AMERICAN IMMIGRATION LAWYERS ASSOCIATION

February 22, 2016

Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director
20 Massachusetts Avenue, NW
Washington, DC 20529-2140

Submitted via e-mail: **feedback@uscis.dhs.gov**

Re: PM–602-0123: "Comparable Evidence Provision for O Nonimmigrant Visa Classifications" (Jan. 21, 2016)

To Whom It May Concern:

The American Immigration Lawyers Association (AILA) submits the following comments in response to the January 21, 2016, USCIS Draft Policy Memorandum, "Comparable Evidence Provision for O Nonimmigrant Visa Classifications" (PM-602-0123).

Founded in 1946, AILA is a voluntary bar association of more than 14,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. AILA's mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. We appreciate the opportunity to comment on this draft memorandum and believe that our collective expertise and experience makes us particularly well-qualified to offer views that will benefit the public and the government.

Request for Notice of Proposed Rulemaking

We preface our comments on the Draft Memorandum with a request that USCIS publish a Notice of Proposed Rulemaking to remove the words "to the beneficiary's occupation" from 8 CFR §214.2(o)(3)(iii) and 8 CFR §214.2(o)(3)(iv). Requiring petitioners to argue that even one evidentiary criterion is not readily applicable *to the beneficiary's occupation* in practice requires petitioners to prove something *is not* true, which is unnecessary, burdensome, and a waste of administrative and private resources which frustrates the intended purpose of the comparable evidence regulations as "catch-all" provisions. Such a regulatory change would allow for the presentation and consideration of comparable evidence in the same way as the newly established regulatory framework for EB-1 outstanding professors and researchers:[1] when a petitioner

[1] *See* "Enhancing Opportunities for H–1B1, CW–1, and E–3 Nonimmigrants and EB–1 Immigrants," 81 Fed. Reg. 2068, 2075 (Jan. 15, 2016).

establishes that the evidentiary criteria listed in 8 CFR §214.2(o)(3)(iii) or 8 CFR §214.2(o)(3)(iv) ***do not readily apply to the evidence that the petitioner proposes to submit***, the petitioner may use the comparable evidence provision to submit additional types of qualitatively comparable evidence that are not listed or that may not be fully encompassed in 8 CFR §214.2(o)(3)(iii) or 8 CFR §214.2(o)(3)(iv).

Comments to the Draft Memorandum

AILA commends USCIS for its efforts in attempting to streamline adjudication procedures for O-1 petitions involving comparable evidence. As USCIS is no doubt aware, such adjudications vary widely.[2] AILA members continue to report instances of adjudicators requiring petitioners to establish that *all* or *some* of the criteria do not readily apply to the beneficiary's occupation before they will consider comparable evidence, which ignores the purpose of the comparable evidence regulation as a "catch-all" provision. The logical construction of the regulation as currently written is that if the beneficiary does not readily meet at least one of the enumerated criteria, the petitioner may provide alternate forms of credible evidence demonstrating the beneficiary's extraordinary ability. AILA is pleased to see that USCIS agrees with this straightforward application and offers the following additional comments.

I. Introduction

- **USCIS states:**

> *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.*[3]

AILA Comment: AILA respectfully requests USCIS to revise this paragraph to read as follows:

> USCIS regulations at paragraphs 8 CFR §214.2(o)(3)(iii) and 8 CFR §214.2(o)(3)(iv) provide the relevant evidentiary criteria for an O-1A alien of extraordinary ability in the fields of science, education, business, or athletics; and for an O-1B alien of extraordinary ability in the arts, respectively. Sub-paragraphs 8 CFR §214.2(o)(3)(iii)(C) and 8 CFR §214.2(o)(3)(iv)(C), respectively, allow for

[2] For example, for O-1A: *contrast Matter of W-V-T-USA-; LLC* ID#13265 (AAO Sept. 14, 2015) at 2; *with* AUG242015_01D8101 (AAO Aug. 24, 2015) at 3; and JUL062015_01D8101 (AAO Jul. 6, 2015) at 2; and for O-1B Arts: *contrast Matter of D-M-, LLC*, ID# 15176 (AAO Jan. 20, 2016) at 2; *with* JUL152015_02D8101 (AAO Jul. 15, 2015) at 2; and JUL082015_01D8101 (AAO Jul. 8, 2015) at 2; *see also* APR142015_01D8101 at 11 (AAO Apr. 14, 2015); and JUL152015_02D8101 (AAO Jul. 15, 2015) at 14.

[3] Draft memorandum at 1.

the submission of comparable evidence in cases where these criteria do not readily apply.

II. Background

- **The Draft Memorandum states:**

> *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. [FN1]*
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> *[FN1 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").]*[4]

AILA Comment: AILA respectfully requests USCIS take notice that the Preamble to the Final Rule published on August 15, 1994, inadvertently makes reference to sub-paragraph "§214.2(o)(3)(*iv*)(C)" when it should have made reference to sub-paragraph "§214.2(o)(3)(*iii*)(C)." Therefore, AILA respectfully suggests USCIS change footnote 1 ("FN1") to read:

> *[FN1 See 59 FR 41818, 41820 (August 15, 1994) (The "catch-all" category at §214.2(o)(3)(iii)(C) allows for the submission of additional evidence not covered by other criteria).]*

- **The Draft Memorandum states:**

> *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.*[5]

AILA Comment: AILA respectfully submits that, as a matter of policy, the best interpretation of the regulations, as currently written, is: (1) to allow for consideration of comparable evidence in cases where at least one relevant criterion in 8 CFR §214.2(o)(3)(iii) or 8 CFR §214.2(o)(3)(iv) does not readily apply; *and* (2) to clarify that evidence being submitted as "comparable" must demonstrate that the beneficiary qualifies as an alien of extraordinary ability – and does not need not be shown to be comparable to the evidence described in any particular criterion. As confirmed in *Kazarian v. USCIS*, "neither USCIS nor [the] AAO may unilaterally impose novel substantive or evidentiary requirements beyond those set forth [in the regulations]."[6]

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[4] Draft memorandum at 2.
[5] *Id.*
[6] *Kazarian v. USCIS*, 596 F.3d 1115, 1121 (9th Cir. 2010) (citing *Love Korean Church v. Chertoff*, 549 F.3d 749, 758 (9th Cir. 2008)).

Based on a plain reading of the regulations as currently written, evidence submitted as "comparable" need not be shown to be comparable to a specific subset of evidence described in any particular criterion. Instead, these provisions allow petitioners the opportunity to submit alternate forms of evidence to demonstrate that a beneficiary has extraordinary ability in his or her field, i.e.:

- For O-1A, the comparable evidence must demonstrate the beneficiary has "sustained national or international acclaim and recognition for achievements in the field"[7] and "is one of the small percentage who have arisen to the very top of the field"[8]; and
- For O-1B Arts, the comparable evidence must demonstrate the beneficiary is "recognized as being prominent in his or her field"[9] and "renowned, leading, or well-known in the field."[10]

As stated above, requiring petitioners to demonstrate that the comparable evidence submitted is comparable to the evidence described in any one criterion – especially the criterion previously shown to be inapplicable – is unnecessarily burdensome and frustrates the intended purpose of the comparable evidence regulations as "catch-all" provisions.

III. Guidance

AILA Comment: AILA asks USCIS to clarify and remind adjudicators that relevant, probative, and credible evidence may be properly presented and considered under more than one regulatory and/or comparable evidentiary criteria[11] by adding the following sentence to this section:

> Relevant, probative, and credible evidence submitted in support of a petition may overlap with and may be properly considered under more than one evidentiary criteria be they regulatory and/or comparable evidentiary criteria.

- **USCIS states:**

> *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.*[12]

[7] 8 CFR §214.2(o)(3)(iii).
[8] 8 CFR §214.2(o)(3)(ii).
[9] 8 CFR §214.2(o)(3)(iv).
[10] 8 CFR §214.2(o)(3)(ii).
[11] The AAO has recently recognized that evidence may be considered under more than one criterion, though ultimately, the petitioner failed to demonstrate why the evidence presented warranted consideration in this manner. *See, e.g., Matter of C-B-&F-, Inc.*, ID# 13701 (AAO Sept. 28, 2015) ("[T]he record does not explain why the Petitioner's competitive awards, which we considered under the awards criterion, warrant additional consideration as comparable evidence of eligibility as the display of the Beneficiary's work.").
[12] Draft memorandum at 3.

AILA Comment: Requiring petitioners to explain why evidence is "comparable" to any one criterion is burdensome and unnecessary.[13] Evidence is "comparable" if it helps demonstrate the beneficiary's extraordinary ability. Further, to require a petitioner to explain why the submitted evidence is "comparable" to the evidence described in the criterion that the petitioner must also explain is "not readily applicable," traps the petitioner and the adjudicator in a loop of circular reasoning: First the petitioner must prove the non-truth of a premise (i.e., the "inapplicability" of a criterion); and then the petitioner must prove the evidence submitted is nonetheless comparable to that criterion. These evidentiary challenges are heightened by the fact that testimonial evidence is often deemed insufficient,[14] even though it may be the only evidence available to demonstrate both "inapplicability" and "comparability." Therefore, this sentence should be excluded from the final policy memo, and USCIS should adopt AILA's recommendations herein.

- **The Draft Memorandum states:**

> *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.*[15]

AILA Comment: This sentence exemplifies the confusion and circular reasoning that results from requiring petitioners to demonstrate both "inapplicability" and "comparability"[16] and

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[13] For example, *see, e.g., Matter of D-, ID# 13836* (AAO Oct. 5, 2015) ("The **Petitioner did not explain why the absence of a dedicated page to the Beneficiary's music style on this single website demonstrates that any one of the criteria do not readily apply to the Beneficiary's occupation**. For example, even assuming there are no trade journals or other media that are dedicated to reviewing the Beneficiary's style of music, that fact does not mean that more general forms of music media would not review an Assyrian singer." (Emphasis added)); *see also* AUG242015_01D8101 (AAO Aug. 24, 2015) at 12 ("The next issue is whether the achievements of the Beneficiary's students should be considered under this criterion as comparable evidence of the Beneficiary's extraordinary ability, pursuant to 8 C.F.R. §214.2(o)(3)(iii)(C). First, the Petitioner must demonstrate that this criterion [8 CFR §214.2(o)(3)(iii)(B)(1)] is not readily applicable to the Beneficiary's occupation. **The Petitioner has not asserted or documented that there are no awards for gymnastics coaches**. Even assuming this criterion is not readily applicable to the occupation of gymnastics coach, **the burden is on the Petitioner to show that the evidence submitted as comparable is comparable to the evidence the criterion describes**." (emphasis added)).

[14] *See* JUL062015_01D8101 at 7 and JUL152015_02D8101 at 8 ("**Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings**. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972))." (Emphasis added); and JUL082015_01D8101 at 15 ("The petitioner asserts that the regulatory criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B) are not readily applicable to the beneficiary's occupation 'as a Dance Director/Instructor.' **The petitioner's assertion that the criterion does not apply, without more, is insufficient.** Moreover, if relying on comparable evidence, **the petitioner must also explain how the evidence is comparable to the existing criteria**, which the petitioner has not done. Accordingly, we will review the evidence under the plain language requirements of this criterion.") (Emphasis added)).

[15] Draft memorandum at 3.

[16] To illustrate the circular reasoning, *see, e.g.*, APR142015_01D8101 (AAO Apr. 14, 2015) at 11 ("The petitioner, however, also asserts that the beneficiary meets the criterion at 8 C.F.R. §214.2(o)(3)(iv)(A) and all of the criteria 8 C.P.R. §214.2(o)(3)(iv)(B)(1)-(6). **The regulatory language precludes the consideration of comparable evidence in this case, as there is no indication that eligibility for this classification in the beneficiary's field cannot be established by the criteria above. Where the beneficiary is simply unable to satisfy the plain language requirements of at least three categories of evidence, the regulation at 8 C.F.R § 214.2(o)(3)(C) does not allow for the submission of comparable evidence**. On appeal, the petitioner does not specifically explain why the regulatory criteria are not readily applicable to the beneficiary's occupation and how the submitted evidence is "comparable" to any specific objective evidence required at 8 C.F.R. §214.2(o)(3)(iv)(A) or 8 C.F.R.

frustrates the intended purpose of the comparable evidence regulations as "catch-all" provisions. Therefore, it should be excluded from the final policy memo.

USCIS acknowledges earlier in the draft policy memo that the O-1 comparable evidence provisions were meant to allow petitioners to demonstrate that the beneficiary qualifies for the benefit sought by submitting relevant, probative, and credible evidence demonstrative of a beneficiary's extraordinary ability, but which does not easily fit, in whole or in part, within an enumerated criterion.[17] Therefore, as a matter of consistency and to avoid situations where petitioners are forced to make exhaustive and burdensome arguments to overcome circular reasoning and logic, we ask USCIS to remove this sentence in its entirety.

- **The Draft Memorandum states:**

> *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 "readily" is commonly defined as "easily" or "without much difficulty."[FN3]*
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> *[FN3 Merriam-Webster.com. 2015. http://www.merriam-webster.com (May 6, 2015).]*
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> *The term "occupation" is commonly defined as "a person's job or profession."[FN4]*
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> *[FN4 Merriam-Webster.com. 2015. http://www.merriam-webster.com (May 6, 2015).]*
>
> *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.*[18]

AILA Comment: As discussed above, to require petitioners to argue that all, some, or even one evidentiary criteria are not readily applicable to the beneficiary's occupation is to require them to prove that something *is not* true. The O-1 comparable evidence provisions were intended to allow petitioners to demonstrate that a beneficiary qualifies for the benefit sought by submitting

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§214.2(o)(3)(iv)(B)(1)-(6)."(Emphasis added)); *see also* JUL152015_02D8101 (AAO Jul. 15, 2015) at 14 ("The petitioner's explanation for why the criteria are not applicable **does not take into account that the criteria at 8 C.F.R § 214.2(o)(3)(iv)(B)(1) and (3) allow for lead or lead or critical roles. While the evidence the petitioner submitted to satisfy 8 C.F.R §214.2(o)(3)(iv)(3) [sic] does not meet that criterion, an inability to meet a criterion does not demonstrate that the criterion is not applicable. Moreover, the petitioner has not established that the trade magazines documented in the record do not report on or review ikebana works in a manner that might demonstrate critically acclaimed success**." (Emphasis added)).

[17] Draft memorandum at 2.

[18] Draft memorandum at 3–4.

relevant, probative, and credible evidence demonstrative of a beneficiary's extraordinary ability, but which does not easily fit, in whole or in part, within an enumerated criterion.[19]

Further, comparable evidence should be accepted as long as it strengthens the individual's case for eligibility as an alien of extraordinary ability.[20] "Readily" means "easily" or "appropriately," and connotes a best fit, so that the petitioner can (and should) *strengthen* the case with comparable evidence. In other words, when enumerated criteria do not easily apply, the petitioner should be allowed to develop its case based on other, qualitatively comparable evidence to establish the beneficiary's extraordinary ability.

- **The Draft Memorandum states:**

> *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.*[21]

AILA Comment: We ask USCIS to remove this sentence in its entirety, as it is unnecessarily vague and ambiguous, and could be misinterpreted by adjudicators as requiring petitioners who satisfy the "comparable evidence" criterion to *also satisfy three additional regulatory criteria*.

IV. Quantitative and Qualitative Approach

AILA Comment: As a general matter, AILA respectfully suggests that USCIS remove Section IV, "Quantitative and Qualitative Approach" from the policy memo. First, as drafted, this section is ambiguous and vague (e.g., "*It is important that the standards of the extraordinary ability classifications not be diluted by the kind of evidence submitted*").[22] It is not clear how the submission of relevant, probative, and credible evidence demonstrating extraordinary ability could conceivably "dilute" the regulatory standards. Second, "neither USCIS nor [the] AAO may unilaterally impose novel substantive or evidentiary requirements beyond those set forth [in the regulations]."[23] Third, citations to the "current version" of the AFM are inappropriate without providing the proposed/draft revisions intended for the AFM.[24]

- **The Draft Memorandum states:**

> *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.*[25]

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[19] *See* Draft memorandum at 2.
[20] *See* "Letter from AILA in Response to USCIS Teleconference on O & P Nonimmigrant Visas," AILA Doc No. 14031041 (posted March 7, 2014), *available at* http://www.aila.org/infonet/letter-from-aila-in-response-to-uscis-o-p.
[21] Draft memorandum at 4.
[22] Draft memorandum at 5.
[23] *Kazarian v. USCIS*, 596 F.3d 1115, 1121 (9th Cir. 2010) (citing *Love Korean Church v. Chertoff*, 549 F.3d 749, 758 (9th Cir. 2008)).
[24] *See also* AILA's "Implementation" comments, below.
[25] Draft memorandum at 4.

AILA Comment: In the event that section IV is retained in the final memo, we remind USCIS that, "neither USCIS nor [the] AAO may unilaterally impose novel substantive or evidentiary requirements beyond those set forth [in the regulations]."[26] Therefore, we suggest replacing this sentence in the main body of the text with the following, which more accurately characterizes the citations within footnote 7:

> *The fact that the petitioner has submitted three of the forms of documentation qualifying under at least three separate regulatory and/or comparable evidentiary criteria does not necessarily establish that the beneficiary is eligible for the O-1 classification.*[27]

Implementation

- **The Draft Memorandum states:**

> *Revisions to AFM Chapter 33.4(d) will be included upon issuance of the final memorandum.*[28]

AILA Comment: AILA asks that USCIS publish the proposed revisions to AFM Chapter 33.4(d) regarding comparable evidence for public notice and comment *prior to* issuance of the final memorandum.[29] Further, any other revisions to AFM Chapter 33.4(d) (other than additions regarding comparable evidence) should also be published for public notice and comment prior to issuance of the final memorandum.

Conclusion

We appreciate the opportunity to comment on this draft policy memorandum, and look forward to a continuing dialogue with USCIS on these issues.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

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[26] *Kazarian v. USCIS*, 596 F.3d 1115, 1121 (9th Cir. 2010) (citing *Love Korean Church v. Chertoff*, 549 F.3d 749, 758 (9th Cir. 2008)).
[27] Draft memorandum at FN7.
[28] Draft memorandum at 4.
[29] For examples of problematic and contradictory language in the current version of the AFM regarding the comparable evidence provisions of the EB-11 and EB-2 immigrant visa categories, regarding EB-11: *See, e.g.*, AFM ch. 22.2(i): "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;" and "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)." Regarding EB-2: *See, e.g.*, AFM ch. 22.2(j): "General assertions that any of the six objective criteria described in 8 CFR 204.5(k)(3)(ii) 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;" and "The petitioner should explain why it has not submitted evidence that would satisfy at least three of the criteria set forth in 8 CFR 204.5(k)(3)(ii) as well as why the evidence it has submitted is 'comparable' to that required under 8 CFR 204.5(k)(3)(ii)."