

INTERIM MEMO FOR COMMENT

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This memo is in effect until further notice.

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director (MS 2000)
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U.S. Citizenship
and Immigration
Services

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PM-602-0005

Policy Memorandum

SUBJECT: Evaluation of Evidentiary Criteria in Certain Form I-140 Petitions (*AFM* Update AD 10-41)

Purpose

This Policy Memorandum (PM) provides guidance regarding the analysis that Immigration Service Officers (ISOs) must use in adjudicating Form I-140, Immigrant Petition for Alien Worker, filed for:

- Aliens of Extraordinary Ability under section 203(b)(1)(A) of the Immigration and Nationality Act (INA);
- Outstanding Professors or Researchers under section 203(b)(1)(B) INA; and
- Aliens of Exceptional Ability under section 203(b)(2) INA.

The purpose of this PM is to ensure that U.S. Citizenship and Immigration Services (USCIS) processes Form I-140 petitions filed under these employment-based immigrant classifications with a consistent standard.

In addition, this PM revises Adjudicator's Field Manual (*AFM*) Chapter 22.2 to clarify that USCIS will make successor-in-interest (SII) determinations in Form I-140 petitions supported by an approved labor certification application if the transfer of ownership took place while such application for labor certification was still pending with the Department of Labor (DOL).¹

Lastly, this PM revises *AFM* Chapter 22.2 to update the DOL e-mail address for ISOs to use when making duplicate labor certification application requests.

Scope

This PM rescinds and supersedes all previously published policy guidance² issued by USCIS and the legacy Immigration and Naturalization Service (INS) specific to the evaluation of required evidence provided in support of Form I-140 petitions under Title 8 Code of Federal Regulations

¹ See USCIS memorandum, *Successor-in-Interest Determinations in Adjudication of Form I-140 Petitions; Adjudicators Field Manual (AFM) Update to Chapter 22.2(b)(5) (AD09-37)*, dated August 6, 2009. It is noted on page 7 of that memorandum that SII determinations could only be made in cases where the labor certification application had been approved prior to the transfer of ownership.

² *AFM* sections that have not been updated by this memo shall remain in effect.

(8 CFR) sections 204.5(h)(3) and (4), 204.5(i)(3)(i), and 204.5(k)(3)(ii). Unless specifically exempted herein, this PM applies to and binds all USCIS employees.

Authority

The Department of Homeland Security (DHS) has delegated to USCIS the authority to make determinations of eligibility in immigrant petitions filed under INA 203(b) and 8 CFR 204.5. See INA 103(a) generally.

Background

USCIS and INS have consistently recognized that Congress intended to set a very high standard for individuals seeking immigrant visas as aliens of extraordinary ability.³ In order to qualify for admission in this category, an alien must, among other things, demonstrate sustained national or international acclaim in the alien's field of endeavor in accordance with INA 203(b)(1)(A). Qualification under this category is reserved for the small percentage of individuals at the very top of their fields of endeavor. *Id.*

The regulation at 8 CFR 204.5(h)(3), implemented in 56 FR 60897 (Nov. 29, 1991), indicates that an alien can establish sustained national or international acclaim through evidence of a one-time achievement (that is, a major, internationally recognized award). Barring the alien's receipt of such an award, the regulation outlines ten criteria, at least three of which must be satisfied for an alien to establish the sustained acclaim necessary to qualify as an alien of extraordinary ability.

The statutory framework for the Outstanding Professor or Researcher visa classification at INA 203(b)(1)(B) requires that the alien be recognized internationally as outstanding in a specific academic field. Outstanding Professors or Researchers should stand apart in the academic community through eminence and distinction based on international recognition.⁴ 8 CFR 204.5(i)(3)(i) outlines six criteria, at least two of which must be satisfied to establish international recognition as outstanding in the academic field necessary to qualify as an Outstanding Professor or Researcher.

The statutory framework for the Alien of Exceptional Ability visa classification at INA 203(b)(2)(A) requires that the alien will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States because of his or her exceptional ability in the sciences, arts or business. The alien must also have a job offer from a U.S. employer to provide services in the sciences, arts, professions, or business.⁵ 8 CFR 204.5(k)(2) defines exceptional ability in the sciences, arts, or business as having a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. 8 CFR 204.5(k)(3)(ii) outlines six criteria, at least three of which must be satisfied to establish advanced expertise required to qualify as an alien of exceptional ability.

³ See House Report 101-723, 1990 U.S.C.C.A.N. 6710. (Sep. 19, 1990), 56 FR 60897 (Nov. 29, 1991).

⁴ See 56 FR 30703 (July 5, 1991).

⁵ No job offer is required for an alien of exceptional ability under INA 203(b)(2) if a waiver of the job offer in the national interest (NIW) is granted under INA 203(b)(2)(B).

In 2010, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) reviewed the USCIS appellate decision on a petition filed under this classification. *Kazarian v. USCIS*, 596 F.3d 1115, C.A.9 (Cal.), March 04, 2010 (NO. 07-56774). Although the court upheld the Administrative Appeals Office (AAO)'s decision to dismiss the appeal, the court took issue with the AAO's evaluation of evidence submitted to meet a given evidentiary criterion. Specifically, the court stated that AAO had imposed requirements beyond those set forth in the regulations. With respect to the criteria at 8 CFR 204.5(h)(3)(iv) ("evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specialization for which classification is sought") and (vi) ("evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media"), the court concluded that while USCIS may have raised legitimate concerns about the significance of the evidence submitted to meet those two criteria, those concerns should have been raised in a subsequent "final merits determination." *Id.* Thus, the *Kazarian* decision sets forth a two-part approach where the evidence is first counted and then considered in the context of a final merits determination.

The analysis used by USCIS and INS in reviewing evidence provided in support of Outstanding Professor or Researcher petitions and Alien of Exceptional Ability petitions also involves an evaluation of lists of regulatory criteria that were implemented in 56 FR 60897.

Policy

In order to promote consistency in decision-making, ISOs will use the two-part approach set forth in the *Kazarian* decision for all petitions filed for Aliens of Extraordinary Ability, for Outstanding Professors or Researchers, or for Aliens of Exceptional Ability. The ISO must first evaluate the evidence on an individual basis to determine if it meets the criteria, and then must consider all of the evidence in totality in making the final merits determination.

Proof

The ISO is reminded that the standard of proof applied for petitions filed for Aliens of Extraordinary Ability, for Outstanding Professors or Researchers, or for Aliens of Exceptional Ability is the "preponderance of the evidence" standard. Thus, if the petitioner submits relevant, probative, and credible evidence that leads USCIS to believe that the claim is true "more likely than not," the applicant or petitioner has satisfied the standard of proof. *See U.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987) (defining "more likely than not" as a greater than 50 percent probability of something occurring).

If a petitioner provides supporting documentation that satisfies the regulatory prongs, and such documentation is legitimate (i.e. not forged, issued in error, inaccurate, etc.), *Kazarian* prohibits USCIS from "unilaterally imposing novel substantive or evidentiary requirements beyond those set forth at 8 C.F.R. section 204.5." *Kazarian* requires that an adjudicator first determine whether the petitioner has provided evidence to satisfy the requisite number of evidentiary prongs under the particular EB-1 classification. The adjudicator must look at each prong for which evidence has been provided ("the proper procedure is to count the types of evidence provided") to determine how many evidentiary prongs have been satisfied. If the documentation (including but not limited to articles, publications, memos, reference letters, expert testimony,

support letters, etc.) is relevant to the category, is substantive (does not merely recite the regulations) and is credible, under Kazarian it suffices. Once USCIS determines that the petitioner has provided satisfactory evidence for the requisite number of prongs, the second phase of review requires the adjudicator to weigh the evidence against the required high level of expertise for the visa category. It is in the second phase of the review where the evidence can be evaluated to see if, cumulatively, it proves by a preponderance of the evidence that the applicant or beneficiary is at the very top of his or her field of endeavor.

Implementation

Effective August 18, 2010, Service Center ISOs are to follow the amended procedures in this update of the *AFM*, AD10-41, in the adjudication of all Form I-140 petitions filed for Aliens of Extraordinary Ability, Outstanding Professors or Researchers, or for Alien of Exceptional Ability pending as of that date, as follows:

1. Paragraph (1)(A) of Chapter 22.2(i) of the *AFM* is revised to read as follows:

(A) Evaluating Evidence Submitted in Support of a Petition for an Alien of Extraordinary Ability. 8 CFR 204.5(h)(3) and (4) describe the various types of evidence that must be submitted in support of an I-140 petition for an alien of extraordinary ability. In general, the petition must be accompanied by initial evidence that: (a) the alien has sustained national or international acclaim; and (b) the alien's achievements have been recognized in the field of expertise. This initial evidence must include either evidence of a one-time achievement (i.e., a major international recognized award, such as the Nobel Prize), or at least three of the types of evidence listed in 204.5(h)(3).

ISOs must use a two-part analysis to determine eligibility under 8 CFR 204.5(h)(3) and (4). First, the ISO must determine if the petitioner has, by a preponderance of the evidence, met at least three of the criteria, and then the ISO should consider all of the evidence in totality in making the final merits determination.

Part One: Evaluate Whether the Evidence Provided Meets at Least Three Criteria. You must determine whether the petition is supported by evidence of a one-time achievement (that is, a major, internationally recognized award). If it is not, then you must make a determination that is limited to whether the evidence submitted in the petition meets at least three criteria at 8 CFR 204.5(h)(3) as discussed below. **Note:** While ISO must consider the quality and caliber of the evidence to determine whether a particular regulatory criterion has been met, the ISO should not make a determination of sustained national or international acclaim in Part One of the case analysis. See the table below for guidance on the limited determinations that must be made in Part One of the E11 analysis:

<u>Part One Analysis of Evidence Submitted Under 8 CFR 204.5(h)(3) and (4)</u>

Note: In certain cases, evidence submitted to establish one criterion may be

<p>sufficient to satisfy more than one of the criteria set forth in 8 CFR 204.5(h)(3). Similarly, in some cases, one type of “comparable” evidence submitted in connection with 8 CFR 204.5(h)(4) might satisfy more than one of the criteria set forth in 8 CFR 204.5(h)(3).</p>	
<p>Regulation</p>	<p>Limited Determination</p>
<p>8 CFR 204.5(h)(3)(i): <i>Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor;</i></p>	<p>1. Determine if the alien was the recipient of prizes or awards.</p> <p>The focus should generally be on <u>the alien's</u> receipt of the awards or prizes, as opposed to his or her employer's receipt of the awards. If the employer was the recipient of the prizes or awards then the evidence must show that the basis for the awards or prizes can be directly attributed to the alien.</p> <p>2. Determine whether the alien has received lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor.</p> <p>Relevant considerations regarding whether the basis for granting the prizes or awards was national or international recognition for excellence in the field include, but are not limited to:</p> <ul style="list-style-type: none"> • The number of awardees or prize recipients as well as any limitations on competitors (an award limited to competitors from a single institution, for example, may have little national or international significance); and • The fact that awards with national or international recognition will probably be reported in the media. While such media reports may not focus on the alien, they might be relevant to the degree of recognition of the award itself.
<p>8 CFR 204.5(h)(3)(ii): <i>Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their</i></p>	<p>1. Determine if the association for which the alien claims membership requires that members have outstanding achievements in the field as judged by recognized experts in that field.</p> <p>The petitioner must show that membership in the associations is exclusive, meaning that it is limited solely to those who have been judged by recognized national or international experts as having attained outstanding achievements in the field for which classification is sought. For example, admission to membership in the National Academy of Sciences as a Foreign Associate is currently limited to just 18 individuals per year, each of whom must be nominated by an academy member, and membership is ultimately granted based upon recognition of the</p>

<p><i>members, as judged by recognized national or international experts in their disciplines or fields;</i></p>	<p>individual's distinguished achievements in original research. See www.nasonline.org.</p> <p>Relevant factors that may lead to a conclusion that the alien's membership in the associations was <u>not</u> based on outstanding achievements in the field include, but are not limited to, instances where the alien's membership was based:</p> <ul style="list-style-type: none"> • Solely on a level of education or years of experience in a particular field; • On the payment of a fee or by subscribing to an association's publications; or • On a requirement, compulsory or otherwise, for employment in certain occupations, such as union membership or guild affiliation for actors. <p>These bases for membership do not require that the prospective member must have made outstanding achievements in the field of endeavor.</p>
<p>8 CFR 204.5(h)(3)(iii): <i>Published material about the alien in professional or major trade publications or other major media relating to the alien's work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation;</i></p>	<p>1. Determine whether the published material was related to the alien and the alien's specific work in the field for which classification was is sought.</p> <p>The published material should be about the alien relating to his or her work in the field, not just about his or her employer or another organization that he or she is associated with. Note that marketing materials created for the purpose of selling the alien's products or promoting his or her services are not generally considered to be published material about the beneficiary.</p> <p>2. Determine whether the publication qualifies as a professional publication or major trade publication or a major media publication.</p> <p>Evidence of published material in professional or major trade publications or in other major media publications about the alien should clearly identify the circulation (on-line or in print) and intended audience of the publication, as well as the title, date and author of the material.</p>
<p>8 CFR 204.5(h)(3)(iv): <i>Evidence of the alien's participation,</i></p>	<p>Determine whether the alien has acted as the judge of the work of others in the same or an allied field of specialization.</p>

<p><i>either individually or on a panel, as a judge of the work of others in the same or an allied field of specialization for which classification is sought;</i></p>	
<p>8 CFR 204.5(h)(3)(v): <i>Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field;</i></p>	<p>1. Determine whether the alien has made original contributions in the field.</p> <p>2. Determine whether the alien's original contributions are of major significance to the field.</p> <p>You must evaluate whether the original work constitutes major, significant contributions to the field. Although funded and published work may be "original," this fact alone is not sufficient to establish that the work is of major significance. For example, peer-reviewed presentations at academic symposia or peer-reviewed articles in scholarly journals that have provoked widespread commentary or received notice from others working in the field, or entries (particularly a goodly number) in a citation index which cite the alien's work as authoritative in the field, may be probative of the significance of the alien's contributions to the field of endeavor.</p>
<p>8 CFR 204.5 (h)(3)(vi): <i>Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media;</i></p>	<p>1. Determine whether the alien has authored scholarly articles in the field.</p> <p>As defined in the academic arena, a scholarly article reports on original research, experimentation, or philosophical discourse. It is written by a researcher or expert in the field who is often affiliated with a college, university, or research institution. It should have footnotes, endnotes, or a bibliography, and may include graphs, charts, videos, or pictures as illustrations of the concepts expressed in the article.</p> <p>2. Determine whether the publication qualifies as a professional publication or major trade publication or a major media publication.</p>

	<p>Evidence of published material in professional or major trade publications or in other major media publications should clearly identify the circulation (on-line or in print) and intended audience of the publication.</p>
<p>8 CFR 204.5 (h)(3)(vii): <i>Evidence of the display of the alien's work in the field at artistic exhibitions or showcases;</i></p>	<p>1. Determine whether the work that was displayed is the alien's work product.</p> <p>2. Determine whether the venues (virtual or otherwise) where the alien's work was displayed were <u>artistic</u> exhibitions or showcases.</p>
<p>8 CFR 204.5 (h)(3)(viii): <i>Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation;</i></p>	<p>1. Determine whether the alien has performed in leading or critical roles for organizations or establishments.</p> <p>In evaluating such evidence, you must examine the role the alien was hired or appointed to fill for the organization or establishment and determine whether that role is (or was) "leading" or "critical." The evidence must establish that the alien has been a leader or has somehow contributed in a way that is of significant importance to the outcome of the organization or establishment's activities. A supporting role may be considered "critical" if the alien's performance in the role is (or was) important in that way. It is not the title of the alien's role, but rather the alien's performance in the role that determines whether the role is leading or critical. In addition, a key question may be whether the alien's role was leading or critical to the organization as a whole.</p> <p>2. Determine whether the organization or establishment has a distinguished reputation.</p> <p>Keep in mind that the relative size or longevity of an organization or establishment is not in and of itself a determining factor. Rather, the organization or establishment must be recognized as having a distinguished reputation. Webster's online dictionary defines <i>distinguished</i> as 1: marked by eminence, distinction, or excellence <distinguished leadership and 2: befitting an eminent person <a distinguished setting.</p> <p>(See http://www.merriam-webster.com/dictionary/distinguished)</p>

<p>8 CFR 204.5(h)(3)(ix): <i>Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field;</i></p>	<p>1. Determine whether the alien’s salary or remuneration is high relative to the compensation paid to others working in the field.</p> <p>Evidence regarding whether the alien’s compensation is high relative to that of others working in the field may take many forms. If the petitioner is claiming to meet this criterion, then the burden is on the petitioner to provide appropriate evidence. Examples may include, but are not limited to, geographical or position-appropriate compensation surveys and organizational justifications to pay above the compensation data. Three websites that may be helpful in evaluating the evidence provided by the petitioner are:</p> <p>The Bureau of Labor Statistics (BLS): http://www.bls.gov/bls/blswage.htm</p> <p>The Department of Labor’s Career One Stop website: http://www.careeronestop.org/SalariesBenefits/Sal_default.aspx</p> <p>The Department of Labor’s Office of Foreign Labor Certification Online Wage Library: http://www.flcdatacenter.com</p>
<p>8 CFR 204.5(h)(3)(x): <i>Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.</i></p>	<p>Determine whether the alien has enjoyed commercial successes in the performing arts.</p> <p>This criterion focuses on volume of sales and box office receipts as a measure of the alien’s commercial success in the performing arts. Therefore, the mere fact that an alien has recorded and released musical compilations or performed in theatrical, motion picture or television productions would be insufficient, in and of itself, to meet this criterion. The evidence must show that the volume of sales and box office receipts reflect the alien’s commercial success relative to others involved in similar pursuits in the performing arts.</p>
<p>8 CFR 204.5(h)(4): <i>If the standards do not readily apply to the beneficiary’s occupation, the petitioner may</i></p>	<p>Determine if the evidence submitted is comparable to the evidence required in 8 CFR 204.35(h)(3).</p> <p>This regulatory provision provides petitioners the opportunity to submit comparable evidence to establish the alien beneficiary’s eligibility, if it is determined that the standards described in 8 CFR 204.5(h)(3) do not readily apply to the alien’s occupation. When evaluating such "comparable" evidence, consider</p>

<p><i>submit comparable evidence to establish the beneficiary's eligibility.</i></p>	<p>whether the 8 CFR 204.5(h)(3) criteria are readily applicable to the alien's occupation and, if not, whether the evidence provided is truly comparable to the criteria listed in that regulation. General assertions that the ten objective criteria described in 8 CFR 204.5(h)(3) do not readily apply to the alien's occupation are not probative and should be discounted. Similarly, claims that USCIS should accept witness letters as comparable evidence are not persuasive. The petitioner should explain clearly why it has not submitted evidence that would satisfy at least three of the criteria set forth in 8 CFR 204.5(h)(3) as well as why the evidence it has submitted is "comparable" to that required under 8 CFR 204.5(h)(3). On the other hand, the following are examples of where 8 CFR 204.5(h)(4) might apply.</p> <p>(1) An alien beneficiary who is an Olympic coach whose athlete wins an Olympic medal while under the alien's principal tutelage would likely constitute evidence comparable to that in 8 CFR 204.5(h)(3)(v).</p> <p>(2) Election to a national all-star or Olympic team might serve as comparable evidence for evidence of memberships in 8 CFR 204.5(h)(3)(ii).</p> <p>Note: There is no comparable evidence for the one-time achievement of a major, international recognized award.</p>
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Part Two: Final Merits Determination. Meeting the minimum requirement of providing evidence relating to at least three criteria does not, in itself, establish that the alien in fact meets the requirements for classification as an alien of extraordinary ability under section 203(b)(1)(A) of the INA. In making this determination, the court in *Kazarian* recognized that the quality of the evidence, such as whether the judging responsibilities were internal and whether the scholarly articles (if pertinent to the occupation) are cited, is an appropriate consideration in the final merits determination. In addition, the alien's performance at the so-called major-league level does not automatically establish that he or she meets the extraordinary ability standards. See *Matter of Price*, 20 I&N, Dec. 3241 citing to 56 FR 60899 (Nov. 29, 1991). Finally, Congress intended that in the absence of a one-time achievement, an alien could qualify for the classification based on a "career of acclaimed work." H.R. Rep. No. 101-723, 59 (Sept. 19, 1990).

In Part Two of the analysis in each case, you must consider all of the evidence to make a final merit determination of whether or not the petitioner, by a preponderance of the evidence, has demonstrated that the alien has:

- (i) 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 CFR 204.5(h)(2); and
 - (ii) Sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise. 8 CFR 204.5(h)(3).
- 2. The introductory language of paragraph (1)(E) of Chapter 22.2(i) of the *AFM* is revised to read as follows:
 - (E) Sustained National or International Acclaim. Under 8 CFR 204.5(h)(3), a petition for an alien of extraordinary ability must be accompanied by evidence that the alien has sustained national or international acclaim and that the alien's achievements have been recognized in the field of expertise. In determining whether the beneficiary has enjoyed “sustained” national or international acclaim, bear in mind that such acclaim must be maintained. (According to Black’s Law Dictionary, 1585 (9th Ed, 2009), the definition of *sustain* is “(1) to support or maintain, especially over a long period of time; 6. To persist in making (an effort) over a long period of time.”) However, the word sustained does not imply an age limit on the beneficiary. A beneficiary may be very young in his or her career and still be able to show sustained acclaim. There is also no definitive time frame on what constitutes “sustained.” If an alien was recognized for a particular achievement, you must determine whether the alien continues to maintain a comparable level of acclaim in the field of expertise since the alien was originally afforded that recognition. An alien may have achieved national or international acclaim in the past but then failed to maintain a comparable level of acclaim thereafter.
 - Note:** Section 22.2(i)(1)(A) of this chapter describes the limited determinations that must be made in Part One of the analysis to determine whether the alien has met any of the evidentiary criteria claimed by the petitioner at 8 CFR 204.5(h)(3). However, the evidence evaluated in Part One is also reviewed in Part Two to determine whether the alien is one of that small percentage who has risen to the very top of the field of endeavor, and that he or she has sustained national or international acclaim.
- 3. The existing text of paragraph (1)(F) of Chapter 22.2(i) of the *AFM* is removed and the paragraph is reserved.
- 4. Paragraph (2)(A) of Chapter 22.2(i) of the *AFM* is revised to read as follows:
 - (A) Evaluating Evidence Submitted in Support of a Petition for an Outstanding Professor or Researcher. 8 CFR 204.5(i)(3) describes the evidence that must be

submitted in support of an I-140 petition for an outstanding professor or researcher. The evidence that must be provided in support of E12, outstanding professor or researcher petitions must demonstrate that the alien is recognized *internationally* as outstanding in the academic field specified in the petition. Thus, the universe against which the beneficiary is compared is measured solely against the particular academic field of which the beneficiary claims outstanding achievement. For example, if a petition is filed on behalf of a particle physics professor, than the professor's work should only be compared against other particle physics professors to determine if the professor is outstanding in that academic field. An ISO should not compare the particle physics professor to all physics professors or quantum physics professors to determine if the professor is recognized internationally as outstanding as a particle physicist. In addition, the petition must be accompanied by an offer of permanent, tenured, or tenure-track employment (limited to "permanent positions" in the case of research positions) from a qualifying prospective employer and evidence that the alien has had at least three years of experience in teaching or research in the "academic field" in which the alien will be engaged. See 8 CFR 204.5(i)(3)(ii) and (iii). The definitions for "permanent" and "academic field" can be found in 8 CFR 204.5(i)(2).

Each E12 petition must be supported by evidence addressing two out of six criteria stated in 8 CFR 204.5(i)(3)(i). ISOs should use a two-part analysis where the evidence is first counted and then considered in the context of a final merits determination.

Part One: Evaluate Whether the Evidence Provided Meets at Least Two E12 Criteria. The determination in Part One of the analysis is limited to determining whether the evidence submitted satisfies the preponderance of the evidence standard and meets at least two criteria at 8 CFR 204.5(i)(3)(i) as discussed below. **Note:** While ISOs must consider the quality and caliber of the evidence to determine whether a particular regulatory criterion has been met, the ISO should not make a determination relative to the alien's claimed international recognition in Part One of the case analysis. See the table below for guidance on the limited determinations that must be made in Part One of the E12 analysis:

Part One Analysis of Evidence Submitted Under 8 CFR 204.5(i)(3)(i)	
Regulation	Limited Determination
8 CFR 204.5(i)(3)(i)(A): <i>Documentation of the alien's receipt of major prizes or awards for outstanding achievement in the</i>	1. Determine if the alien was the recipient of prizes or awards. The focus should generally be on the <u>alien's</u> receipt of awards or prizes, as opposed to his or her employer's receipt of awards or prizes. If the employer was the recipient of the prizes or awards then the evidence must show that the basis for the awards or prizes can be directly

<p><i>academic field;</i></p>	<p>attributable to the alien.</p> <p>2. Determine whether the alien has received prizes or awards for excellence for outstanding achievement in the academic field.</p>
<p>8 CFR 204.5(i)(3)(i)(B): <i>Documentation of the alien's membership in associations in the academic field which require outstanding achievements of their members;</i></p>	<p>1. Determine if the association for which the alien claims membership requires outstanding achievements in the field that members have.</p> <p>The petitioner must show that membership in the associations is exclusive, meaning that it is limited solely to those who have made outstanding achievements in the academic field.</p> <p>Relevant factors that may lead to a conclusion that the alien's membership in the association was <u>not</u> based on outstanding achievements in the academic field include, but are not limited to, instances where the alien's membership was based:</p> <ul style="list-style-type: none"> • Solely on a level of education or years of experience in a particular field; or • On the payment of a fee or by subscribing to an association's publications.
<p>8 CFR 204.5(i)(3)(i)(C): <i>Published material in professional publications written by others about the alien's work in the academic field. Such material shall include the title, date, and author of the material, and any necessary translation;</i></p>	<p>1. Determine whether the published material was about the alien's work.</p> <p>The published material should be about the alien's work in the field, not just about his or her employer or another organization that he or she is associated with. Articles that cite the alien's work as one of multiple footnotes or endnotes are not generally "about" the alien's work.</p> <p>2. Determine whether the publication qualifies as a professional publication.</p> <p>Evidence of published material in professional publications about the alien should clearly identify the circulation (online or in print) and intended audience of the publication, as well as the title, date, and author of the material.</p>
<p>8 CFR 204.5(i)(3)(i)(D): <i>Evidence of the alien's participation, either</i></p>	<p>Determine whether the alien has participated either individually or on a panel, as the judge of the work of others in the same or an allied field of specialization.</p>

<p><i>individually or on a panel, as the judge of the work of others in the same or an allied academic field;</i></p>	
<p>8 CFR 204.5(i)(3)(i)(E): <i>Evidence of the alien's original scientific or scholarly research contributions to the academic field;</i></p>	<p>Determine whether the alien has made original scientific or scholarly research contributions to the academic field.</p>
<p>8 CFR 204.5(i)(3)(i)(F): <i>Evidence of the alien's authorship of scholarly books or articles (in scholarly journals with international circulation) in the academic field;</i></p>	<p>1. Determine whether the alien has authored scholarly articles in the field.</p> <p>As defined in the academic arena, a scholarly article reports on original research, experimentation, or philosophical discourse. It is written by a researcher or expert in the field who is often affiliated with a college or university. It should have footnotes, endnotes, or a bibliography, and may include graphs, charts, videos, or pictures as illustrations of the concepts expressed in the article.</p> <p>2. Determine whether the publication qualifies as a scholarly book or as a scholarly journal with international circulation in the academic field.</p> <p>Evidence of published material in scholarly journals with international circulation should clearly identify the circulation (online or in print) and intended audience of the publication. Scholarly journals are typically written for a specialized audience often using technical jargon. Articles normally include an abstract, a description of methodology, footnotes, endnotes, and bibliography (see http://www.nova.edu/library/help/misc/glossary.html#s).</p>

Part Two: Final Merits Determination. Meeting the minimum requirement by providing at least two types of this evidence does not, in itself, establish that the alien in fact meets the requirements for classification as an Outstanding Professor or Researcher under section 203(b)(1)(B) of the INA. In Part Two of the analysis in each case, you must consider all of the evidence to make a final

merit determination of whether or not the petitioner has, by a preponderance of the evidence, demonstrated that the alien is recognized internationally as outstanding in a specific academic area.

5. Paragraph (2)(A) of Chapter 22.2(j) of the *AFM* is revised to read as follows:

(A) Evaluation of Evidence Submitted in Support of a Petition for an Alien of Exceptional Ability. 8 CFR 204.5(k)(3)(ii) provides that, in order to show the requisite exceptional ability, the petition must be accompanied by at least three of six criteria (set forth in 8 CFR 204.5(k)(3)(ii)). ISOs should use a two-part analysis where the evidence is first counted and then considered in the context of a final merits determination.

Part One: Evaluate Whether the Evidence Provided Meets at Least Three E21 Alien of Exceptional Ability Criteria. You must make a determination regarding whether the evidence submitted in the petition meets at least three criteria at 8 CFR 204.5(k)(3)(ii). **Note:** While ISOs must consider the quality and caliber of the evidence to determine whether a particular regulatory criterion has been met, the ISO should not make a determination relative to the alien's claimed exceptional ability in Part One of the case analysis.

(i) An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability;

(ii) Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought;

(iii) A license to practice the profession or certification for a particular profession or occupation;

(iv) Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability;

Note: To satisfy this criterion, the evidence must show that the alien has commanded a salary or remuneration for services that is indicative of his or her claimed exceptional ability relative to others working in the field.

(v) Evidence of membership in professional associations; or

(vi) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

(vii) 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.

8 CFR 204.5(k)(3)(iii) provides that petitioners may submit "comparable evidence" to establish an alien's eligibility in cases where the standards set forth in 8 CFR 204.5(k)(3)(ii) do not apply. In cases where such comparable evidence is submitted, it is reasonable to require the petitioner to explain why 8 CFR 204.5(k)(3)(ii) does not apply.

Part One: Evaluative Determination. The determination in Part One of the analysis is limited whether the evidence submitted satisfies at least three of the criteria at 8 CFR 204.5(k)(3)(ii) or the comparable evidence criterion in 8 CFR 204.5(k)(3)(iii). After determining that, by a preponderance of the evidence, those criteria have been met, the ISO should move on to Part Two of the analysis to make a separate merits-based determination of eligibility based on the totality of evidence presented.

Part Two: Final Merits Determination. Meeting the minimum requirement by providing evidence three of the regulatory criteria does not, in itself, establish that the alien in fact meets the requirements for classification as an alien of exceptional ability under section 203(b)(2) of the INA. In Part Two of the analysis, you must consider all of the evidence to make a final merit determination of whether or not the petitioner has, by a preponderance of the evidence, shown that the beneficiary is at a degree of expertise significantly above that ordinarily encountered. Therefore, evidence submitted to establish exceptional ability must somehow place the alien above others in the field in order to fulfill the criteria; qualifications possessed by most members of a given field cannot demonstrate a degree of expertise "significantly above that ordinarily encountered." Note that section 203(b)(2)(C) of INA provides that mere possession of a degree, diploma, certificate or similar award from a college, university school or other institution of learning shall not by itself be considered sufficient evidence of exceptional ability. To meet the criterion set forth in 8 CFR 204.5(k)(3)(ii)(F), formal recognition in the form of certificates and other documentation that are contemporaneous with the alien's claimed contributions and achievements may have more weight than letters prepared for the petition "recognizing" the alien's achievements.

6. The existing text of paragraph (2)(B) of Chapter 22.2(j) of the *AFM* is removed and the paragraph is reserved.

7. Technical Correction: The thirteenth paragraph in Chapter 22.2(b)(5)(B) of the *AFM* is revised to read as follows:

For successor-in-interest purposes, the transfer of ownership may occur at any time after the filing of the original labor certification with DOL.

8. Technical Correction: The DOL email address to use to request duplicate approved labor certifications from DOL in paragraphs (9) and (10) of Chapter 22.2(b) of the *AFM* is revised (in both paragraphs) to read as follows:

The duplicate certification email request to DOL should be sent to Duplicate.PERM@dol.gov. The email must contain the petitioner's name in the subject line.

9. The *AFM* **Transmittal Memoranda** button is revised by adding, in numerical order, a new entry to read:

AD 10-41 (08/18/10)	Chapter 22.2(i)(1)(A), Chapter 22.2(i)(1)(E), Chapter 22.2(i)(1)(F), Chapter 22.2(i)(2)(A), Chapter 22.2(j)(2)(A), Chapter 22.2(j)(2)(B), Chapter 22.2(b)(5)(B), Chapter 22.2(b)(9) and Chapter 22.2(b)(10)	Provides guidance on evaluation of evidentiary criteria in certain Form I-140 petitions, and makes technical revisions to other portions of Chapter 22.2.
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Use

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Contact Information

Questions or suggestions regarding this PM should be addressed through appropriate channels to the Business Employment Services Team within the Service Center Operations Directorate.