

Extraordinary Entrepreneurs Require Extraordinary Evidence: A Review of Recent Non-Precedent EB-1A AAO Decisions Under the Trump Administration

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An international entrepreneur's options for permanent residence are limited. The United States does not have a "start-up" visa. For many entrepreneurs, particularly those facing long backlogs in other immigrant visa categories, an "extraordinary ability" petition may be the only available path to a green card.

A foreign national can demonstrate extraordinary ability, and thereby eligibility for permanent residence in the employment-based first preference category (EB-1A), by having obtained a major international prize such as a Nobel Prize or an Academy Award.¹ Such awards are uncommon in most EB-1A petitions, particularly with entrepreneurs. Absent such an award, a foreign national can still demonstrate extraordinary ability by documenting at least three of the following 10 criteria:

1. Receipt of lesser nationally or internationally recognized prizes or awards;
2. Membership in associations in the foreign national's field of expertise that require outstanding achievements of their members;
3. Published material about the foreign national in professional or major trade publications or other major media;
4. Participation, either individually or on a panel, as a judge of the work of others in the foreign national's field;
5. Original scientific, scholarly, artistic, athletic or business-related contributions of major significance in the foreign national's field;
6. Authorship of scholarly articles in the foreign national's field, in professional or major trade publications or other major media;
7. Display of the foreign national's work at artistic exhibitions or showcases;
8. A leading or critical role for organizations or establishments that have a distinguished reputation;
9. Command of a high salary or other significantly high remuneration for services, in relation to others in the field; or
10. Commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk or video sales.

If these criteria do not apply to the foreign national's field, the foreign national may submit comparable evidence.²

Given the importance of EB-1A to many foreign entrepreneurs, we sought to find examples of how entrepreneurs are faring in meeting the criteria above under the current administration. To that end, we found three non-precedent decisions issued by the U.S. Citizenship and Immigration Services' Administrative Appeals Office (AAO) since January 2017. In each of the three cases filed by international entrepreneurs, the AAO carefully parsed the evidence, found sometimes non-obvious insufficiencies and vagueness in the evidence and denied the petition.

This article summarizes each case, with particular attention paid to the evidence provided and how the AAO treated that evidence. It concludes with some observations on what international entrepreneurs should do to maximize their chances of obtaining an extraordinary ability green card.

¹ 8 C.F.R. § 204.5(h)(3). See generally U.S. Citizenship and Immigration Services, *Employment-Based Immigration: First Preference EB-1* (last updated Oct. 29, 2015), <https://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-first-preference-eb-1> (last visited Apr. 20, 2018).

² 8 C.F.R. § 204.5(h)(4).

Matter of O-P-, Oct. 18, 2017³

In this appeal from the Nebraska Service Center, a self-employed interior designer from Ukraine sought to demonstrate extraordinary ability, arguing that she met the following criteria:

1. Published material about the foreign national in professional or major trade publications or other major media.

The entrepreneur provided a Ukrainian magazine featuring the entrepreneur, along with two unsigned letters from the magazine, and a third-party document listing the magazine as having the second-highest circulation among Ukrainian interior design magazines. This evidence did not satisfy the AAO, as the evidence did not indicate whether the magazine was national or regional, and the list of magazines did not source its circulation data. As such, the AAO found that the entrepreneur had not properly demonstrated that the Ukrainian magazine constituted major media.

2. Original scientific, scholarly, artistic, athletic or business-related contributions of major significance in the foreign national's field.

The entrepreneur provided photos of her work, an article describing her work and letters discussing her work. While the AAO found that her work was admired, it held that none of the evidence specifically discussed how the entrepreneur's work had influenced others. As such, the AAO found that the foreign national had not demonstrated contributions of major significance to her field.

3. Authorship of scholarly articles in the foreign national's field, in professional or major trade publications or other major media.

The entrepreneur authored two articles in an interior design periodical. The periodical was not scholarly in nature. The entrepreneur argued that there were no scholarly journals in interior design, but that these articles were comparable to scholarly articles in the interior design field. However, the entrepreneur did not provide proof that there were no scholarly journals in interior design. Therefore, the AAO found that it could not determine if these articles were comparable to scholarly articles for the field of interior design.

4. Command of a high salary or other significantly high remuneration for services, in relation to others in the field.

The entrepreneur provided a letter from her client showing that the client paid the entrepreneur's company \$10,500 for six weeks of service. The entrepreneur also provided information showing that this amount is significantly higher than the average price typically commanded by Ukrainian interior designers. However, the AAO found that it was unclear whether the client payment was actually salary, or payments to her company, which could include overhead, cost of fixtures or other non-salary costs. Because the AAO could not determine her specific salary from the payments, it found that the entrepreneur had not demonstrated command of a high salary.

Matter of J-C-, May 12, 2017⁴

In this appeal from the Texas Service Center, the entrepreneur was a co-founder of two Chinese agricultural companies. The entrepreneur sought to demonstrate extraordinary ability by demonstrating:

1. Published material about the foreign national in professional or major trade publications or other major media.

The AAO found that the entrepreneur met this criterion by providing:

- An article published in a Chinese periodical, with a letter from the editor-in-charge, documenting a circulation of 400,000 daily, and the periodical's government designation as the official Chinese publication for the entrepreneur's trade.
- An article in a second periodical, with a letter from the editor-in-charge documenting a monthly circulation of 30,000 to 60,000.

2. Authorship of scholarly articles in the foreign national's field, in professional or major trade publications or other major media.

The entrepreneur attempted to meet this criterion by providing multiple books he had authored, with partial translations, along with statements from the respective editors explaining the number of copies sold. Additionally, the entrepreneur

³ https://www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2017/OCT182017_02B2203.pdf (last visited Apr. 20, 2018).

⁴ https://www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2017/MAY122017_01B2203.pdf (last visited Apr. 20, 2018).

provided a magazine article with a statement from the publishing periodical's editor-in-chief, explaining that the periodical is "a nationally renown[ed] magazine on economics and management." However, because the entrepreneur provided minimal translation of the books and magazine article, the AAO found that it could not determine whether these publications were in fact scholarly. As such, the AAO found that the entrepreneur did not meet this criterion.

3. Participation, either individually or on a panel, as a judge of the work of others in the foreign national's field.

The entrepreneur asserted that he had judged the work of others as an evaluation committee member of a program sponsored by the entrepreneur's Master of Business Administration program. The entrepreneur provided two letters, one describing him as a mentor/instructor, and the other confirming that the entrepreneur was one of seven evaluation committee members, without explaining whether he actually judged anyone, or simply served on the committee. Because the letters did not explicitly state the entrepreneur's judging duties in his capacity as a committee member, the AAO found that he had not met this criterion.

4. A leading or critical role for organizations or establishments that have a distinguished reputation.

The AAO was not satisfied that the entrepreneur worked in a leading role, or that the organization he worked for was distinguished. While the entrepreneur provided articles discussing his company, these articles did not discuss the company's reputation or standing. In addition, the entrepreneur did not provide internal documents, a personnel chart to demonstrate his position within the company or documentation of his accomplishments in the company. As such, the AAO found that the entrepreneur had not met his burden.

Matter of Z-C-P-, Feb. 27, 2018⁵

In this appeal from the Nebraska Service Center, a technological consultant and entrepreneur sought to demonstrate extraordinary ability by arguing that he met the three categories below.

1. Published material about the foreign national in professional or major trade publications or other major media.

To meet this criterion, the entrepreneur submitted a certified translation of an article discussing the entrepreneur and his work. The article appeared in a Hungarian edition of what appears to be an international publication. The name of the publication is redacted, but it appears that the AAO recognized the publication as meeting the definition of major media. As such, this article likely appeared in a generally known international periodical that also circulates in the United States. The AAO did not consider or require any additional supporting evidence, other than the article itself, to determine that the entrepreneur had met his burden on this issue.

2. A leading or critical role for organizations or establishments that have a distinguished reputation.

The entrepreneur provided reference letters and screenshots documenting his various previous positions. However, because the entrepreneur failed to provide a personnel chart, along with other corporate documentation of his positions, the AAO found that the entrepreneur failed to demonstrate how his former roles fit into the overall hierarchy of the organization, how they compared to other leadership positions, and how the entrepreneur's work correlated with the companies' success. As such, the AAO found that the entrepreneur failed to meet his burden.

3. Command of a high salary or other significantly high remuneration for services, in relation to others in the field.

While the entrepreneur provided his tax return to demonstrate his income, he did not provide documentation from his claimed employer corroborating his salary. Furthermore, the entrepreneur provided documentation that was inconsistent regarding the nature and timing of his positions. As such, the AAO found that the entrepreneur had not demonstrated command of a high salary.

Key Takeaways

Proving extraordinary ability to the satisfaction of the AAO is difficult for everyone.⁶ But it is even more difficult for international entrepreneurs. They often don't have academic publications in their name. They may not run large companies. And their new technology or bright idea may not fit into a traditional field.

⁵ https://www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2018/FEB272018_03B2203.pdf (last visited Apr. 20, 2018).

⁶ See generally Charles Gordon, Stanley Mailman, Stephen Yale-Loehr & Ronald Wada, *Immigration Law and Procedure* § 39.03; Chris Gafner & Stephen Yale-Loehr, *Attracting the Best and the Brightest: A Critique of the Current U.S. Immigration System*, 38 *Fordham Urban L.J.* 183 (2010); Miller Mayer Success Story: O-1 Extraordinary Ability Visa Approval (Nov. 15, 2017), <https://millermayer.com/2017/miller-mayer-success-story-o-1-extraordinary-ability-visa-approval/> (last visited Apr. 20, 2018) (summarizing O-1 visa approval for company owner).

While it is difficult to draw broad conclusions from three cases, it appears that the AAO is carefully parsing through documentation. Vagueness in evidence can lead to denial, even if the vagueness is not obvious. For example, letters claiming work on a review board without explicitly stating the judging responsibilities of the entrepreneur will not be enough. Likewise, failing to provide a personnel chart documenting an entrepreneur's position in the company he or she founded appears to prevent the AAO from finding that the entrepreneur holds a leading or critical role in his or her own company.

While such standards of evidence call into question the burden of proof applied in these cases, entrepreneurs should be as specific as possible in the evidence provided, making sure the evidence clearly demonstrates every element of each criterion argued.

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