

***Robinson Cano Double Play!!* Non-PERM
Based Green Card Options and H-2B
2015 Interim Final Rule Update**

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Introduction

- EB11 Extraordinary Ability – can self sponsor; visas readily available
- EB12 Outstanding Professors & Researchers – cannot self sponsor but visas readily available
- EB2 National Interest Waiver – can self sponsor; visas not available for all countries but more availability than in EB3 (professionals, skilled and other workers)
- *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) holding USCIS cannot augment regulatory criteria; and setting out a two-part test for adjudicating petitions in these categories.

Who Qualifies? Extraordinary Ability (*see* INA 203(b)(1)(A))

- Extraordinary ability in the sciences, arts, education, business or athletics;
- *Sustained* national *or* international acclaim
- Achievements recognized in the field of expertise;
- Continue work in the area of extraordinary ability; *and*
- Substantially benefit prospectively the United States (statutory language not in the regulations)

Who Qualifies? Outstanding Professors or Researchers (*see* INA 203(b)(1)(B))

- 203(b)(1)(B) Outstanding professors and researchers.--An alien is described in this subparagraph if--
 - 203(b)(1)(B)(i) *the alien is recognized internationally as outstanding in a specific academic area,*
 - 203(b)(1)(B)(ii) the alien has at least 3 years of experience in teaching or research in the academic area, and
 - 203(b)(1)(B)(iii) the alien seeks to enter the United States--
 - 203(b)(1)(B)(iii)(I) for a tenured position (or tenure-track position) within a university or institution of higher education to teach in the academic area,
 - 203(b)(1)(B)(iii)(II) for a comparable position with a university or institution of higher education to conduct research in the area, or
 - 203(b)(1)(B)(iii)(III) for a comparable position to conduct research in the area with a department, division, or institute of a private employer, if the department, division, or institute employs at least 3 persons full-time in research activities and has achieved documented accomplishments in an academic field.

(Emphasis added)

Who Qualifies? Advanced Degree or Exceptional Ability (*see* INA 203(b)(2))

- 203(b)(2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability.
 - 203(b)(2)(A) In general.--Visas shall be made available, in a number not to exceed 28.6 percent of such worldwide level, plus any visas not required for the classes specified in paragraph (1), to qualified immigrants who are members of the professions holding advanced degrees or their equivalent *or who because of their 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*, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(Emphasis added)

The Kazarian Two-Step

- One (threshold - quantitative): Must first evidence three of the 10 listed criteria.
- Two (final merits - qualitative): *If* can meet the first step, *then* consider and weigh the evidence as a whole to determine if meets the level of expertise for extraordinary ability (sustained national or international acclaim).

Kazarian v. USCIS, 596 F.3d 1115 (9th Cir. 2010)

UCIS Policy Memo Revising the AFM (Dec. 22, 2010)

- Extends *Kazarian* to Outstanding Professors and Researchers, and Exceptional Ability cases under EB2.
- Cites *Kazarian* as establishing a two-prong test in adjudicating these types of cases without articulating a useful standard for the final merits analysis.
- Introduces a highly subjective element in the process and instructs officers to re-adjudicate the evidence at the second step of the analysis by considering the filing its totality.
- Reminds adjudicating officers to articulate specific reasons why petitioner has not demonstrated eligibility as an individual of extraordinary ability by a preponderance of the evidence but does not provide a foundation or clear guidance.
- Pulls away from *Buletini v. INS*, F. Supp. 1222 (E.D. Mich. 1994) where two-step approach: (1) 3 of 10 criteria met, then (2) must have extraordinary ability *unless* specific reasons substantiate otherwise.

Hypo #1 National Interest Waiver

- Facts:
 - Oil & Gas drilling Specialist
 - Employed by large energy company
 - Senior employee
 - Extensive experience in home country
 - Experience transferable to U.S. project
 - Does candidate qualify for a NIW?

Hypo #1: Evidence of Exceptional Ability

- Evidence of Past Achievements
- Detailed Job Offer
- Evidence of Recognition of Achievements & Significant Contributions to the Industry
- Demonstration that work is National & International in Scope
- Demonstrate that National Interest Adversely Affected if LC required
- Evidence of unique Attributions, standing apart from peers.

Hypo #2 EB1A-Alien of Extraordinary Ability

- Facts:
 - Engineer
 - Master's degree
 - Employed by large energy company
 - 30 years of international experience in his field
 - Does the candidate qualify as an alien of extraordinary ability?

Hypo #2 Evidence of Extraordinary Ability

- Precisely specify area of expertise
- Publications should indicate number of citations and explain significance of contribution
- Detailed resume and employment letters
- Explain membership in associations which require outstanding achievement
- Evidence of high salary

Surviving H-2B: 2015 Interim Final Rule

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Preliminary Steps

- Preparing your client
 - Time needed for an H-2B filing under the 2015 Interim Final Rule
 - Proving a season or need vs. reality of the H-2B Visa cap pressures
 - Expectations before the Dept. of Labor
 - Initial understanding of Prevailing Wage Determination
 - What documentation USCIS will seek from employer

Prevailing Wage Request for a PWD

- H-2B Registration: Form ETA 9155 Form (Not necessary; no portal set up)
- Obtain a Prevailing Wage Determination
 - ETA 9142 Prevailing Wage Request must be filed in order to receive Prevailing Wage Determination
 - Prevailing Wage Determination must be valid on the date the job order is placed
 - What to do with DOL delays on issuing wage?
 - Regulations suggest filing a PWR at least 60 days before you need the PWD

File H-2B ETA 9142 Application for Temporary Labor Certification

- Upon receipt of PWD, the ETA 9142 Application may be filed
- Required Docs:
 - PWD
 - ETA 9142
 - Copy of job order/proof of submission to SWA
 - G-28 Notice of Entry as Attorney
 - Copies of contracts with agents or recruiters or statement re: no recruiter/agent
 - DOL requests: proof of need, contracts, FEIN verification, explanation as to change of dates
- Adoption of an H-2A style, post-filing recruitment

Job Order Content

Employer Name and Contact Info	Provision of board, loading, other facilities
Indicate job order is temporary, full-time, # of openings	State all deductions from paycheck
Description of job duties, requirements	Inbound and outbound transportation and subsistence
Geographic area of intended employment	Provision of daily transportation
Wage offer	State reimbursement of visa, border, related fees
Availability of overtime and wage offer	Tools, supplies, equipment provided at no cost
Provision of on-job training	Three-fourths guarantee
State that single workweek used to compute wage	Instruct applicants to contact nearest SWA
Specify frequency of pay	

Notice of Acceptance (NOA) or Notice of Deficiency (NOD)

- Notice of Deficiency: may be issued for typos or request for additional information from DOL
- Notice of Acceptance:
 - NOA will outline the required information for newspaper ads to be placed on 1 Sunday and 1 weekday
 - NOA will instruct the SWA to place the job order and remain active until 21 days prior to date of need (SWA representative actually may ask employer to place job order)
 - NOA will instruct employer to post notice/contact bargaining representative
 - NOA will outline requirements for the Recruitment Report

Notice of Acceptance: H-2B Recruitment (continued)

- NOA will outline the expected recruitment details
- Employer to complete recruitment and submit a Recruitment Report
- Newspaper ads must be placed within 14 days of receipt of the NOA
- Job Order must run
- Former U.S. employees to be contacted
- Notice of posting within 2 conspicuous locations or another manner providing reasonable notification to all employees
 - Electronic posting OK
 - 15 consecutive business days (three weeks for some businesses)

Labor Certification and USCIS

- The Certifying Officer may issue a final determination and mail the original ETA 9142 to the employer
- The I-129 Petition for Nonimmigrant Worker may be filed with either VSC or CSC
 - Original Labor Certification filed with the I-129
 - USCIS requests: Previous 24 months of payroll; FEIN and business verification; other information
 - Issues with filing multiple I-129s
 - Cap count updates

H-2B Consular Appointments

- \$190/worker for an H-2B appointment
 - \$190/spouse or child for an H-4 appointment
- Discussing transportation, subsistence, travel expenses with employer upfront
- Sending employee copies of the job order, ETA 9142, I-129 Approval Notice
- Two-day consular appointments in Mexico
 - Day 1: Biometrics are taken at the ASC
 - Day 2: H-2B Interview at the US Consulate
 - Employee will need the Approval Notice, Passport and DS-160 Confirmation

Post-Arrival Notes

- I-94 and Visa copies
 - Errors on Visa or I-94s
- I-9 Compliance
- All documentation to be retained by employer at place of business
- Early Departure notices to USCIS and DOL
 - Early Departure, Abandonment Notices may be sent to USCIS and DOL via email