

# INTERPRETER RELEASES®

Report and analysis of immigration  
and nationality law



THOMSON REUTERS

Vol. 92, No. 3 • January 19, 2015

## IN THIS ISSUE

---

WINNING AN EB-1B OUTSTANDING PROFESSOR/ RESEARCHER CASE AFTER <i>KAZARIAN</i> by Paul Herzog .....	141
1. USCIS Announces myE-Verify Expanded to 16 More States.....	144
2. USCIS Announces Consideration of a Known Employer Pilot Program.....	145
3. BIA Finds California “Unlawful Intercourse with a Minor” Offense Is an Aggravated Felony.....	145
4. CBP Expands Global Entry to the Republic of Panama and Seven Additional Airports, Adds APC Kiosks at San Diego International Airport.....	147
5. House Passes DHS Appropriations Bill; Prohibits Use of Funds for Certain Executive Branch Actions.....	148
6. Newly Introduced Legislation.....	150
7. Federal Case Summaries by Gerald Seipp.....	152
8. BALCA Decisions .....	161
9. DOS Updates 9 FAM .....	162
10. Agencies Seek Comments on Information Collections .....	163
11. Some States Support Obama Administration’s Executive Actions on Immigration.....	164
12. DOL Extends Comment Period Regarding Notice of Intent to Issue Declaratory Order Regarding BALCA’s <i>Island Holdings</i> Decision....	165
13. Intercountry Adoptions Update: Accreditation Actions.....	165
14. Immigration Briefing on “Legitimation” After <i>Watson v. Holder</i> .....	166
15. Noteworthy.....	167

---

## WINNING AN EB-1B OUTSTANDING PROFESSOR/ RESEARCHER CASE AFTER *KAZARIAN*

by Paul Herzog\*

With the lengthy backlogs in the EB-2 category<sup>1</sup> for Chinese and Indian immigrants, and no prospects of any relief from Congress, many immigrants in the scientific and academic communities are casting a covetous eye on the outstanding professor/researcher category. This option is tempting because a petition approval in this category allows the beneficiary to bypass the labor certification process and immigrate without being subject to visa backlog.

Statutory provisions for the outstanding professor/researcher category, EB-1B, are found at § 203(b)(1)(B) of the Immigration and Nationality Act [8 USCA § 1153(b)(1)(B)]. This category is available to:

- tenured or tenure track professors;
- persons employed in a comparable position at a university to conduct research; or
- persons employed in a permanent research position with a private employer provided that the private employer employs at least three full-time researchers and has documented research accomplishments in the field.<sup>2</sup>

To qualify, the beneficiary must have at least three years of experience teaching or researching in the field

---

*\*Paul Herzog is the proud son of immigrants. He earned his J.D. from Tulane Law School and his B.A. magna cum laude from Syracuse University. He practices immigration law in Los Angeles, California, with the Law Offices of Adam Green with a particular focus on immigration options for scholars, scientists, and entrepreneurs. Mr. Herzog frequently writes and speaks about immigration law and policy. His most recent article for Interpreter Releases was “The National Interest Waiver: Understanding Its History and Navigating Its Terrain,” published in 90 Interpreter Releases 1955 (Sept. 30, 2013). Mr. Herzog gratefully acknowledges the invaluable assistance of Ms. Tess Sadowsky in the preparation of this article.*

and must submit evidence in at least two of the following categories:

- receipt of major prizes or awards for outstanding achievement
- membership in an association which requires outstanding achievement
- published material in professional publications written by others about the applicant's work
- evidence of the person's participation as a judge of the work of others
- evidence of original scientific research
- authorship of scholarly books or articles in the field

The EB-1B category is enticing because these requirements seem straightforward. However, the simplicity of the regulations conceals many traps for the unwary. Therefore, it is helpful to review the Administrative Appeals Office (AAO) decisions, especially following the decision of the U.S. Court of Appeals for the Ninth Circuit in *Kazarian v. U.S. Citizenship and Immigration Services*, 596 F.3d 1115 (9th Cir. 2010),<sup>3</sup> to shed light on the exact meaning of each of the requirements.

In *Kazarian*, the Ninth Circuit required U.S. Citizenship and Immigration Service (USCIS) to adopt a two-step method for adjudicating cases in the "extraordinary ability" category. First, the USCIS adjudicator must count up and classify the types of evidence submitted and determine as a threshold matter if the petitioner has submitted at least the evidence required at 8 CFR § 204.5(i)(3)(i). Then, if USCIS determines that the required evidence has been submitted, it conducts a "final merits determination" to see if the evidence indicates that the alien has achieved international recognition. Although *Kazarian* concerned the EB-1A extraordinary ability category,<sup>4</sup> this procedure was also adopted by USCIS for EB-1B cases. Specifically, adjudicators must first count the evidence to see if two or more of the criteria have been satisfied. Then, the adjudicator must consider if the evidence as a whole demonstrates that the beneficiary is outstanding.<sup>5</sup> The language used by the AAO is instructive on this second prong: "outstanding professors and researchers *should stand apart* in the academic community through *eminence and distinction* based on *international recognition*"<sup>6</sup> (emphasis added). Thus, a practitioner evaluating a potential case must understand that simply submitting evidence within the listed categories is not sufficient. The evidence must also indicate "eminence and distinction." Each evidential

category sheds light on what the AAO considers to be "eminence and distinction."

#### RECEIPT OF MAJOR PRIZES OR AWARDS FOR OUTSTANDING<sup>7</sup> ACHIEVEMENT IN THE ACADEMIC FIELD

The AAO continually discusses what is *not* a major award. In 2012, the AAO noted:

Awards limited to students or novices in the field cannot serve as qualifying evidence under 8 C.F.R. 204.5(i)(3)(i)(A), nor is research funding considered a prize or award. The beneficiary's faculty award grants from the beneficiary's employing university, student fellowships (which fund future research rather than recognize past achievements) and travel award to finance attendance at a meeting do not qualify as major prizes or awards for outstanding achievement in the academic field.<sup>8</sup>

Scholarships, grants, and fellowships, no matter how prestigious, should *not* be considered "awards" within the meaning of these regulations. To establish that an award demonstrates outstanding achievement, attorneys must submit documentary evidence that the award was given in recognition of past achievement. While the Nobel Prize is the obvious example in this category, lesser awards, such as those given by national or international professional associations or scientific societies, can also satisfy this category. The critical factor is to demonstrate that the award was given for *prior* achievement and that the award or prize is considered "major" in the field.

#### MEMBERSHIP IN ASSOCIATIONS IN THE ACADEMIC FIELD WHICH REQUIRE OUTSTANDING ACHIEVEMENTS OF THEIR MEMBERS

The AAO has emphasized that to qualify for this category, the association in question must *require* outstanding achievements from its members. This disqualifies many professional associations, which merely require that members have carried out original research or are simply active in their fields.<sup>9</sup> However, The National Academy of Sciences or equivalent organizations in other countries, such as Britain's Royal Society, do qualify.

#### PUBLISHED MATERIAL IN PROFESSIONAL PUBLICATIONS WRITTEN BY OTHERS ABOUT THE ALIEN'S WORK IN THE ACADEMIC FIELD

Materials published in professional publications about the alien's work must include the title, date, and author of the material and any necessary translation.

INTERPRETER RELEASES (ISSN 0020-9686) (USPS 000-191) is issued weekly (48 times per year; no issue the weeks of May 25, June 22, November 30, and December 28). • Principal Attorney Editors: Beverly Jacklin, Melissa Funk and Carolyn Bower. • Published and copyrighted by Thomson Reuters, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526. • Address correspondence concerning content to: Beverly Jacklin, Interpreter Releases, Thomson Reuters/West, 50 Broad Street East, Rochester, NY, 14614; (585) 627-2504; fax (585) 258-3768, Beverly.Jacklin@thomsonreuters.com • Customer Service: (800) 328-4880, ext. 65411 • <http://www.west.thomson.com> • For subscription information: call (800) 221-9428 • Periodicals postage paid at St. Paul, MN • POSTMASTER: Send address changes to INTERPRETER RELEASES, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526.

This publication was created to provide you with accurate and authoritative information concerning the subject matter covered; however, this publication was not necessarily prepared by persons licensed to practice law in a particular jurisdiction. The publisher is not engaged in rendering legal or other professional advice and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional. © 2015 Thomson Reuters. Reproduction, storage in a retrieval system, or transmission of this publication in any form or by any means, electronic, mechanical, photocopying, xerography, facsimile, recording, or otherwise, without permission of Thomson Reuters, is prohibited. For authorization to photocopy, please contact the Copyright Clearance Center at 222 Rosewood Drive, Danvers, MA 01923, USA (978) 750-8400, fax (978) 646-8600 or West's Copyright Services at 610 Opperman Drive, Eagan, MN 55123; fax (651) 687-7551. Please outline the specific material involved, the number of copies you wish to distribute and the purpose or format of the use.

Mere citation to the beneficiary's work or simply mentioning the beneficiary is not sufficient to count as evidence, neither are press releases issued by a university or company. The published material must have appeared in a professional publication or scholarly journal and be predominantly about the alien or the alien's work.

**Practice Tip:** Though citations cannot count as "published material," they are still helpful to show that the beneficiary has made an original research contribution or to demonstrate the importance and impact of the beneficiary's publications. Therefore, citations are strong evidence for a subsequent evidence category: evidence of the alien's original scientific or scholarly research contributions to the academic field.

**PARTICIPATION, EITHER INDIVIDUALLY OR ON A PANEL, AS THE JUDGE OF THE WORK OF OTHERS IN THE SAME OR AN ALLIED ACADEMIC FIELD**

Because many scholarly and scientific journals operate on a system of peer review, it is common for even young researchers to be asked to "peer review" a manuscript which a journal is considering for publication. This duty meets the regulatory requirement, but the AAO has made clear that such service is not sufficient to indicate "eminence." In a July 2012 decision, the AAO noted:

The AAO cannot ignore the fact that scientific journals are peer reviewed and rely on many scientists to review submitted articles. Thus, peer review is routine in the field; not every peer reviewer enjoys international recognition. The record establishes the beneficiary's moderate record of peer review (approximately 74...manuscripts). However, without evidence that sets beneficiary apart from others in his field, *such as evidence that he has reviewed manuscripts for a journal that credits a small elite group of referees, received independent requests from a substantial number of journals, or served in an editorial position for a distinguished journal, the AAO cannot conclude that the beneficiary's judging experience is indicative of or consistent with international recognition.*<sup>10</sup>

Thus, when submitting evidence in this category, attorneys should submit evidence showing how that reviewing work distinguishes the beneficiary from others in the field. Attorneys should also recognize other types of review work which indicate that an alien is eminent in his or her field, for example, a client's service as a reviewer to government agency, such as NASA or the Centers for Disease Control and Prevention, or for astronomers, evaluating requests for observation time at major observatories.

**ORIGINAL SCIENTIFIC OR SCHOLARLY RESEARCH CONTRIBUTIONS TO THE ACADEMIC FIELD**

AAO decisions stress that the language is "original research *contribution*" and not simply "original research." The AAO states that "the plain language of the regulation does not simply require original research, but an original 'research contribution'". If the regulation contemplated merely the submission of original research, it would have said so, and not have included the extra word "contribution." Moreover, the plain language of the regulation requires that the contribution be "to the academic field" rather than an individual laboratory or institution."<sup>11</sup>

Consequently, original research work alone is insufficient; the alien's work must have made an actual contribution to the field as a whole. Evidence of heavy citation, licensing of patents, or media attention help demonstrate the alien's significant contribution to the field.

In a December 2012 decision overturning a denial by the center director, the AAO assigned significance to the fact that the petition included citations and also letters from scientists directly explaining how they were applying the alien's work.<sup>12</sup> This contrasts an earlier decision in which the AAO upheld the director's denial, explaining that, even though reference letters were submitted which praised the alien's research, the letters never explained how the alien's work contributed to the field as a whole.<sup>13</sup>

**Practice Tip:** For most practitioners, letters of recommendation are the standard way of demonstrating that the alien has made original research contributions, but letters of recommendation which are vague about the impact of the alien's work or several letters which all sound the same will carry little weight with an adjudicator. However, letters detailing the importance of the alien's work, the impact on the field as a whole, and how that work has been applied by others will be very helpful to the alien's case. Wherever possible, practitioners should try to submit objective evidence to corroborate statements made in letters of recommendation.

**AUTHORSHIP OF SCHOLARLY BOOKS OR ARTICLES (IN SCHOLARLY JOURNALS WITH INTERNATIONAL CIRCULATION) IN THE ACADEMIC FIELD**

This category is straightforward. If your client has published articles, then the category is satisfied. However, to emphasize that your client has achieved "eminence and distinction," it is helpful to include additional evidence. For example, include evidence about the publication to establish that it is in fact a scholarly publication that circulates internationally. In addition, in science, a hierarchy of journals exists; prominent journals like Nature, Proceedings of the National Academy of Science, and Science are

considered preeminent. This prominence is based on their circulation and how selective they are in deciding which articles to publish. An article is typically published in one of these journals because it is considered a major advance in the field. If your client has published in such a journal, draw attention to it by including information regarding the stature of that journal. Moreover, extensive citation of your client's articles is also evidence of the alien's importance. A resource such as Google Scholar can provide this evidence.

## CONCLUSION

When a smart, accomplished researcher who is justifiably proud of his or her achievements contacts an immigration attorney, it seems silly not to immediately go to the immigration category that was specifically written for such individuals. However, we best serve our clients by carefully doing a "due diligence." This means not accepting claims in a resumé at face value. Rather, to determine if the potential client qualifies for the "outstanding researcher" category, review with the alien carefully each category of evidence and ask these questions:

- What journals were your articles published in? How frequently have these articles been cited by others?
- What is the extent of your reviewing work? Does it exceed that of other researchers? Have you served on the editorial board of journals?
- For any awards won, what are the criteria to receive these awards?
- For membership in associations, what are the criteria to join the association?

After determining that a client qualifies, the attorney must exercise similar care in preparing the actual application. In assembling the materials and preparing the actual application, the attorney needs to avoid the temptation to pursue the "kitchen sink" approach—throwing in every piece of paper documenting every accolade that the client has earned and trust the adjudicator to make sense of it all. Only evidence which directly demonstrates how your client has achieved "eminence and distinction based on international recognition" should be included. Finally, the cover letter should clearly and succinctly explain how the client qualifies according to the regulatory categories. By carefully following such an approach, the attorney will truly serve the client's interests and ensure that qualified cases are approved while not wasting time and resources on unqualified cases.

## Notes

- <sup>1</sup> Employment-based (EB) second preference petitions for members of the professions holding advanced degrees or persons of exceptional ability in the sciences, arts, or business, INA § 203(b)(2) [8 USCA § 1153(b)(2)].
- <sup>2</sup> The requirement for "permanent" employment typically excludes temporary post-doctoral positions from using this category. See, e.g., *Matter of [name not provided]*, NSC, (AAO July 24, 2012) at pages 5-6.
- <sup>3</sup> *Kazarian* is discussed in 87 Interpreter Releases 606 (Mar. 15, 2010).
- <sup>4</sup> INA § 203(b)(1)(A) [8 USCA § 1153(b)(1)(A)].
- <sup>5</sup> *Matter of [name not provided]*, TSC (AAO Dec. 23, 2011).
- <sup>6</sup> *Matter of [name not provided]*, NSC (AAO, July 10, 2012) at page 12.
- <sup>7</sup> *Id.*
- <sup>8</sup> *Matter of [name not provided]*, TSC (AAO, July 13, 2012) at pages 5-6. See also *Matter of [name not provided]*, NSC (AAO, May 11, 2012) at pages 5-6.
- <sup>9</sup> *Matter of [name not provided]*, NSC (AAO July 17, 2012) at page 6.
- <sup>10</sup> *Matter of [name not provided]*, NSC (AAO July 10, 2012) at page 12 (emphasis added).
- <sup>11</sup> *Id.* at 8.
- <sup>12</sup> *Matter of [name not provided]*, TSC, (AAO, December 12, 2012).
- <sup>13</sup> *Matter of [name not provided]*, TSC, (AAO, July 30, 2012). ■

## 1. USCIS Announces myE-Verify Expanded to 16 More States

U.S. Citizenship and Immigration Services (USCIS) has announced the expansion of myE-Verify, <http://www.uscis.gov/mye-verify>, USCIS' website that gives U.S. workers and job-seekers resources and tools to learn about and participate in the E-Verify<sup>14</sup> process. The myE-Verify website introduced secure personal myE-Verify accounts and Self Lock in five states and the District of Columbia. Account holders can use the new Self Lock feature to lock their social security numbers to prevent unauthorized or fraudulent use within E-Verify. Accounts and Self Lock are now accessible to residents in 16 additional states—California, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Jersey, New York, Ohio, South Carolina, Texas, Utah and Washington—and will eventually be available nationwide.