

**DRAFT FOR COMMENT ONLY**

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U.S. Citizenship and Immigration Services  
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**U.S. Citizenship  
and Immigration  
Services**

January 21, 2016

PM –602-0123

## Policy Memorandum

SUBJECT: Comparable Evidence Provision for O Nonimmigrant Visa Classifications

### Purpose

This Policy Memorandum (PM) provides guidance on the adjudication of O nonimmigrant petitions.

Specifically, this PM assists U.S. Citizenship and Immigration Services (USCIS) officers in applying the regulatory comparable evidence provisions set forth in Title 8 Code of Federal Regulations (8 CFR), section 214.2(o)(3)(iii)(C), and 8 CFR 214.2(o)(3)(iv)(C) when adjudicating nonimmigrant visa petitions for aliens of extraordinary ability in the fields of science, education, business or athletics (O-1A) and aliens of extraordinary ability in the arts (O-1B). This PM clarifies the official USCIS interpretation of the regulation as a matter of policy and provides additional instruction to officers as it relates to the application of the interpretive policy.

### Scope

This PM applies to and is binding on all USCIS employees. This PM supersedes any prior guidance on the subject of comparable evidence when adjudicating O nonimmigrant petitions.

### Authorities

- Immigration and Nationality Act (INA) section 101(a)(15)(o) - O-1 nonimmigrant definition
- 8 CFR 214.2(o) - O regulations

### Policy

#### I. Introduction

USCIS regulations allow for the submission of comparable evidence in support of O-1A and certain O-1B nonimmigrant petitions. The regulations have a similar structure for both classifications: a part (A), under which a beneficiary may qualify by reason of a nomination or receipt of a significant national or international award; a part (B), which sets forth criteria that tend to establish eligibility and requires that a certain number of criteria be met in order to be considered further; and a part (C), which allows a beneficiary to submit “comparable evidence” in cases where the listed criteria in part (B) do not readily apply to the beneficiary’s occupation.

Currently, when adjudicating O-1 nonimmigrant petitions, adjudicators evaluate comparable evidence as an entirely separate option only when the petitioner has established that the *majority* of the listed criteria in part (B) do not readily apply to the beneficiary's occupation. While USCIS believes that this approach is a defensible interpretation of the comparable evidence provision in the regulation, USCIS believes a more flexible interpretation is consistent with the regulatory intent as it relates to comparable evidence in the O-1 nonimmigrant context.

USCIS is issuing this PM to provide clarifying and updated guidance on the application of the comparable evidence provision when adjudicating O-1 nonimmigrant visa petitions.

## II. Background

The regulations at 8 CFR 214.2(o)(3)(iii) and 8 CFR 214.2(o)(3)(iv), which respectively apply to the O-1A and O-1B (arts) visa classifications, list criteria as examples of the kinds of evidence that would typically be available to show that a beneficiary has extraordinary ability in his or her field.

In the alternative, 8 CFR 214.2(o)(3)(iii)(C) and 8 CFR 214.2(o)(3)(iv)(C) allow petitioners to submit comparable evidence if the criteria described in the former provisions do not readily apply to the beneficiary's occupation. These provisions allow petitioners the opportunity to submit alternate but equivalent forms of evidence to establish eligibility.

While the comparable evidence provisions speak generally to the "criteria" and the application of the provisions to the beneficiary's occupation (e.g., they indicate that the petitioner may submit comparable evidence if the criteria described in 8 CFR 214.2(o)(3)(iii) or 8 CFR 214.2(o)(3)(iv) do not readily apply to the beneficiary's occupation), the regulatory text is not clear as to when comparable evidence may be considered.

Although the provisions reference "criteria," it is uncertain whether the regulatory provision was just generally referring to the list of criteria for which comparable evidence could be submitted, including on an individual criterion basis, or if the regulation intended to impose a numerical requirement (e.g., the majority) that must be met before comparable evidence could be considered.

The comparable evidence provision was intended as a "catch-all" to allow for additional evidence to be considered when the other enumerated criteria do not readily apply, in whole or in part, when evaluating whether the beneficiary has extraordinary ability.<sup>1</sup> While alternative interpretations of the regulation are possible, USCIS believes that the best interpretation as a matter of policy is to allow for consideration of comparable evidence on a criterion-by-criterion basis.

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<sup>1</sup> See 59 FR 41818, 41820 (August 15, 1994) ("the 'catch-all' category at §214.2(o)(3)(iv)(C) allows for the submission of additional evidence not covered by the other criteria").

### III. Guidance

In adjudicating O-1 nonimmigrant visa petitions, USCIS will consider evidence of equal significance pertaining to the beneficiary's claim of extraordinary ability when one or more than one criterion does not readily apply to the beneficiary's occupation. USCIS will not disregard such evidence simply because some, but not all, of the criteria apply. Disregarding relevant, credible, and probative evidence simply because some of the criteria apply to the beneficiary's occupation could result in a case where the beneficiary has qualifying extraordinary ability, but is denied merely because his or her occupation was not fully contemplated by the regulatory criteria.

Based on the interpretation set forth in this PM, a petitioner must only show that a particular criterion does not readily apply to the beneficiary's occupation before a petitioner may offer comparable evidence with regard to that criterion. The petitioner does not have to show that all or a majority of the criteria do not readily apply before comparable evidence may be considered. The number of criteria that do not apply is irrelevant to this analysis.

This interpretation is further supported by the fact that the O regulations do not explicitly mandate a showing that a certain number of criteria do not apply before a petitioner may submit comparable evidence. These provisions do not include a qualifier such as "all" or "the majority of" before "criteria." It is unclear if the use of the term "criteria" was intended to require a showing that all or a majority of the criteria do not readily apply, or if the use of the word "criteria" was merely a reference to the multiple evidentiary options listed in the regulations. This interpretive policy resolves that ambiguity.

As such, petitioners should submit evidence that applies to the listed criteria at 8 CFR § 214.2(o)(3)(iii)(B) or (iv)(B) if it is available and readily applies to the beneficiary's occupation. However, if the petitioner establishes that a particular criterion at 8 CFR § 214.2(o)(3)(iii)(B) or (iv)(B) is not readily applicable to the beneficiary's occupation, the petitioner may then use the comparable evidence provision to submit additional evidence that is not specifically described in that criterion.<sup>2</sup> This is the case even though the remaining listed criteria may be applicable to the beneficiary's occupation.

For comparable evidence to be considered, the petitioner must explain why the evidentiary criterion is not readily applicable to the beneficiary's occupation as well as why the submitted evidence is "comparable" to the criterion listed in the regulations. A general unsupported assertion that the listed criterion does not readily apply to the alien's occupation is not probative and will be discounted. However, a statement alone can be sufficient if it is detailed, specific, and credible. Comparable evidence will not be considered if the evidence is submitted in lieu of a particular criterion that is readily applicable to the beneficiary's occupation simply because the beneficiary cannot satisfy that criterion.

When determining if a criterion is readily applicable to the beneficiary's occupation, officers should apply commonly accepted definitions of the terms "readily" and "occupation." The term

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<sup>2</sup> A petitioner may not rely on comparable evidence in lieu of meeting 8 CFR § 214.2(o)(3)(iii)(A) or (iv)(A).

“readily” is commonly defined as “easily” or “without much difficulty.”<sup>3</sup> The term “occupation” is commonly defined as “a person's job or profession.”<sup>4</sup> Officers are reminded that the petitioner does not have to show that the criterion is entirely inapplicable to the beneficiary’s occupation. Rather, if the petitioner shows that a criterion is not easily applicable to the beneficiary’s job or profession, USCIS should take into consideration alternative evidence submitted by the petitioner that is comparable to the criterion.

A petitioner relying upon comparable evidence must still establish the beneficiary’s eligibility by satisfying at least three separate evidentiary criteria as required under the regulations. While the petitioner is not limited to the kinds of evidence listed in the criteria and is not required to show that all or a majority of the criteria do not readily apply to the beneficiary’s occupation before USCIS will accept comparable evidence, the use of comparable evidence does not change the standard for the classification. It remains the petitioner’s burden to establish that the beneficiary has extraordinary ability in his or her field of endeavor.

#### **IV. Quantitative and Qualitative Approach**

As a general matter, an adjudicator must assess not only the quantity of evidence offered, but also its quality.<sup>5</sup> With respect to O nonimmigrant visa petitions, current guidance [the Adjudicator’s Field Manual (AFM)]<sup>6</sup> instructs adjudicators to determine whether a beneficiary meets the standards as outlined in the regulations, using such a quantitative and qualitative approach.

Under this guidance, an adjudicator first determines whether the petitioner has submitted documentation that is pertinent to the required number of regulatory criteria. If these minimum criteria are met, the adjudicator must then consider all the evidence in its totality to determine if the beneficiary is an alien of extraordinary ability or achievement as defined in 8 CFR 214.2(o). The fact that the petitioner has produced evidence for at least three of the criteria does not necessarily establish that the beneficiary is eligible for the O-1 classification.<sup>7</sup>

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<sup>3</sup> *Merriam-Webster.com*. 2015. <http://www.merriam-webster.com> (May 6, 2015).

<sup>4</sup> *Merriam-Webster.com*. 2015. <http://www.merriam-webster.com> (May 6, 2015).

<sup>5</sup> *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) citing *Matter of E-M-*, 20 I&N Dec. 77, 80 (Comm’r 1989).

<sup>6</sup> See AFM, Ch. 33.4(d) (“[T]he adjudicator must determine whether the alien meets the standards as outlined in the regulations cited above; however, he/she cannot make a favorable determination simply because the petitioner has submitted three of the forms of documentation mentioned. It must be a decision based on whether the total evidence submitted establishes that the alien of extraordinary ability has sustained national or international acclaim and recognition in his or her field of endeavor; or in the case of an alien of extraordinary ability in the arts and extraordinary achievement in the motion picture or television industry, whether he or she has a demonstrated record of high level accomplishment or a high level of achievement (or “distinction”)”).

<sup>7</sup> See AFM Ch. 33.4(d); see also *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (emphasis added): “[T]ruth is to be determined not by the quantity of evidence alone but by its quality. Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.”

In cases involving the submission and consideration of comparable evidence, the same analysis applies. Adjudicators must still evaluate the quality, and not just the quantity, of the evidence submitted in support of an O-1 petition to determine whether the comparable evidence submitted by a petitioner sufficiently establishes eligibility for the classification sought.

It is important that the standards of the extraordinary ability classifications not be diluted by the kind of evidence submitted. The evidence, considered in its totality and quality, must demonstrate that the beneficiary meets the definition of extraordinary ability in his or her field of endeavor.

#### **V. Preponderance of the Evidence Standard**

A petitioner seeking the O classification for a beneficiary must establish that it meets each eligibility requirement of the classification by a preponderance of the evidence.<sup>8</sup> In other words, the petitioner must show that what it claims is more likely the case than not. This is a lower standard of proof than that of “clear and convincing evidence” or the “beyond a reasonable doubt” standard.

The petitioner does not need to remove all doubt from the adjudication. Even if an officer has some doubt about a claim, the petitioner will have satisfied the standard of proof if it submits relevant, probative, and credible evidence, considered “individually and within the context of the totality of the evidence,” that leads to the conclusion that the claim is “more likely than not” or “probably” true.<sup>9</sup>

#### **Implementation**

Revisions to AFM Chapter 33.4(d) will be included upon issuance of the final memorandum.

#### **Use**

This memorandum is intended solely for training and guidance of USCIS personnel in performing their duties relative to adjudications of petitions. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable by law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

#### **Contact information**

Questions regarding this PM should be addressed through appropriate channels to the Office of Policy and Strategy.

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<sup>8</sup> See *Matter of Chawathe*, 25 I. & N. Dec. 369, 375-376 (AAO 2010).

<sup>9</sup> *Id.* at 376.