

## Article

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### How to Improve the Impact of Reference Letters Establishing Extraordinary Ability

*James Joyce is revered as one of the greatest writers of the 20th Century. There is the James Joyce Quarterly, which brings together a wide array of critical and theoretical work focusing on the life, work, and reception of James Joyce; the James Joyce Society, founded in 1947, devoted to the appreciation of the life, works, and significance of the Irish author; literally thousands of biographies chronicling Joyce's story; academic courses focusing only on Joyce's work; and scholars who build their careers analyzing both the man and his work. Who would question that a writer such as James Joyce was extraordinary?*

Apparently, many did. During his career, James Joyce suffered rejections from publishers, suppression by censors, attacks by critics, and misunderstanding by readers. Moreover, as a novelist he was not very prolific. In his almost 60 years, he only published four novels. Yet at the same time, his writing was lauded by literary experts, who recognized his “exuberant exploration of the total resources of language.” These experts credit Joyce as “one of the most radical innovators of twentieth-century writing,” whose “technical innovations in the art of the novel include an extensive use of interior monologue; he used a complex network of symbolic parallels drawn from the [sic] mythology, history, and literature, and created a unique language of invented words, puns, and allusions.”

While there were people who did not recognize Joyce's genius, many others did, and those that did were willing to attest to that fact. Such attestations, particularly in the form of letters of reference, are critical to establishing extraordinary ability when there is not a substantial amount of other documentation. For example, four novels may not be very much in a lifetime of writing, but even one brilliant novel should be, and four brilliant novels is certainly indicative of extraordinary ability. Letters from experts in the field can clarify what it is about Joyce's

writing and related accomplishments that were “brilliant” and should make him eligible to be considered extraordinary.

These letters can do the same in other fields; they can contextualize an individual’s accomplishments and expertise so that their importance is understood. When a cursory review of an individual’s curriculum vitae does not clearly suggest eligibility for the employment-based first preference (EB-1) immigrant visa, but there are other reasons to believe that such an application would be appropriate, these letters may articulate the relevant factors. The word of respected experts in the field should be a powerful source of evidence in documenting an individual’s status in the field.

Inasmuch as letters of reference can be the cornerstone of a difficult-to-document case, referees need to understand that the visa petition is not a peer review process. U.S. Citizenship and Immigration Services (USCIS) adjudicators review many petitions from individuals in many different and distinct fields. In one day, it is possible that a USCIS adjudicator reviews petitions from such diverse occupations as writer, mechanical engineer, accountant, biochemist, yoga teacher, et cetera. Therefore, for the referee’s letters to be of value to the petition, they should explain the individual’s skills and expertise in terms that a lay person—someone with absolutely no knowledge of the field—can understand. Moreover, the referees should address the standards and criteria by which extraordinary ability petitions are reviewed.

## **The Evidentiary Criteria**

Ultimately, the EB-1 standard is whether the foreign national is one of the small percentage who has risen to the very top of his or her field of endeavor. Accordingly, in determining whether to pursue this option, it is critical to define the individual’s field and his or her level of expertise within that field. All too often it seems the focus is on whether the individual has published, how many publications exist, and whether they are first author publications. While the maxim “publish or perish” may be true in academia, the immigration regulations defining the EB-1 category are fortunately more generous than that. This broader understanding of the many other attributes that indicate extraordinary ability is reflected in the regulations at 8 CFR 204.5(h)(3). These regulations list 10 evidentiary criteria, only one of which is “*authorship of scholarly articles*.” There remain nine other criteria listed in the regulations that should be given equal weight in determining an individual’s eligibility for extraordinary ability.

For some foreign nationals, the question may not be their eligibility as an alien of extraordinary ability, but rather, documenting this eligibility. Therefore, it is important to review and explain the evidentiary criteria with such individuals, and to see how and where their expertise can be categorized in these terms. In determining how they fit these evidentiary standards, it is equally important to determine how they can document these standards. This article explores the use of reference letters in establishing the evidentiary criteria relevant in a particular case

and provides suggested guidance that may be given to referees interested in supporting the petition. Specifically, this article suggests that where referees analyze, point-by-point, as many of the evidentiary criteria as are relevant to that petition, they may strongly influence the outcome of an otherwise difficult petition. The key is in getting the referees to understand the level of detail that is necessary for the USCIS adjudicator to understand the significance of the subject accomplishment. The following suggestions are presented in the order in which the criteria appear in the regulations; however, referees should consider presenting the criteria in the order in which it is most relevant and reflective of the applicant's stature in the field.

### **Alien's Receipt of Nationally or Internationally Recognized Prizes or Awards for Excellence in the Field of Endeavor**

The key to this criterion is noting that the standard is nationally or internationally *recognized*, not nationally or internationally *awarded*. "*Recognized*" generally means that people react to it as impressive. This is a credential that is striking as a distinction, and makes one consider the individual as someone he or she would trust as an expert in the field. The reference letter should consider distinctions earned by the beneficiary, even if they are not specifically entitled "Award." For example, perhaps the beneficiary was selected for a distinguished position, has received patents, or has been afforded special privileges. When describing these distinctions, the letter should address how and why they meet the standards of national recognition for excellence. Where it is a more traditional "honor," the letter should address the number of individuals in competition for the award, the basis or criteria upon which it was awarded, and how widely it is regarded in the field of endeavor.

### **Alien's Membership in Associations in the Field that Require Outstanding Achievements**

The requirements for membership in a particular association are not always evident. Often, it is helpful to reference the bylaws, constitution, or other membership criteria, usually readily available on the Internet, to provide insight into the relative ranking and difficulty of obtaining membership. For example, many professional organizations require nomination, election, and/or recommendations by/from members in good standing. This may establish that the "*outstanding achievements*" required for membership were judged as such by "*national or international experts in their disciplines or fields*." While proof of membership and the requirements of membership should be included as supporting documentary evidence, the referee's letter can clarify these requirements, and discuss how such memberships are viewed in the field.

### **Published Material in Professional or Major Trade Publications or Major Media about the Alien**

Whether it's true that there's no such thing as bad press is a question for another day. What is at issue here is what such published material indicates about the beneficiary. The referee's letters can be useful in addressing the significance of the source, as well as clarifying how the published material reflects on the beneficiary. For example, if information about the beneficiary is available on the Internet, the referee may comment on the value of the Web site, *i.e.*, is it a site other people in the field frequently reference? In what context is beneficiary discussed? What else is discussed on the site? Another example is citations to the beneficiary's published work. The referee could highlight that the authors who cited to the beneficiary's work relied on the beneficiary's findings; whether such comments were laudatory; and why such citations are significant. This same analysis can be used to evaluate any instance that the beneficiary's name appears to see if it can be used to add to the total picture that this individual *"has risen to the very top of the field of endeavor."* The referee's letter can be used as the vehicle for preventing or overcoming USCIS's frequent suggestion that "mere references" to beneficiary's work do not meet the standards of this criterion.

### **Alien's Participation as a Judge of the Work of Others**

Even those roles that appear to clearly meet this criterion can have a stronger impact on the petition if the significance of such a role is clarified in the reference letters. For example, legacy Immigration and Naturalization Service (INS) has acknowledged in liaison minutes that "providing official direction for a thesis or a dissertation satisfies the judge of the works of others criteria. Similarly, participation by the alien as a reviewer for peer reviewed scholarly journals will usually be a solid piece of evidence for evaluating the alien's extraordinary ability." However, notwithstanding USCIS's recognition of these roles, ensuring that the particular adjudicating officer is aware of their significance is important, and the referee's letter is an appropriate venue for such a discussion.

Moreover, the referee's letter can also detail other roles in which the beneficiary's evaluation of others is less apparent. Consider, for example, the beneficiary's role on a committee in which faculty members are evaluated, or in which policies are developed or revised, or if the beneficiary has developed protocols, guidelines, or procedures by critiquing previous standards. These types of roles generally involve judging the work of others, yet they are not easy to document. The referee's letter can provide the necessary evidence by documenting not only the role, but also the responsibilities, and how they meet this criterion.

### **Alien's Original Significant, Scholarly Contributions of Major Significance in the Field**

If an individual is regarded as an expert in his or her field, it is usually because he or she has in some way contributed something to that field. It may be that he or she has raised the bar by being the first to achieve a certain standard, innovated new technology, discovered an important gene, revived a traditional art form, or, in James Joyce's case, developed an

“experimental use of language” that impacted the art of the novel. In detailing the original contributions of major significance attributed to an individual, the referee must first provide background on the field itself. For example, what is the importance of the field; how does beneficiary’s work fit into this scheme; what is it about the field that makes it difficult, demanding, and challenging; and what percent of the field can perform this type of work?

This description of the field via the reference letters provides a context to understand the importance of what the beneficiary has accomplished in the field, and why such accomplishments can be considered “significant contributions.” The referee’s letters may articulate in detail the underlying goals of beneficiary’s work, how this issue has been dealt with traditionally, the shortcomings of prior approaches, and what the beneficiary has done to overcome these shortcomings. In addition, letters should address the impact of beneficiary’s work on the field, including cost or time savings. Perhaps most importantly, specific concrete examples should be provided in terms that a lay person—the average person on the street—can understand. Detailing what it is that the beneficiary actually does, the degree of skill required to do it, and the impact of such work presents compelling evidence of an original and significant contribution.

### **Alien’s Authorship of Scholarly Articles in the Field, in Professional Journals, or Other Major Media**

Copies of an individual’s publications should certainly be sufficient documentation to establish that a beneficiary has met this criterion. However, merely including copies of beneficiary’s published materials does not necessarily translate the importance of such publications to the USCIS adjudicator. By providing specific details about the journal or source where the material appeared, its circulation or impact factor, as well as a summary of the articles’ findings, the publications may do more than satisfy this criterion, they may also be an important indicator of several other criteria such as original contributions of major significance, judge of the work of others, and leading and critical roles, to suggest a few. For example, if beneficiary’s article is a review, it probably evaluated and critiqued the work of other experts in the field. If the article was published in one of the foremost journals, it may underscore the original contributions of major significance. If the beneficiary was the primary author, it may evidence the beneficiary’s leading and critical roles. The reference letters can articulate to what extent the articles serve as evidence of these other criteria.

### **Display of Work in the Field at Artistic Exhibitions or Showcases**

Similar to publications, the beneficiary’s presentations may also provide evidence supporting other criteria. Details regarding the forum; whether it was a regional, national, or international conference; the sponsoring organization; whether the beneficiary was invited or selected; and whether it was an oral or poster presentation may provide insight into the significance of what



is being presented. In addition, the beneficiary's role vis-a-vis the presentation, whether he or she is a panelist or moderator, may substantiate his or her critical or essential capacity.

### **Employed in a Critical or Essential Capacity by Organizations with a Distinguished Reputation**

This criterion has two major components: (1) the distinction of the institution or organization; and (2) the beneficiary's responsibilities within the institution or organization. The first can be documented by the reputation or ranking of the institution within the field, for what it is generally known, and how competitive it is to obtain a position within the institution. The second component requires an analysis of the beneficiary's specific responsibilities. Job titles are often quite misleading and may not provide a complete picture of the essentiality of the beneficiary's role. The reference letters can fill in the necessary details such as where the beneficiary fits within the hierarchy, how many people he or she supervises, oversight he or she receives, authority to establish policy or direct research, roles on committees, et cetera.

### **High Salary**

Clearly defining the field is essential to evidencing whether the beneficiary *"has commanded a high salary . . . in relation to others within the field."* If the field encompasses both academia and the private sector, salaries within the former almost always pale in comparison with those in the latter. The reference letters may explain how individuals in an academic setting spend a great deal of time both performing research and teaching, neither of which are "money-making" endeavors. Moreover, in academic settings, money earned for an innovation or the success of a publication often goes toward supporting other activities at the university or nonprofit entity. Given this background, the beneficiary's salary can be put into perspective.

### **Comparable Evidence**

While USCIS regulations list evidentiary criteria to establish extraordinary ability, this list is not exclusive. Rather, the regulations provide that: *"If the above standards do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence to establish the beneficiary's eligibility."* Investigation and exploration into a particular field of expertise is essential to identify this *"comparable evidence."* For example, depending upon the particular field, *"comparable evidence"* may include prestigious fellowships, expertise with advanced technology, or a rare combination of skills. The key is determining how individuals in that field are judged and evaluated, and to portray the foreign national according to those standards.

### **Sustained National or International Acclaim**

The definitive criteria for extraordinary ability are not so much what an individual does, but how well he or she does it, and how his or her expertise can be documented. In harder-to-document cases, reference letters are a critical source of evidence not only for the specific criteria, but also to address the issue of “*sustained acclaim*.” According to American Heritage Dictionary of the English Language, to “sustain” means “to keep in existence; maintain.” Therefore, “*sustained acclaim*” would indicate that an individual first established a reputation in the field and has maintained that reputation for a period of time. The referees can articulate what aspect of the individual’s background or expertise jumpstarted this reputation, and further define how this reputation sustained itself through continuing contributions, innovations, the continuous impact of the work in the field, as well as other accomplishments.

To document the “*national or international*” level of beneficiary’s acclaim and lend credence to the significance of the evidentiary criteria discussed above, reference letters should be from as many diverse geographical sources as possible. This is not to say “the more letters the better.” On the contrary, a carefully thought out selection of diverse institutions coupled with appropriately worded letters keeps the case focused and goes far in establishing that the beneficiary has a national reputation for excellence in the respective field of expertise.

### **Using the Letters for Outstanding Researcher and National Interest Waiver Petitions**

Similar in many ways to a petition as an alien of extraordinary ability are petitions for an outstanding researcher or professor and petitions for a national interest waiver. Certainly, these similarities can work to an individual’s advantage by setting the stage to simultaneously pursue more than one permanent residency strategy. Consider, for example, that evidencing special qualifications above the norm (alien of extraordinary ability and outstanding researcher) and evidencing that these qualifications will prospectively benefit the United States (national interest waiver) entail comparable, if not the same, documentation.

The major difference between the national interest waiver and the other two categories is that in evidencing that a foreign national’s immigration will serve the national interest, adjudication of the petition will most likely focus on the needs of the United States and the foreign national’s ability to satisfy these needs. On the other hand, in the extraordinary ability or outstanding researcher context, adjudication will focus predominately on the foreign national’s superior qualifications. The greater the alien’s qualifications, of course, the more obvious it becomes that the United States will benefit from the services of the alien, which brings us back to the national interest waiver.

As opposed to the national interest waiver and the extraordinary ability petitions, the outstanding researcher does require an employer that is willing to act as the petitioner for the immigration visa. Moreover, the outstanding researcher petition also requires evidence that the candidate has three years’ experience as a researcher and has an “international” (as

opposed to “national or international”) reputation. With regard to the national interest waiver, there are no *per se* eligibility criteria; rather, a ruling by the Administrative Appeals Office established a three-prong test. Because the similarities outweigh the differences, referees can generally provide one letter that can be used for all three petitions. How these reference letters support a finding of extraordinary ability versus outstanding researcher versus national interest waiver can be addressed in the attorney’s cover letter or memorandum of law.

## **Conclusion**

The purpose of this article was to provide suggestions on how expert testimonials can be more effective in establishing extraordinary ability for the purposes of applying for EB-1 classification. Traditional reference letters are usually written as one expert to another, not as one expert to a lay adjudicator. The suppositions inherent in such a letter limit its impact, as it may not be clear to the adjudicator what the beneficiary did and why anyone should care about it. Moreover, traditional reference letters are not written specifically to address the USCIS evidentiary criteria for extraordinary ability. Therefore, by arming potential referees with guidance on the purpose of their testimonials, their support letter can be the cornerstone to an otherwise difficult-to-document case.

*The material contained in this article does not constitute direct legal advice and is for informational purposes only. An attorney-client relationship is not presumed or intended by receipt or review of this presentation. The information provided should never replace informed counsel when specific immigration-related guidance is needed.*

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