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USCIS GUIDANCE ENABLING STEM GRADUATES TO OBTAIN O-1 EXTRAORDINARY VISAS SHOULD APPLY EQUALLY TO EB-1 EXTRAORDINARY PETITIONS FOR GREEN CARDS

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By Cyrus D. Mehta & Jessica Paszko*

Earlier this year, the USCIS issued policy guidance in the USCIS Policy Manual to clarify how the USCIS evaluates evidence to determine eligibility for O-1A nonimmigrants of extraordinary ability, with a focus on persons in science, technology, engineering, or mathematics (STEM) fields. The O-1A nonimmigrant visa is available to persons of extraordinary ability in the sciences, business, education, and athletics. The O-1B is available to persons with a record of extraordinary achievement in the motion picture of television industry or to persons who have gained distinction in the arts. The new guidance has not added additional criteria or requirements for O-1A applicants in STEM, but has, among other things, added a chart in an appendix describing examples of evidence that may satisfy the O-1A evidentiary criteria, as well as considerations that are relevant to evaluating such evidence (with a focus on evidence and considerations that are relevant to STEM fields) and provides examples of qualifying comparable evidence that petitioners could provide in support of a petition for a beneficiary in a STEM field.

The O-1A visa is the nonimmigrant "cousin" of the employment based first preference immigrant visa (EB-1A) for individuals with extraordinary ability, often dubbed the Einstein visa. The two visa categories mirror one another and require petitioners to effectively establish the same evidentiary criteria. But note that the regulatory standards for an O-1A require that the beneficiary meet only eight rather than 10 criteria as the criteria for beneficiaries in the arts

have been moved under a different section in the regulations at 8 C.F.R. § 214.2(o)(3)(iv). *See* the INA provisions for EB-1A under INA § 203(b)(1)(A) and the O-1A under INA § 101(a)(15)(O). *See also* the regulatory criteria for the EB-1A under 8 C.F.R. § 204.5(h)(3) and for the O-1A under 8 C.F.R. § 214.2(o)(3)(iii). However, and most notably, a victory under EB-1A comes with a green card, while a victory under O-1 comes with a temporary period of authorized employment. While there is no limit on the number of times that an O-1 can be extended, there are virtually no paths to citizenship for O-1 beneficiaries unless they can qualify under any of the other employment-based (EB) preference categories, such as EB-1, EB-2, or EB-3. However, the very reason that one many apply for the O-1 is because the other EB categories are not the right fit for that particular beneficiary. For instance, because they don't have a qualifying degree or an employer who wishes to pursue the lengthy and costly PERM labor certification process on their behalf. Many who seek an O-1A are founders of their own companies which would make labor certification virtually impossible. Those who are unable to file labor certifications because they own their companies may sidestep the labor certification process by applying for a National Interest Waiver. Still, to apply for a National Interest Waiver, the USCIS considers whether the person's proposed endeavor has both substantial merit and national importance, the person is well positioned to advance the proposed endeavor, and that it would beneficial to the U.S. to waive the job offer and thus the permanent labor certification requirements. *See Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016). At the same time though, for some EB-2 beneficiaries, even those who can benefit from a National Interest Waiver, this path may not befit them with a green card for many years, even decades, if they are nationals of backlogged countries such as India or China. If Indian born beneficiaries can qualify for the O-1A under the new guidance, they should similarly be able to qualify for the EB-1A as this category is current for India and all other countries under the State Department Visa Bulletin.

8 CFR § 214.2(o)(3)(iii) provides that:

An alien of extraordinary ability in the fields of science, education, business, or athletics must demonstrate sustained national or international acclaim and recognition for achievements in the field of expertise by providing evidence of:

(A) Receipt of a major, internationally recognized award, such as the Nobel Prize; or

(B) At least three of the following forms of documentation:

(1) Documentation of the alien's receipt of nationally or internationally recognized prizes or awards for excellence in the field of endeavor;

(2) Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields;

(3) Published material in professional or major trade publications or major media about the alien, relating to the alien's work in the field for which classification is sought, which shall include the title, date, and author of such published material, and any necessary translation;

(4) Evidence of the alien's participation on a panel, or individually, as a judge of the work of others in the same or in an allied field of specialization to that for which classification is sought;

(5) Evidence of the alien's original scientific, scholarly, or business-related contributions of major significance in the field;

(6) Evidence of the alien's authorship of scholarly articles in the field, in professional journals, or other major media;

(7) Evidence that the alien has been employed in a critical or essential capacity for organizations and establishments that have a distinguished reputation;

(8) Evidence that the alien has either commanded a high salary or will command a high salary or other remuneration for services, evidenced by contracts or other reliable evidence.

(C) If the criteria in paragraph (o)(3)(iii) of this section do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence in order to establish the beneficiary's eligibility.

To satisfy the second criterion, USCIS has typically required that the petitioner show that membership in the association requires outstanding achievements in the field for which classification is sought, as judged by recognized national or international experts. In cases where associations may have multiple levels of membership, the petitioner must show that in order to obtain the level of membership afforded to the beneficiary, the beneficiary was judged by recognized national or international experts as having attained outstanding

achievements in the field for which classification is sought. In light of the new policy guidance, USCIS has provided a possible example that may be helpful to STEM beneficiaries. It states:

embership in the Institute of Electrical and Electronics Engineers (IEEE) at the IEEE fellow level requires, in part, that a nominee have "accomplishments that have contributed importantly to the advancement or application of engineering, science and technology, bringing the realization of significant value to society," and nominations are judged by an IEEE council of experts and a committee of current IEEE fellows. As another possible example, membership as a fellow in the Association for the Advancement of Artificial Intelligence (AAAI) is based on recognition of a nominee's "significant, sustained contributions" to the field of artificial intelligence, and is judged by a panel of current AAAI fellows.

With respect to the fifth criterion, the USCIS provides that "evidence that the beneficiary developed a patented technology that has attracted significant attention or commercialization may establish the significance of the beneficiary's original contribution to the field. If a patent remains pending, USCIS will likely require additional supporting evidence to document the originality of the beneficiary's contribution."

While all O-1A petitioners may submit comparable evidence under 8 C.F.R. § 214.2(o)(3)(iii)(C) if the enumerated criteria do not readily apply to a particular beneficiary, in the STEM context, USCIS reiterates that "s with all O-1A petitions, officers may consider comparable evidence in support of petitions for beneficiaries working in STEM fields. Specifically, if a petitioner demonstrates that a particular criterion does not readily apply to the beneficiary's occupation, the petitioner may submit evidence that is of comparable significance to that criterion to establish sustained acclaim and recognition." Relatedly, with respect to the evaluating the totality of the evidence, the policy manual provides that when "the evidentiary requirements specified above are satisfied, an officer proceeds to evaluate the totality of all the evidence in the record to determine whether the beneficiary has extraordinary ability with sustained national or international acclaim." Here, "officers may consider any potentially relevant evidence, even if such evidence does not fit one of the above regulatory criteria or was not presented as comparable evidence." In the STEM context, this may occur when the "record establishes that the beneficiary is named as an investigator, scientist, or researcher on a peer-reviewed and competitively

funded U.S. government grant or stipend for STEM research." In turn, this "type of evidence can be a positive factor indicating a beneficiary is among the small percentage at the top of the beneficiary's field."

The Biden Administration has clearly expressed its desire to expand immigration benefits for those in the STEM field but has not allowed them to take advantage of all immigrant visas, such as the EB-1A. While we applaud the government's move to expand the O-1A visa category to cover those in the STEM field, we wonder why a similar expansion has not occurred for the EB-1A. After all, as mentioned, the two visa categories share similarities and both intend to welcome extraordinary individuals to the U.S. Both categories also require "a level of expertise indicating that the person is one of the small percentage who have arisen to the very top of the field of endeavor." See 8 CFR §214.2(o)(3)(ii); 8 CFR §204.5(h)(2). If the government endeavors to promote STEM fields, then it should also allow extraordinary individuals working in the STEM field to apply for the EB-1A. Allowing an extraordinary individual in the STEM field to easily become a permanent resident after obtaining the O-1A visa will allow this individual unfettered by the limitations of a temporary visa status to thrive and flourish, which in turn will benefit the United States.

Jessica Paszko is an Associate at Cyrus D. Mehta & Partners PLLC. She graduated with a J.D. degree from Brooklyn Law School in 2021.