

CRITICAL ANALYSIS OF THE ELEMENTS THAT MAKE UP E11 STATURE

The regulations state that evidence required to support a petition for E11 classification should include at least three types of documentation. The regulations provide a list of ten types of documentation which can be submitted to meet this requirement. However, merely submitting three of the listed types of documentation may not be sufficient to establish that the alien is of E11 calibre. Remember, the alien must first meet the statutory requirement of showing that he or she has:

...a high level of expertise indicating that the individual is one of a small percentage who has risen to the top of the field of endeavor.

The alien can show that he or she meets this standard by submission of at least three types of documentation which shows that the alien is at the top of his or her field of endeavor and that he or she has sustained national or international acclaim and recognition. So, it takes more than just submitting three documents. The quality of the submitted documentation will show if the alien is of E11 calibre, not the quantity.

The following is a discussion of the issues that should be considered when assessing the quality of the evidence.

A. "VERY TOP" OF THE FIELD OF ENDEAVOR.

The definition states that the individual must be, "...one of a small percentage who has risen to the very top..."

1. What is a small percentage? One percent? Ten percent? What is the population of the field of endeavor?

Consider the total population you are dealing with in the field of endeavor. The "very top" of the field may be a larger or smaller percentage depending on the size of the total population.

For example: If the alien claims to be of extraordinary ability as a professional baseball player, you need to determine how many individuals could be considered professional baseball players. If there are only 1,000 professional baseball players, then ten percent would be a significant number. But, if there are 100,000 then ten percent would be a very small number of players in relation to the total.

Determining the population also means that you need to judge what is the actual field of endeavor. If the alien claims to have extraordinary ability in business, what is the population? All business executives? Business executives in the particular field of business? This will be a major consideration.

2. What is the very top?

Prime example is sports leagues; NHL, NFL, NBA, etc. Are all members of professional, national leagues at the "very top" of the field of endeavor? What is the criteria for determining which national league players are E11 calibre?

AAO has consistently held that not all major league players are of E11 calibre. Instead, AAO's standard has looked to the "elite" of the major leagues as being E11. So, how can you determine who is "elite" in the league? Consider awards. Has the individual been named most valuable player? Does the individual have impressive statistics? Has the player been able to successfully negotiate a very high salary?

What about a boxer? If he is ranked by the World Boxing Federation is he at the "top of the field of endeavor?" Are all ranked boxers at the "top of the field?" If not, at what ranking should we consider them to be E11 calibre? There are many organizations that rank boxers. The alien may be ranked differently by these organizations. Look at the overall ranking of the individual. Is he ranked fairly high by most of the organizations? Has he been a "contender" for the title? Has he held the title in his weight class?

How about fields of endeavor that are obscure or limited to very few individuals, like wine makers? This can get very tricky. Certainly awards would be helpful, but many times the awards for these types of fields are limited. Commercial success may be another indicator. But remember, the burden is on the petitioner or attorney to establish eligibility.

What about business? Does earning mega bucks mean that the individual is at the very top? It's a consideration but is not always determinative. Consider issues such as the alien's contribution to the field of business in which he or she has been engaged. Has the individual made significant improvements in his field of business? Has he developed a highly successful organization in his field of business? Is his organization looked to as the premier organization in the business field?

Petitions based on entrepreneurial skills can be very tricky. Has the entrepreneurial skill demonstrated been looked upon by the business community as exceptional? Examples of individuals with exceptional entrepreneurial skills might include Bill Gates, Steven Jobs, and Malcolm Forbes. Of course these individuals are not aliens, but aliens of their calibre could be considered E11 calibre.

3. Is it easier to be at the "very top" of some fields of endeavor than others?

Perhaps. If the field is unique or obscure it may be easier for an individual to rise to the top of the field than in fields where many individuals are competing for recognition.

B. "RISEN" TO THE TOP OF THE FIELD OF ENDEAVOR.

AAO has denied a petition based on this issue. If an individual was at the top of the field but has steadily been declining, then he may not be of E11 calibre. Prime examples of this occur in the arts and in athletics. Many singers, actors, and professional athletes have a relatively short period at the top of the field.

C. "SUSTAINED" NATIONAL OR INTERNATIONAL RECOGNITION.

1. How long must an individual have been recognized in the field before we consider that recognition as being "sustained?"

Ask four people how long "sustained" is and you will get four different answers. Obviously if the individual just made one movie this year and is now a hot property, we could probably make a strong argument that the recognition is not sustained. But, what about recognition in a field for two years? One year and six months? Ten years?

What can be used as a measuring stick? Good judgement. Obviously if the individual has won the Nobel Prize we would consider the recognition as sustained. If the individual has been in several movies with roles leading up to starring roles then we can consider the recognition sustained. If an athlete has been a major league player for six years and is now "first string" we can consider the recognition as being sustained.

2. How do we determine national recognition? What about awards, etc. from third world countries? How do we know what award is a nationally recognized award?

In many cases the submitted awards are not familiar to people in the United States. This is where you need to make sure the petitioner and/or attorney submits sufficient explanation and supporting documentation about the award from which you can judge if the award is a significant national award.

Many times there will be reports, by major media sources, about the alien in the alien's country of origin. This type of documentation can support a claim of national recognition.

3. What if an individual has been recognized for many years but has not been working in his or her field of endeavor for several years?

What about someone like Taiho. He was one of the most lauded sumo wrestlers in Japan for many years. He has not been in the sport for over a decade. His only recent public exposure has been commercial endorsements. It's unlikely that we could grant this alien E11 classification based on his prior acclaim as a sumo wrestler. Also, in order to qualify for E11 classification, the individual must be coming to work in his or her area of expertise. Since he no longer "works" as a sumo wrestler, he would not be coming to work in his field of expertise.

D. PLANS TO CONTINUE WORKING IN THE AREA OF EXTRAORDINARY ABILITY.

The statute requires that the alien continue to work in the area of extraordinary ability. This can be a major problem. AAO has upheld several denials of petitions for sports figures who wished to enter the United States to function as coaches in fields where they had been premier athletes. They held that performing in the sport was a separate field from coaching in the sport. But, the AAO has been ambiguous on this issue in the past. So, watch out for those professional athletes who want to coach

Since this classification does not require a job offer, this determination will be based largely on the petitioner's or attorney's assertions about future work in the field.

E. EXTENSIVE DOCUMENTATION OF EXTRAORDINARY ABILITY.

1. What is a one-time achievement, major, internationally recognized award? Apart from the obvious, i.e., Nobel Prize, Olympic Gold Medal, Academy Award, are there other awards which could be considered a one-time achievement, major, internationally recognized award? Could be, if so, the petitioner or attorney would have to establish the lofty level of the award.

2. The regulations provide a "laundry list" of required evidence which can be submitted to show that the individual is at the top of the field of endeavor and has sustained national or international acclaim and recognition. The regulations also state that at least three types of documentation should be submitted. But, this is meant to be a guide to the kinds of evidence which can be submitted to establish that an individual is of E11 calibre. Mere submission of three or more of the types of documents listed may not establish that the individual is of E11 calibre.

Is it possible for an individual who is not of E11 calibre to submit three or more of the types of evidence listed? You bet. If so, how can you deny such a case? By attacking the quality of the submitted evidence, ie., attacking the "laundry list."

3. **Attacking the "laundry list."**

- a. Lesser nationally or internationally recognized awards for excellence in the field of endeavor.

How much "lesser" are we talking about? How can we determine if an award is nationally or internationally recognized; especially in obscure fields? We would need more than just the petitioner's allegations. Often the petitioner and/or attorney will submit testimony as to the nature of the award and the criteria for receipt of such an award. If this information is not there, the petitioner and/or attorney should be asked to provide such information.

- b. Membership in associations in the field which require outstanding achievements as a prerequisite for membership.

There are many professional organizations for occupations such as doctors, lawyers, engineers, teachers, etc. How can we determine if outstanding achievement is a prerequisite for membership in any of these organizations? Often the organizations have by-laws which spell out the criteria for membership. If this is not submitted ask for evidence which shows that only individuals with outstanding achievements are considered for membership.

- c. Published material about the alien in professional or major trade publications, or other major media about the alien's work.

What if the material discusses the alien's work because it is novel or unique? Will any published material about the alien's work be acceptable evidence of the alien's outstanding ability? Be careful in this area. This is where you notoriety can be confused with extraordinary ability. For example, Zsa Zsa is always in the news, mostly the Enquirer, because of notorious things that she does, not because she has demonstrated exceptional ability in a particular field.

Also, the media often reports on novel or unique business, scientific, or educational methods. Not because they are looked upon as the apex of the field but because they are different. Novelty and uniqueness does not necessarily equate to extraordinary ability.

What is a "major trade publication?" Seems likely that Variety is a major trade publication, but how about publications that deal with obscure or highly specialized fields? How can we determine if such a publication is a "major trade publication?"

Once again, it is the petitioner's and/or attorney's responsibility to provide enough information to allow you to determine if the publication is looked upon as a major trade publication.

- d. Evidence that the alien participated, individually or on a panel, as a judge of the work of others in the field.

If a professor reviews Phd students' theses, is he serving as a judge of the work of others in the field? If so, does that mean he has demonstrated extraordinary ability? AAO has consistently held that this is not the case. The key is does the alien judge the work of others who are at the "professional level" in the field of endeavor. Serving as a judge of students or trainees in a field would not suffice.

What about serving as a judge in small competitions such as local art competitions? That depends. If the artists are amateurs, probably not. If the artists are all professional artists who make their living from their painting, could be. Also, who is sponsoring the art competition? Is this a highly respected art organization, or just a community recreation center?

- e. Scientific, scholarly, artistic, athletic or business related contributions of major significance in the field.

Key thing here is "major significance." Any individual can contend that they have contributed to their field of endeavor. But, this looks beyond the alien's success in the field. Consider if the alien's work has led to changes in the field. Or, has the alien's work been used as a guideline or training tool by others in the field. Has the alien expanded the field? In sports, it could be that the alien invented a new move, such as in figure skating. Or, in education it may be that the alien developed a new method of instruction that is now widely used by schools.

- f. Evidence of the alien's authorship of scholarly articles in the field, in professional or other major trade publications or other major media.

This usually is an issue in cases where the alien is engaged in scientific fields. If the alien is the primary author of a research paper or is one of the primary authors, then you could consider this evidence as indicative of extraordinary ability. A key point to keep in mind is that most researchers are expected to publish their findings. So, if all (or most) researchers are expected to publish their findings, does this mean all researchers are of E11 calibre? Don't think so.

- g. Evidence of the display of the alien's work in the field at artistic exhibitions or showcases.

This relates specifically to aliens who claim extraordinary ability in the arts. All artists display their work. That is the nature of the field. But, not all artistic exhibiting or showcasing would show the alien to be of extraordinary ability. Grammar school children showcase their art work at open houses for parents. University students put on plays and performances for the public. Major artists display their work at Rockefeller Center.

What is the quality of the exhibition or showcase? This is the major consideration when judging the quality of documentation submitted in this category.

- h. Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.

This goes hand-in-hand with the preceding discussion on "exhibitions and showcases" of the alien's work. Who an alien has worked for and what role an alien has filled is crucial to determining extraordinary ability. Obviously if an alien has performed for the Metropolitan or the Bolshoi Ballet, we would consider those organizations as having distinguished reputations. But, the alien must have had a leading or critical role in those performances. If the alien was in the chorus or the corps de ballet, the role would not be considered leading or critical.

- i. Evidence that the alien has commanded a high salary or other significantly high remuneration for services in relation to others in the field.

This would not apply well in many cases. Scientific and educational fields do not pay particularly well. So, high salaries would not be a good indicator of the ability of the worker. Sometimes a researcher will opt to work at an institution that may not pay particularly well but is working in areas of study that are unique or at the "cutting edge."

However, in fields such as athletics and performing arts, a high salary may be a good indicator of the ability of the alien. Such fields commonly reward extraordinary ability with a substantial salary.

- j. Evidence of commercial success in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.

Just as athletes are ranked in their sport, performing artists are ranked by their "draw" or "sales." This category relates to an artist's ranking in the artistic field. This is where Billboard and other charts may be submitted. Also, evidence of gold or platinum records, box office ranking for movies, etc.