or function;
- (C) Exercises wide latitude in discretionary decision-making; and
- (D) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

Managerial capacity means an assignment within an organization in which the employee primarily:

- (A) Manages the organization, or a department, subdivision, function, or component of the organization;
- (B) Supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (C) If another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or, if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (D) Exercises direction over the day-to-day operations of the activity or function for which the employee has authority.

IV. EB-2 National Interest Waiver

A final direct path for the highly qualified is the EB-2 National Interest Waiver.

Required Elements

The candidate must hold an advanced degree or its equivalent, (masters or doctorate), and/or who, because of his exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States

· See INA § 203(b)(2), 8 U.S.C. § 1153(b)(2); regulations at 8 C.F.R. § 204.5(a)(g), (k).

Required Evidence

Proof of exceptional ability is established by evidence meeting ANY THREE of the following:

- (1) Degree relating to area of exceptional ability;
- (2) Letter from current or former employer showing at least 10 years experience;
- (3) License to practice profession;
- (4) Salary or remuneration demonstrating exceptional ability;
- (5) Membership in professional association;
- (6) Recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organization.
- (7) Comparable evidence may be submitted if the above categories are inapplicable. This evidence may include expert opinion letters.

Defining National Interest

The regulations do not provide guidance to interpret “national interest.” The BCIS Administrative Appeals Unit has suggested seven factors to be considered: (1) improving the U.S. economy; (2) improving wages and working conditions for U.S. workers; (3) improving education and programs for U.S. children and underqualified workers; (4) improving health care; (5) providing more affordable housing; (6) improving the U.S. environment and making more productive use of natural resources; and (7) interested government agency request. Matter of (Mississippi Phosphate), Case No. EAC 92 091 50126 (AAU July 21, 1992) [], reported in 69 Interpreter Releases 1364-65 (Oct. 26, 1992); 70 Interpreter Releases 773-83 (June 14, 1993).

Due to wide variances in reported BCIS decisions around the country, the BCIS in Matter of New York State Department of Transportation, Int. Dec. # 3363 (Acting Assoc. Comm. 1998), [“NYS DOT”], established the following threshold test to determine national interest:

- (1) the person seeks employment in an area of substantial intrinsic merit;
- (2) the benefit will be national in scope; and
- (3) the national interest would be adversely affected if a labor certification were required.