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April 5, 2011

Self-Sponsored Petitions for U.S. Permanent
Residence: National Interest Waiver Petitions

National Interest Waiver Petitions

Presenter

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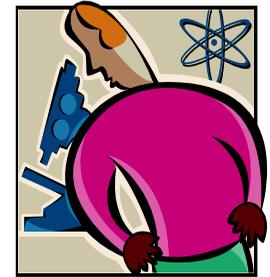
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Employment-Based Permanent Residence Refresher

- Three main employment-based (EB) categories:

- **EB-1** – extraordinary ability
 - outstanding researcher
- **EB-2** – advanced degree
 - exceptional ability
- **EB-3** – professionals, skilled workers



- Normally a three-step process:

Labor certification → I-140 petition → Adjustment of status

- Exceptions:

- Labor certification exemption: EB-1, EB-2 NIW, Schedule A
- Possibility of Concurrent I-140 / I-485 filings

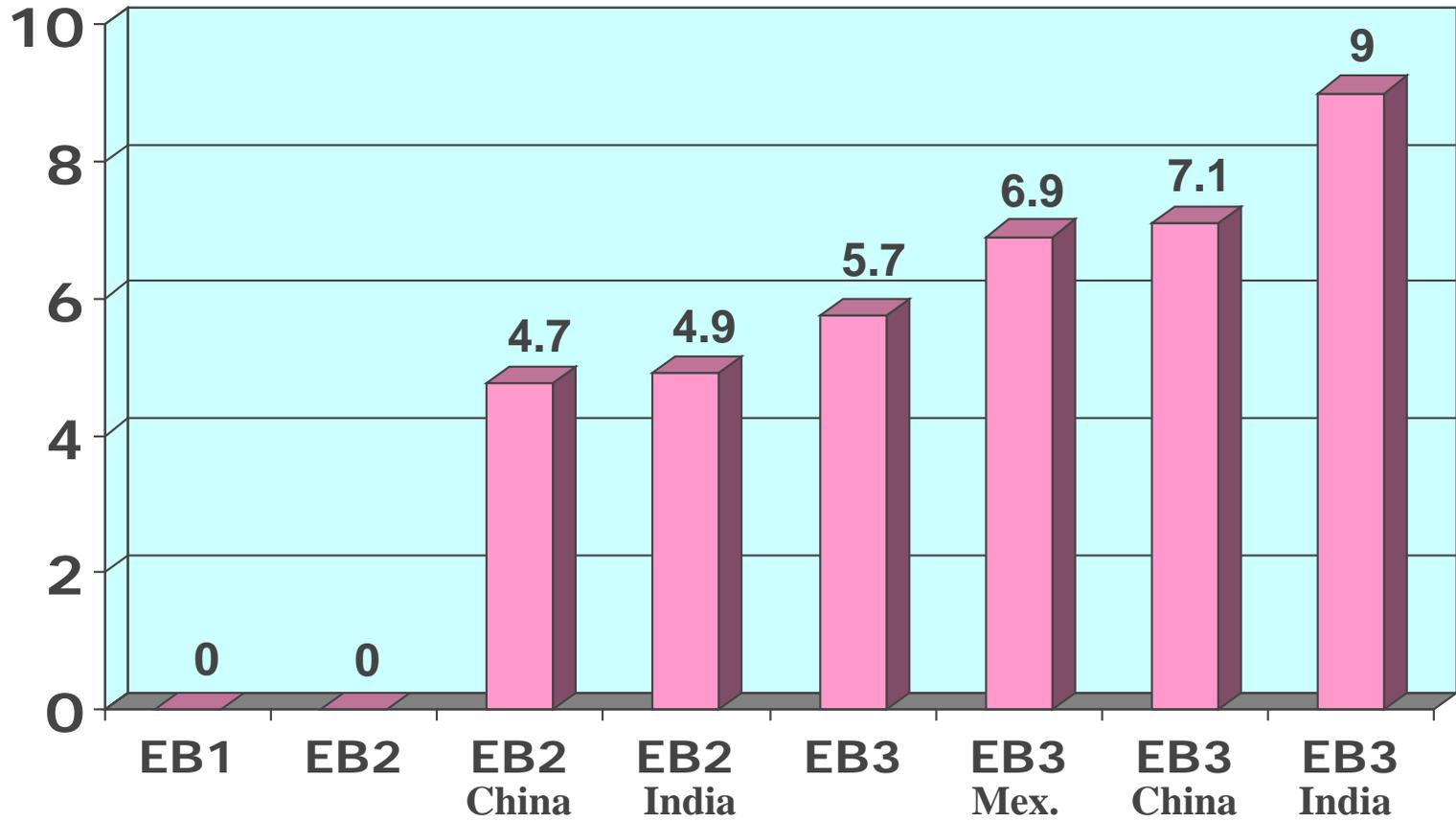
EB Sponsorship and Numerical Limits

- Normally requires employer sponsorship / job offer
- Categories allowing ***self-sponsorship***:
 - ***EB-1 extraordinary ability***
 - ***EB-2 National Interest Waiver***
- ***Numerical limits*** on EB Categories
 - ~ 40,000/year for EB-1, EB-2 & EB-3 each
 - Possibility of flow-down of unused numbers
 - Per country limit – 7% of worldwide limit
- Place in line determined by ***priority date*** (filing date of labor cert. or I-140 petition, if labor cert. exempt)
- **EB-1** – current for all countries of birth
- **EB-2** – excess demand for China- and India-born



Current Backlogs Due to PR Numerical Limits

■ Current wait in years, as of April 2011 (subject to change)



Cut-off date: None None 7/22/06 5/8/06 7/22/05 5/8/04 3/1/04 4/8/02

Overview of National Interest Waiver (NIW)

- EB-2 applicants normally must be sponsored by U.S. employer through permanent job offer and go through labor certification process before I-140 can be filed
- ***USCIS may waive both job offer & labor certification requirement if applicant can show that waiver would be in the U.S. national interest***
- Applicant must qualify for EB-2 through:
 - ***Advanced degree*** (includes BS + 5 years exp.), **OR**
 - ***Exceptional ability***
 - expertise significantly above that ordinarily encountered
 - At least 3 of 6 criteria



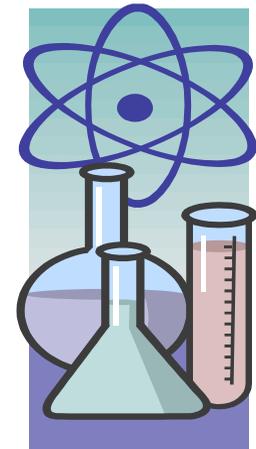
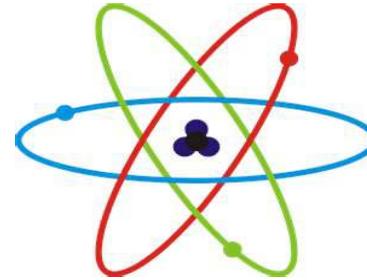
Criteria for Determining National Interest

- No criteria in statute or in regulations (unlike for EB-1 extraordinary ability and outstanding researcher)
- ***USCIS applies criteria of 1998***
administrative appeals case:
NY State Dept. of Transportation
- ***NYSDOT three-part test:***
 - Employment must be in area of ***substantial intrinsic merit***
 - Proposed benefit of work must be ***national in scope***
 - National interest would be adversely affected if labor certification were required, i.e.,
 - Must show applicant will serve national interest to ***substantially greater degree*** than US worker having same min. qualifications

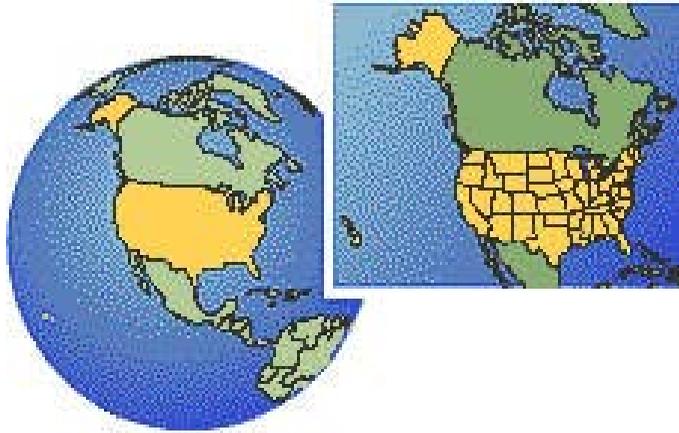


First Prong of *NYSDOT* – Field Of Intrinsic Merit

- Show *importance* of and *benefits* from field
- Identify *practical applications* whenever possible
- Almost any field might qualify – this prong not likely to be an obstacle to approval
- Merits of High Energy & Astro Physics that could be cited:
 - Advances fundamental understanding of matter/energy/universe
 - Advances technology
 - Practical applications (medical, technological, research, space, etc.)



Second Prong of *NYSDOT* – National Scope



- Employment *cannot benefit only employer or local economy*
- Job can be limited to a particular geographic area, as long as *benefit is national*
- This prong can be an obstacle to approval in some cases
- For research of national / international interest, strong case can be made on national scope of benefit
- Activity funded by US national government should be a favorable factor

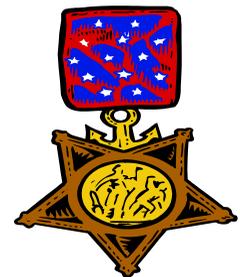
Third Prong of *NYSDOT* – Superior to Norm

- Typically hardest prong to satisfy & crux of case
- ***Focus is on foreign national.*** Must show:
 - Applicant will serve national interest to ***substantially greater degree*** than peers
 - Qualifications/accomplishments ***set applicant apart*** from peers and present “**significant benefit**” to field
 - ***Significant role in field***, to greater extent than peers
 - Key role in project not enough, if U.S. worker could play same role. Would substantial project disruption result?
 - Track record of ***demonstrable achievements***
 - ***Influencing/impacting field as a whole***
 - Don't just show shortage of U.S. workers in field; show ***inability to find comparably qualified workers***

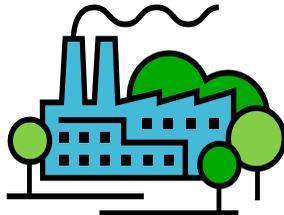
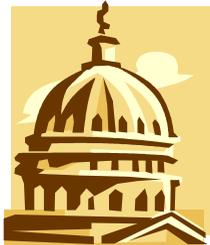
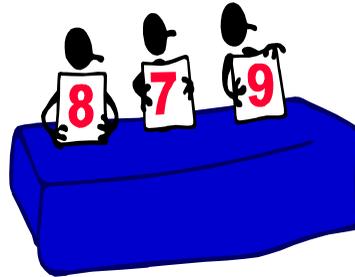


Factors & Evidence for Third *NYSDOT* Prong

- No set criteria but generally somewhat lower standard than EB-1 extraordinary ability
- Have flexibility but can use similar evidence as for EB-1, such as awards, articles, patents, citations, peer review, membership in selective organizations, media coverage, key roles, renown, etc.
- Need to focus evidence on how the individual's activities benefit society, with concrete examples of practical applications whenever possible
- Need to distinguish the applicant's qualifications & achievements from what would be typical of peers



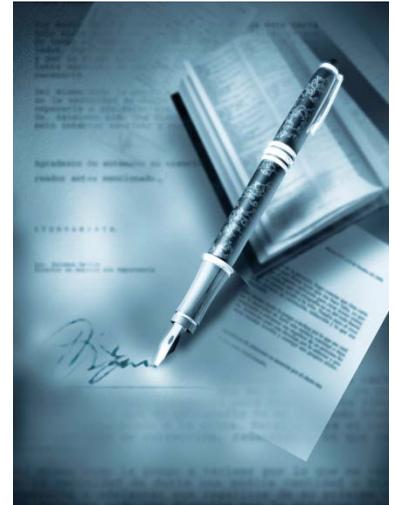
Evidentiary Issues for *NYSDOT* Third Prong



- Publications and collaborative research on large-scale projects
- Evidence of peer review
- Expert letters
 - Need to be detailed, specific
 - In laymen's language
 - Concrete examples
 - Explain significance/benefit
- Sources for letters
 - Government
 - Professional associations
 - Industry
 - "Independent" experts
 - Research colleagues
 - Employers, PhD advisers

NIW Filing with USCIS

- I-140 petition (with \$580 filing fee)
 - I-140 may be signed by applicant or employer
- Employee portion of labor cert. form
- Petition support letter
- Supporting documents/exhibits, e.g.:
 - Applicant's CV and educational credentials
 - Awards, patents
 - Articles by, and about, applicant
 - Information on journals in which articles appeared
 - Citation search results
 - Documentation of peer review
 - Conference speaking/organizing roles
 - Expert letters (may be with summary CVs/bios)
 - Background information



Timeline for NIW Case Processing



- Case preparation (incl. expert letters)
- USCIS I-140 Processing
 - Posted at 4 months, but variable
 - Add more time if there's a Request for Evidence (RFE)
 - Cannot premium process NIWs
- I-485 Adjustment of Status Processing
 - Posted at 4 months, but variable
 - Cannot premium process AOS
 - Can file I-140 & I-485 concurrently if priority date is current
 - concurrent EB-2 NIW/AOS filing currently possible for all applicants except those "chargeable" to China or India
 - Option to consular process IV



Pros and Cons of NIW Category

- Pros

- Avoids labor certification
- Allows self-sponsorship
- Generally not tied to particular employer
- Does not require same level of achievement/recognition as EB-1
- Flexibility on types of evidence



- Cons

- Need to show benefit that's national in scope
- EB-2 not current for China/India
- No premium processing
- Subjective / amorphous standards



EB-1A VISA CATEGORY

How to qualify for Legal Permanent Residence as an Extraordinary Ability Alien

Definition of “Alien”

An alien is a national of a country other than the U.S. or a “Foreign National”

Definition of “Statute”

The definition of or the description of the requirements for an EB-1A are found in the “statute” (or law)

EB-1A STATUTE [INA §203(b)(1)(A)]

- An alien who has extraordinary ability in the sciences, (arts, education, business, or athletics), which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation.
- Must continue work in the area of extraordinary ability.
- Foreign national's entry into the U.S. will substantially benefit prospectively the United States.

Definition of “Regulation”

The EB-1A requirements and the way you have to prove that you qualify for EB-1A are found in the “regulations”, which are standards imposed by the government agency which decides (or adjudicates) EB-1A petitions (USCIS)

EB-1A REGULATION 8 CFR §204.5(h)

The definition of extraordinary ability is:

“A level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor.”

Regulations Governing EB-1A

NOT REQUIRED

- An offer of employment
- A Labor Certification
- Employer sponsoring or petitioning

REQUIRED

- “Clear evidence” that he or she is coming to the United States to continue work in the area of the person’s expertise

Definition of “Evidence”

Information and documentation to convince a USCIS adjudicator that you qualify for the benefit you seek—EB-1A

Adjudicator = someone who decides your case

“Preponderance of the Evidence”

- Burden of persuasion is on YOU (applicant/petitioner)
- Adjudicator must decide if claim is **probably true** or **probably not true**



Critical Mass of Evidence

- Different evidence carries different weight
- For success, petition must reach critical mass of credible and probative evidence

Quality

Credibility

Primary vs. Secondary Evidence

PRIMARY

- Government looks for this type of evidence first
- More valued than secondary evidence

SECONDARY

- Second tier of less valued evidence
- Generally takes more of this type of evidence to meet burden

Primary Evidence of EB-1A

- Sustained national or international acclaim
- Achievements have been recognized in the field

e.g.

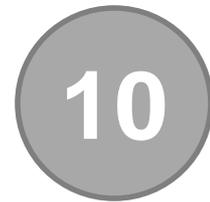
**Nobel
Prize**

**Fields
Medal**

OR

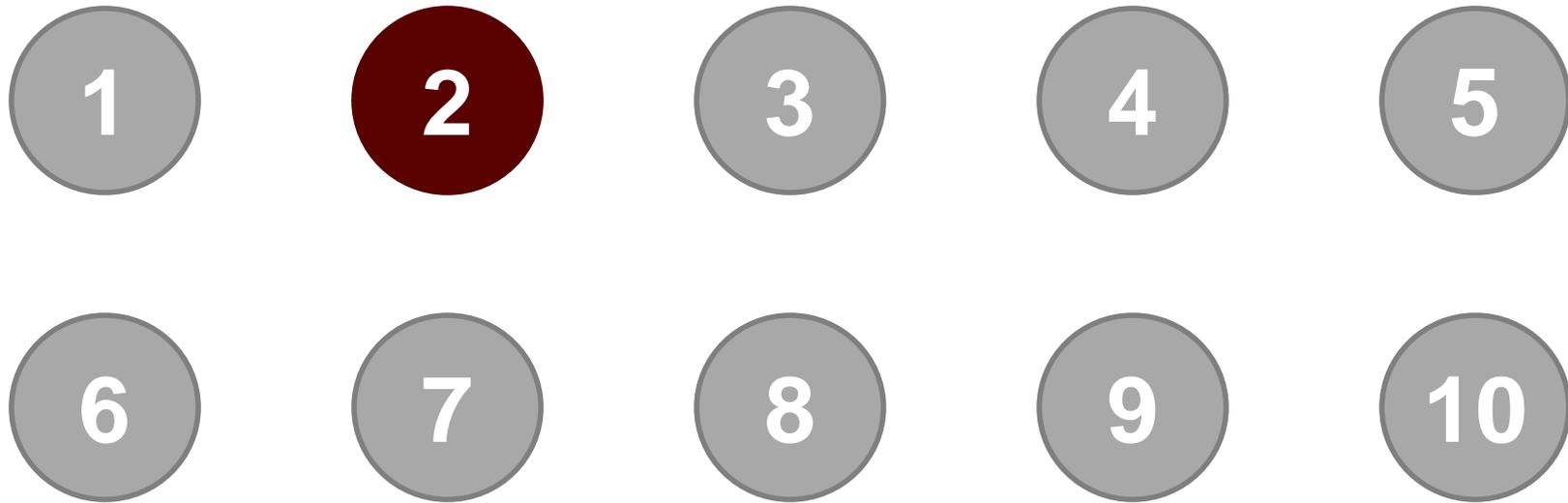
At least three of the ten categories of secondary evidence

10 Categories of Secondary Evidence



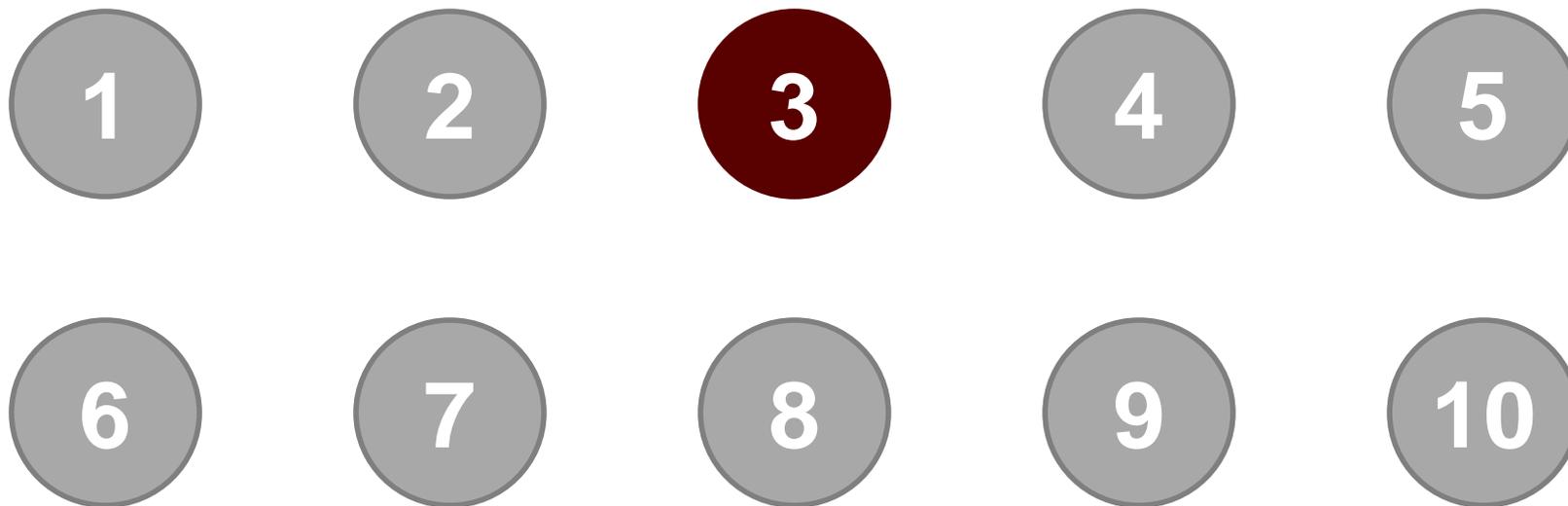
Documentation of receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor.

10 Categories of Secondary Evidence



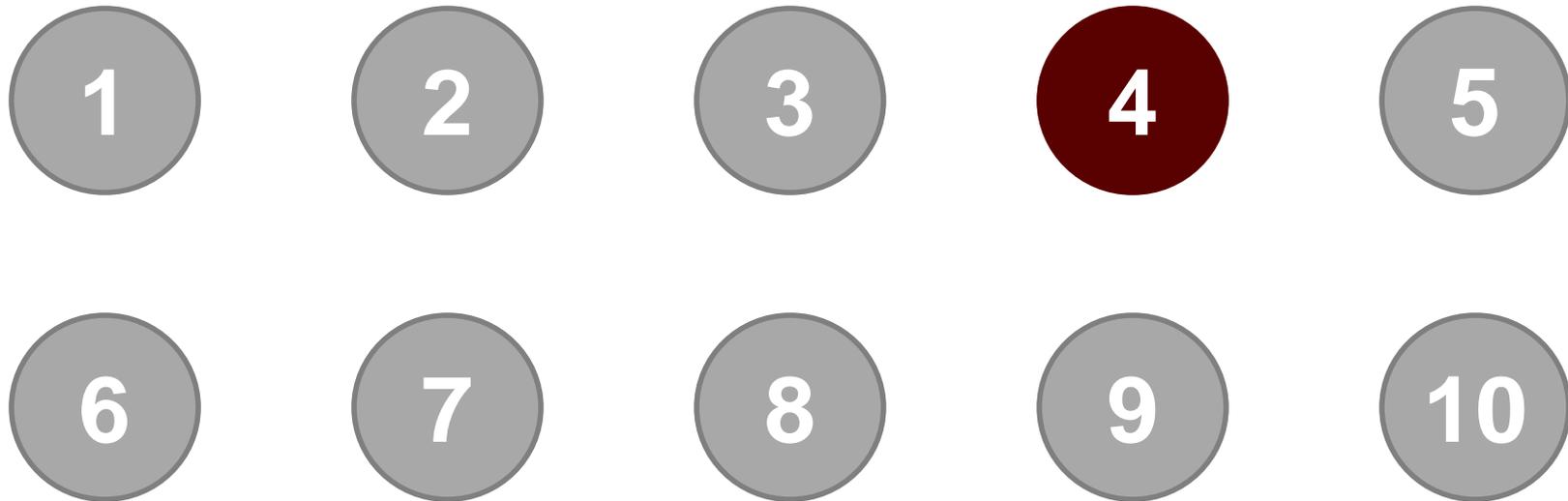
Documentation of membership in associations in the field for which classification is sought, which require outstanding achievements of their members.

10 Categories of Secondary Evidence



Published material about the foreign national in professional or major trade publications or other major media relating to the foreign national's work in the field for which classification is sought.

10 Categories of Secondary Evidence



Evidence of the foreign national's participation as a judge of the work of others in the same or an allied field of specialty for which classification is sought.

10 Categories of Secondary Evidence



Evidence of the foreign national's original scientific, scholarly, (artistic, athletic, or business) related contributions of major significance in the field.

10 Categories of Secondary Evidence

1

2

3

4

5

6

7

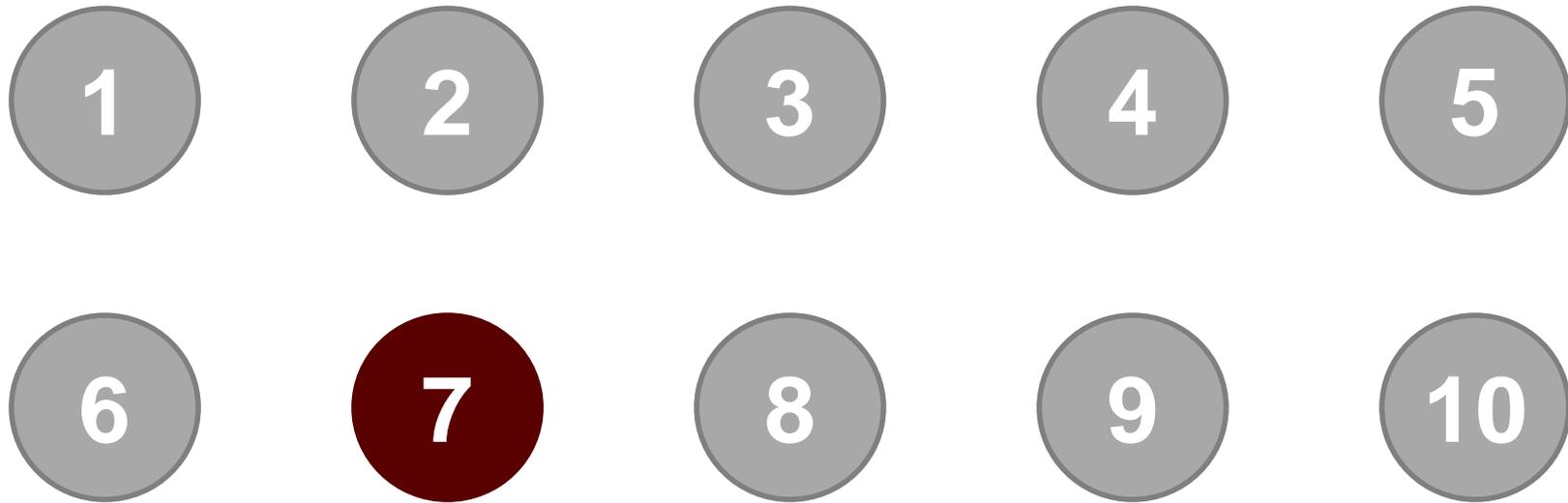
8

9

10

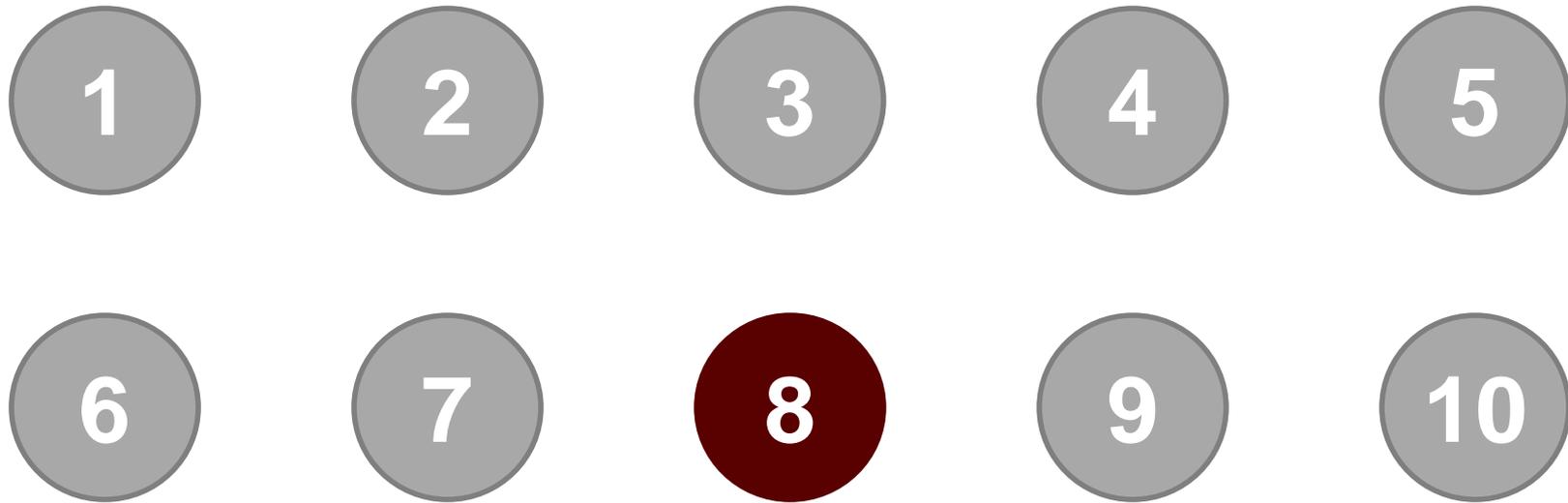
Evidence of the foreign national's authorship of scholarly articles in the field in professional or major trade publications or other major media.

10 Categories of Secondary Evidence



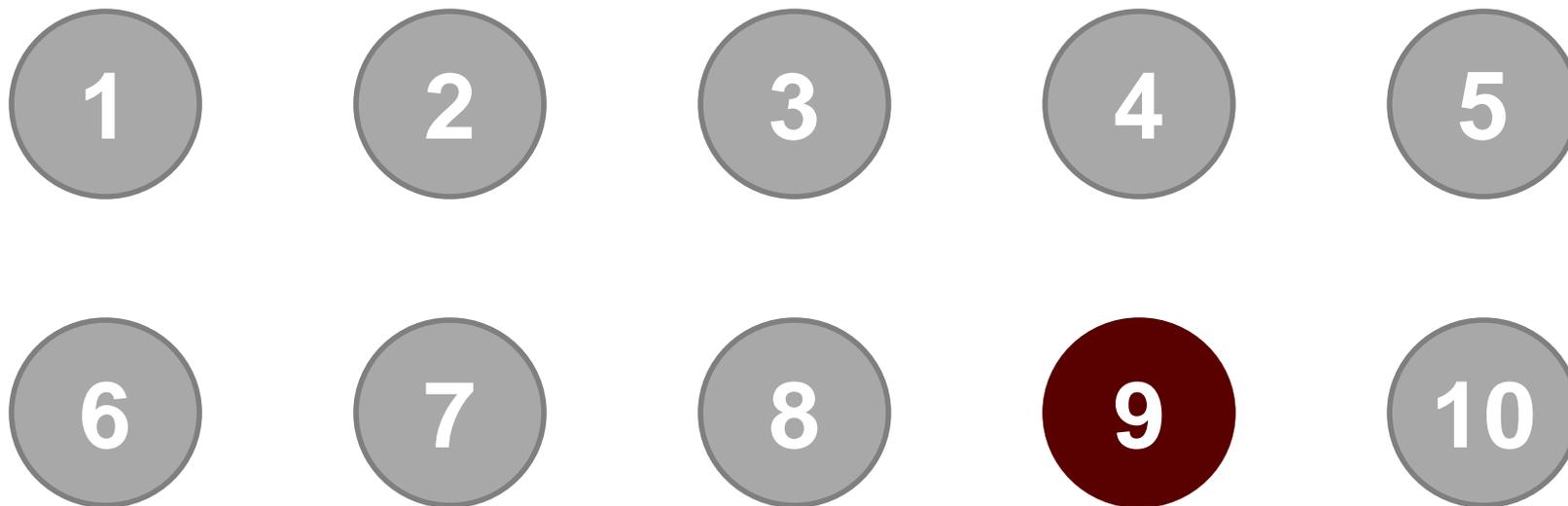
Evidence of participation in artistic exhibitions.

10 Categories of Secondary Evidence



Evidence that the foreign national has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.

10 Categories of Secondary Evidence



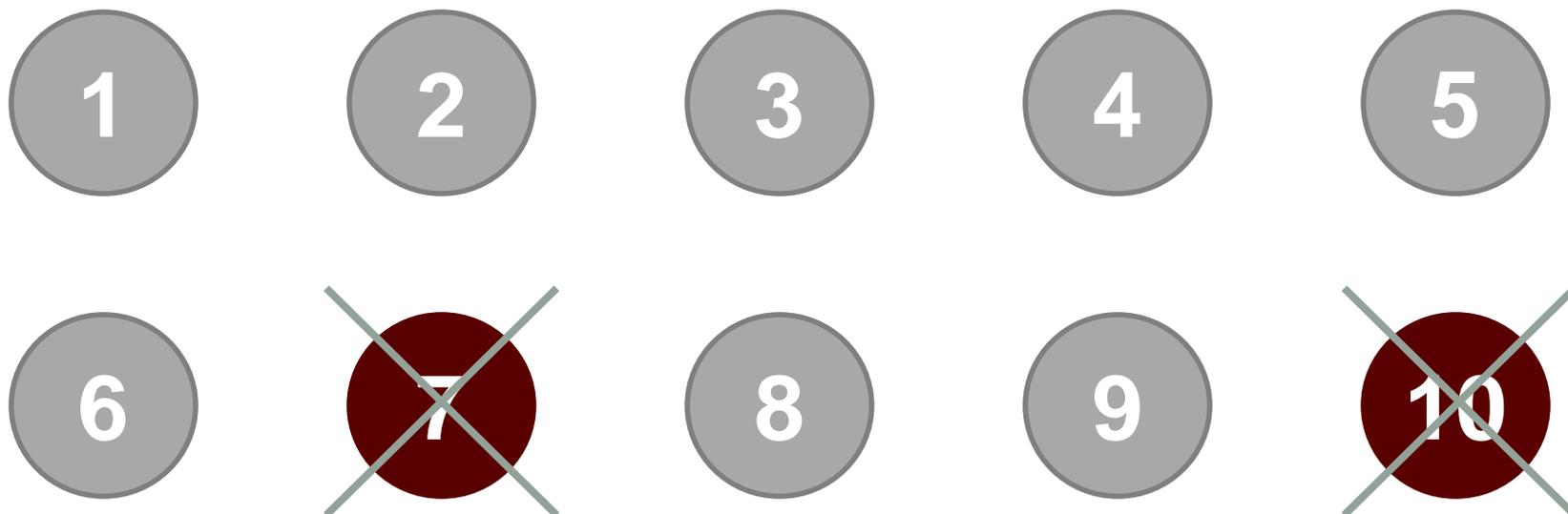
Evidence that the foreign national has commanded a high salary or other significantly high remuneration for services in relation to others in the field.

10 Categories of Secondary Evidence



Evidence of commercial success in the performing arts.

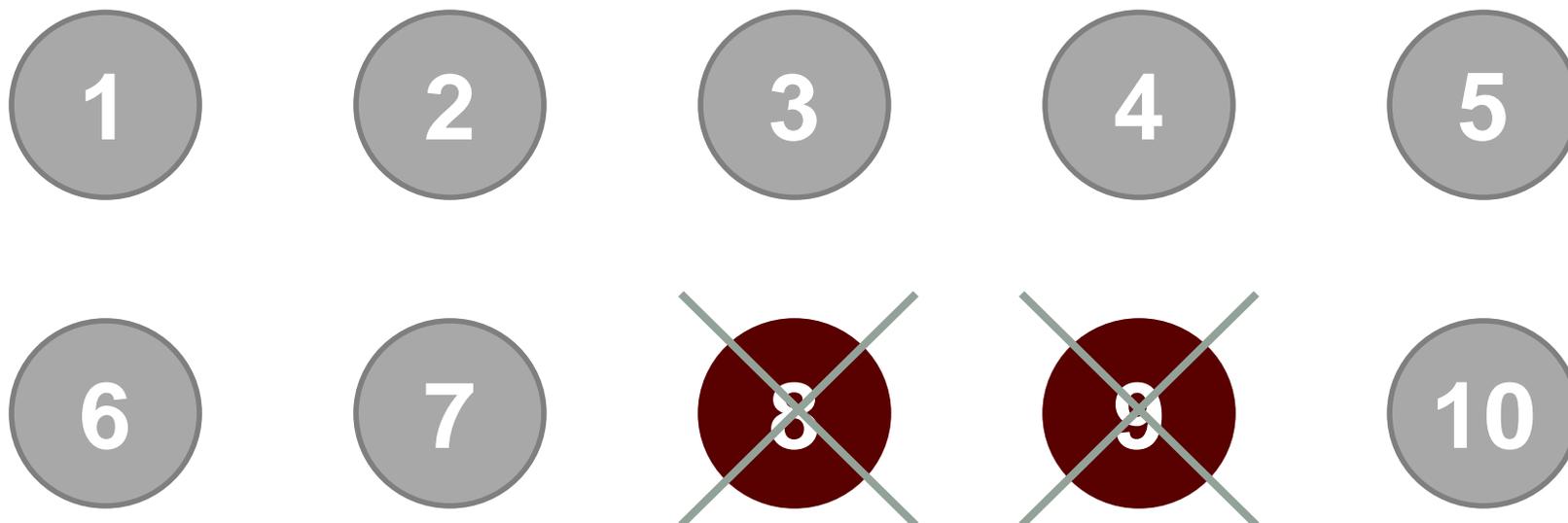
10 Categories of Secondary Evidence



- 7. Evidence of participation in artistic exhibitions
- 10. Evidence of commercial success in the performing arts

NOT APPLICABLE TO SCIENTIFIC COMMUNITY

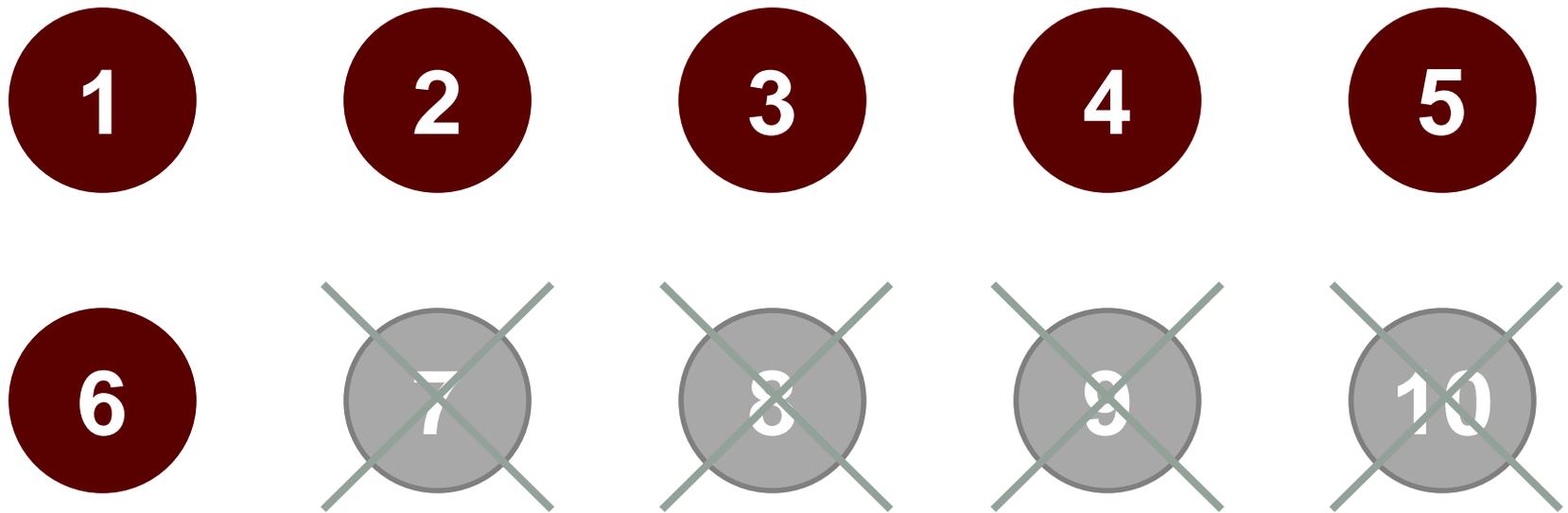
10 Categories of Secondary Evidence



8. Evidence that the foreign national has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.
9. Evidence that the foreign national has commanded a high salary or other significantly high remuneration for services in relation to others in the field.

NORMALLY AVAILABLE TO ONLY THE MOST SENIOR OF SCIENTISTS

Focus on 6 Categories



Of the ten types of evidence from which to gather support, only eight could possibly pertain to scientists and only six are relevant to most scientists.

“Catch-all” Addendum

The regulations add a catch-all statement:

“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.”

“Catch-all” Addendum

**Submission of comparable evidence is
not recommended**

WHY NOT?

Since at least six of the categories of secondary evidence clearly are available to scientists, it is nearly impossible for a scientist to invoke this catch-all.

UNLESS...

You can define the category of science in which you work as different from other fields of science.

6 Categories of Secondary Evidence

- 1 Documentation of receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor.



Do not include nominations or student prizes

- Being nominated for a prize will generally not carry significant weight --- you must win the prize!
- The weight given student prizes is negligible

6 Categories of Secondary Evidence

1

Documentation of receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor.



A NOTE ON OBSCURITY:

- Many science prizes are obscure to the general public
- Provide documentation of the award of prize to you AND:
 - Value and importance of prize in scientific community
 - Importance of the organization awarding the prize

6 Categories of Secondary Evidence

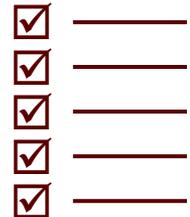
2

Documentation of membership in associations in the field for which classification is sought, which require outstanding achievements of their members.



Association Significance

Membership Criteria



Evidence of the significance of the association and evidence of the membership criteria of the association must be submitted in addition to the evidence of membership.

6 Categories of Secondary Evidence

3

Published material about the foreign national in professional or major trade publications or other major media relating to the foreign national's work in the field for which classification is sought.

Relevance is key

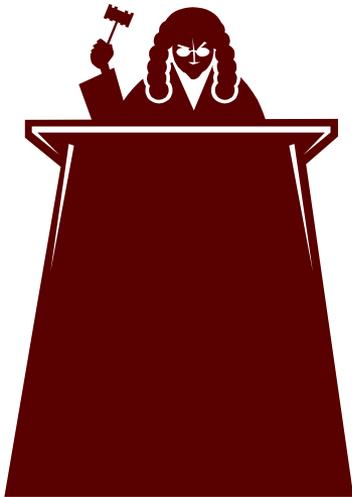
- Published material must:
 - Focus on applicant
 - Relate to the work in specific EB-1 field
- No human interest stories
- No non-work related articles



6 Categories of Secondary Evidence

4

Evidence of the foreign national's participation as a judge of the work of others in the same or an allied field of specialty for which classification is sought.



Peer-review panels

- Includes serving on peer-review panels for journals screening articles for publication
 - Once for one journal = OK
 - Multiple times for multiple journals = BETTER
- Supported with laudatory letter from editor who requested your participation
- Add documentation of the prestige of the journal

6 Categories of Secondary Evidence

- 5** Evidence of the foreign national's original scientific, scholarly, artistic, athletic, or business related contributions of major significance in the field.
- 6** Evidence of the foreign national's authorship of scholarly articles in the field in professional or major trade publications or other major media.

USCIS Adjudicator's Field Manual states:

“The most persuasive evidence in this regard is unsolicited, contemporaneous documentation that shows that independent experts or organizations in the field consider the published material to be significant or that the beneficiary's findings or methodologies have been widely cited or adopted by the industry or professional community at large.”

(Adjudicator's Field Manual, Section 22.2(i)(1)(E)(6))

6 Categories of Secondary Evidence

5

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

6

Evidence of the foreign national's authorship of scholarly articles in the field in professional or major trade publications or other major media.



- Multiple articles no longer sufficient

- Prove value of articles by proving:

- ✓ Value of peer-reviewed journals

- ✓ Frequency of citation of articles

- ✓ Context and importance of findings and conclusions

- String citations with no narrative discussion are worth less than citations with narrative discussion of the work of the author

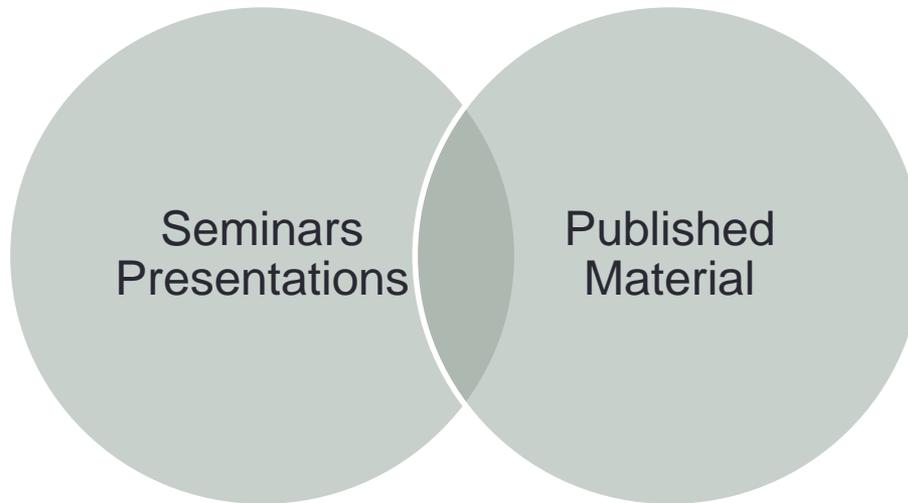
- Testimonial letters by leading figures in your field are important



6 Categories of Secondary Evidence

- 5** Evidence of the foreign national's original scientific, scholarly, artistic, athletic, or business related contributions of major significance in the field.
- 6** Evidence of the foreign national's authorship of scholarly articles in the field in professional or major trade publications or other major media.

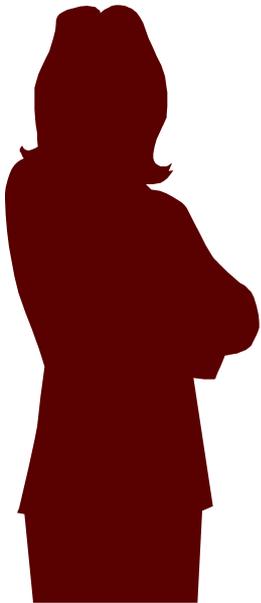
Category 5
Original
Contributions



Category 6
Scholarly
Articles

Presentation of Evidence

The USCIS Adjudicator



- Intelligent and skeptical layman
- Will not know any physics
- Will not jump to positive conclusions in your favor
- Will assume nothing
- Will require you to prove everything

New Adjudication Process for EB-1A

New two step process being employed by USCIS to adjudicate all EB-1A petitions:

Step 1 **Eligibility**

Satisfy for petition to be considered

Step 2 **Approvability**

Satisfy for petition to be approved

New Adjudication Process for EB-1A

Step 1

- Is evidence submitted in at least 3 of 10 approved categories?
- Is evidence credible and probative?



YES



NO

Step 2

- Does evidence as a whole establish applicant as extraordinary ability alien?

NO



DENIED



YES

APPROVED

New Adjudication Process for EB-1A

In addition to three types of approved evidence, you must also establish:

A

Sustained national or international acclaim

Prove acclaim and prove that it has continued

B

Recognized as top of your field

Prove achievements in your field established that you are considered one of the small percentage of people at the very top of your field

Presentation of Evidence

Level of proof required

Do not assume that any claim you make will be accepted or valued

Example: Testimonial letter from leader in the field

- ❑ Must prove that letter writer is a leader in the field
- ❑ Include a complete curriculum vitae of the letter writer
- ❑ Document his/her standing in the field

Presentation of Evidence

“Shows great potential”

- ❑ Common phrase in academic testimonial letters written for junior people in field
- ❑ Potential in this context is the **KISS OF DEATH**
- ❑ Achievement and accomplishment!

Presentation of Evidence

Ideal testimonial letter would be:

“more brilliant than I am and has already accomplished more than I did at the comparable stage of my career”



As you will not get that, focus on getting:

Unambiguous and unqualified positive assessment of significant accomplishments and their impact on the field of science and on the work of other scientists

A Caveat

All scientists publish multiple papers

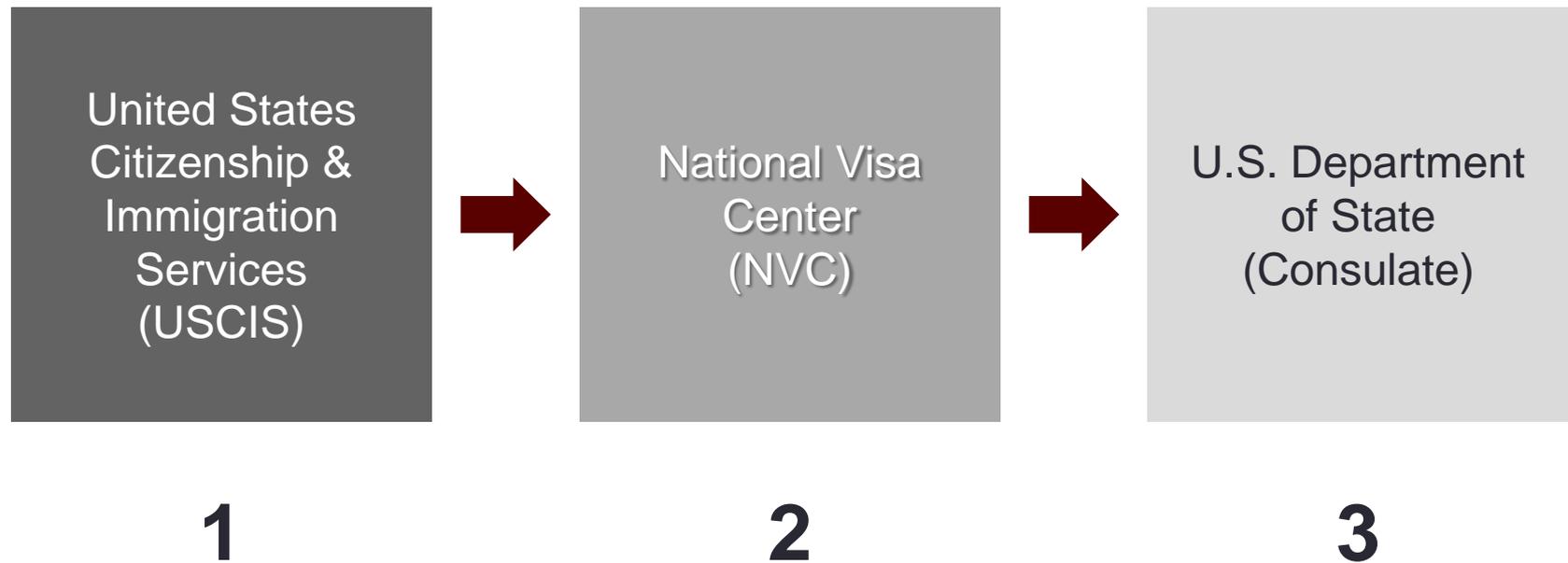
- Growing cynical view held by USCIS adjudicators
- Publication in scientific journals is “ordinary” and not evidence of extraordinary ability
- Evidence of quality and significance of work is key

TWO PATHS TO LEGAL PERMANENT RESIDENCE

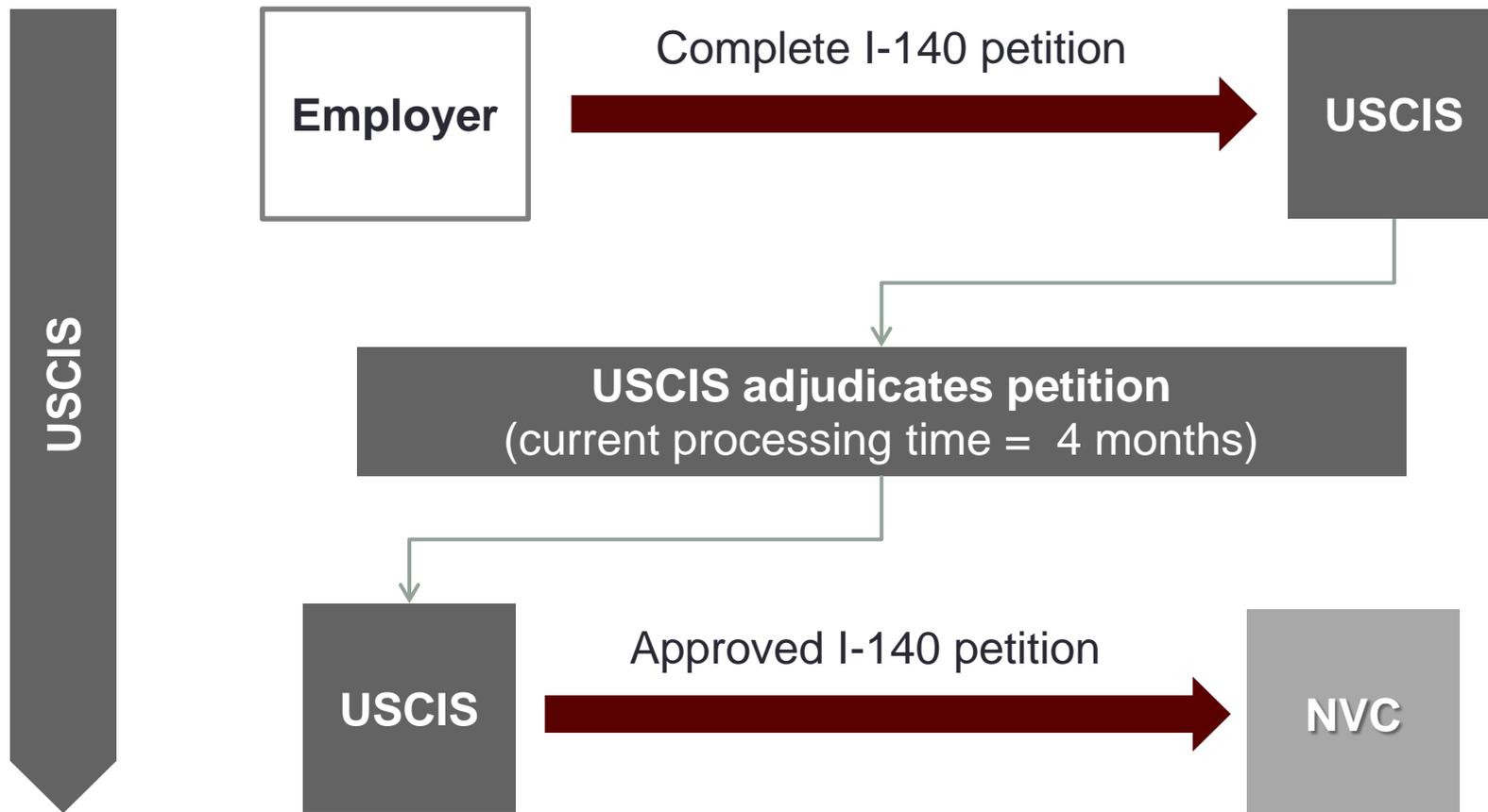
Immigrant Visa Processing vs.
Adjustment of Status

Immigrant Visa Processing

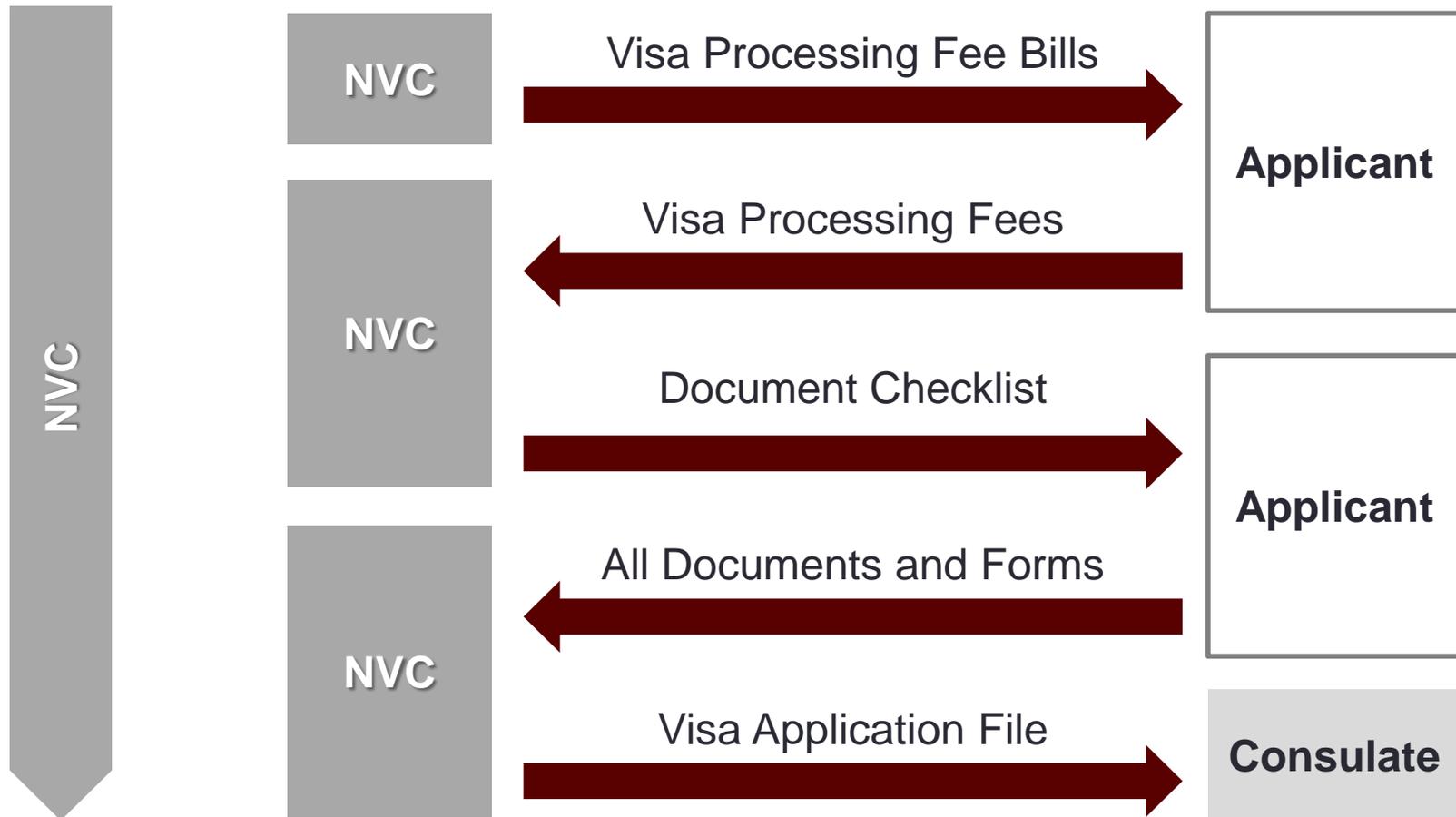
- Visa Processing is sequential



Immigrant Visa Processing



Immigrant Visa Processing



Immigrant Visa Processing

NVC

Document Checklist

Applicant

Biographic Documents

- Birth certificate
- Marriage certificates
- Divorce decrees
- Death certificates
- Adoption certificates

Military Service Records

- Confirmation of military service for any country in which service was performed

Court and Prison Records

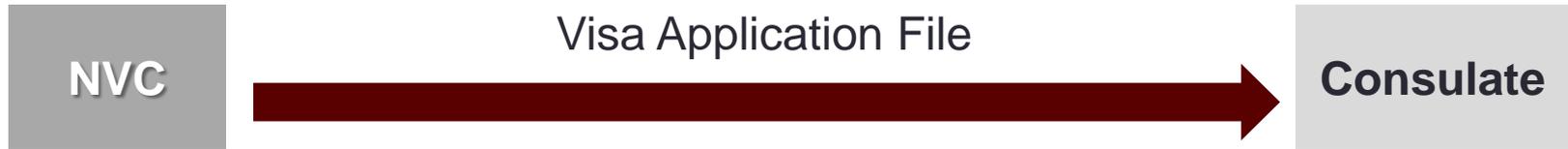
- Complete records for any and all criminal convictions
- Must include complete information on circumstances of case and final disposition

Police Clearance Letters

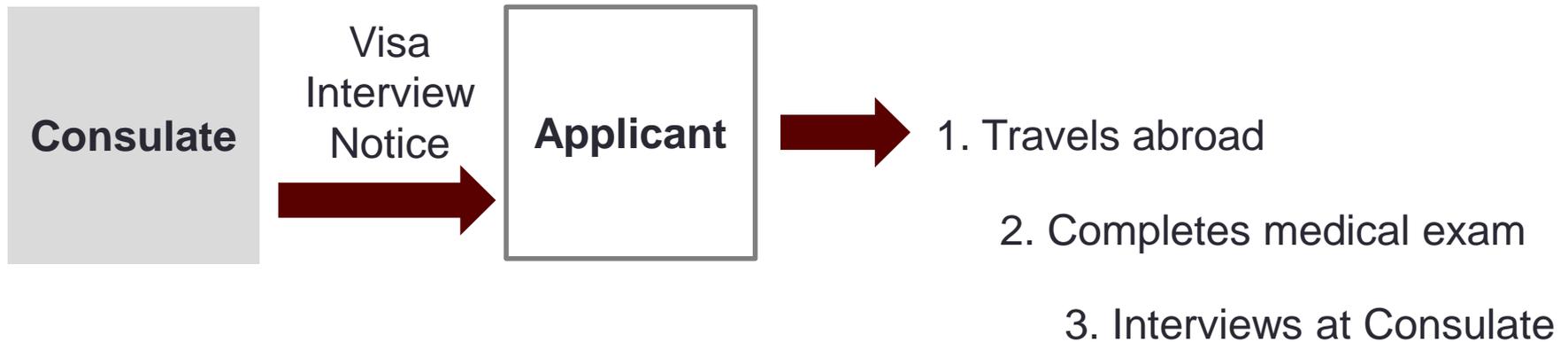
- Police Clearance Letters from **ALL** countries of residence from age of 16 to present

Original or Certified Copies of ALL documents

Immigrant Visa Processing



If visa number is available:



Immigrant Visa Processing

AFTER THE INTERVIEW:

Consulate

- Processes application
- Makes determinations on waivers and second interviews
- Issues decision:

*Additional documentation/interview required or
immigrant visa issued or denial*

A Brief Discussion of Waivers

Reasons a waiver application may be required include:

Criminal
conviction

Lied during
admission to
U.S.

Lied in prior
application

Medical Issue

Adjustment of Status

If visa number is available:

Concurrent Filing of Visa Petition and Applications

I-140 Visa Petition filed by Employer

Adjustment of Status Application Package

I-485 Adjustment of
Status

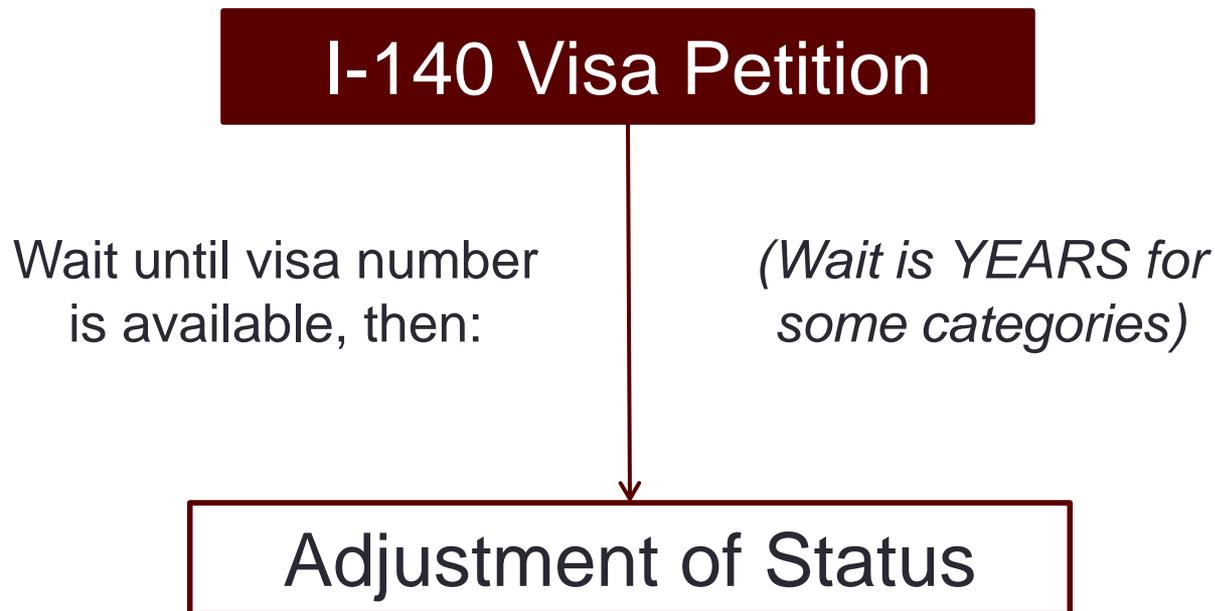
I-131 Advance
Parole

I-765 Employment
Authorization

Any Required Waiver Applications

Adjustment of Status

If visa number is not available, sequential filing:



Adjustment of Status

Eligibility for Adjustment of Status

✓ **Valid Entry**

- Inspected and admitted or paroled into U.S.

✓ **Maintenance of Status**

- Maintained lawful nonimmigrant status

✓ **Employment Authorization**

- Never worked in U.S. without USCIS authorization

✓ **Visa Number Available**

Adjustment of Status

Section 245(k) Exceptions for Employment Based Adjustment of Status applicants

✓ **Maintenance of Status**

- Allows up to 180 days out of status

✓ **Employment Authorization**

- Allows up to 180 days of employment without authorization

Adjustment of Status

BARS FROM U.S. FOR UNLAWFUL PRESENCE

- 3 year bar triggered by departure after 180 days of unlawful presence
- 10 year bar triggered by departure after 365 days of unlawful presence

NOTE: F-1 or J-1 status listed as D/S = not unlawful presence

Exit and successful reentry wipes all violations

Advantages/Disadvantages

Adjustment of Status

- ❑ Does not require travel time or expense

Immigrant Visa Processing

- ❑ Requires travel and a minimum of one week abroad for medical exam, interview, and wait for return of passport
- ❑ Travel and wait abroad required for every family member applying for immigrant visa

Advantages/Disadvantages

Adjustment of Status

- ❑ Administrative delays do not affect applicant's day-to-day life

Immigrant Visa Processing

- ❑ Administrative delays may require applicant to extend trip abroad or to make an additional trip abroad for second interview or to receive immigrant visa

Advantages/Disadvantages

Adjustment of Status

- ❑ Police clearance letters not required

Immigrant Visa Processing

- ❑ Police clearance letters required from every country of residence from age 16 to present

Advantages/Disadvantages

Adjustment of Status

- Military records not required

Immigrant Visa Processing

- Certified copies of all military records required

Advantages/Disadvantages

Adjustment of Status

- ❑ Waiver applications can be submitted simultaneously with Adjustment of Status application

Immigrant Visa Processing

- ❑ Waiver applications may only be submitted upon request of U.S. Consul after a determination of ineligibility for a visa and eligibility for a waiver

Advantages/Disadvantages

Adjustment of Status

- No appeal from denial, but applicant can renew application for Adjustment of Status in removal proceedings while remaining in the U.S.

Immigrant Visa Processing

- No appeal from denial

Advantages/Disadvantages

Adjustment of Status

- ❑ Adjudication is at the discretion of USCIS
- ❑ Discretion cannot be exercised arbitrarily; there are rules for exercise of discretion

Immigrant Visa Processing

- ❑ Adjudication is not discretionary

Advantages/Disadvantages

Adjustment of Status

- ❑ Currently, administrative processing times for employment based visa petitions and concurrent Adjustment of Status applications are less than Immigrant Visa Processing sequential processing time

Immigrant Visa Processing

- ❑ Historically, processing time for Adjustment of Status can be delayed even with visa numbers available, but Immigrant Visa Processing time remains fairly constant

Advantages/Disadvantages

Adjustment of Status

- ❑ Applicant can be represented by counsel at the interview

Immigrant Visa Processing

- ❑ Applicant is not entitled to the presence of counsel at the interview

Advantages/Disadvantages

Adjustment of Status

- ❑ Portability to another employer after 180 days
- ❑ Retain your priority date, visa category and right to adjust status

Immigrant Visa Processing

- ❑ No portability to different employer while application is pending

Of minimal importance as EB-1-A does not require a specific job offer

Advantages/Disadvantages

Adjustment of Status

- ❑ If visa number retrogresses after Adjustment of Status filing, application remains pending and dependent family members retain the right to work and travel

Immigrant Visa Processing

- ❑ If visa number retrogresses after Immigrant Visa filing, just a delay with no interim benefits

Advantages/Disadvantages

Adjustment of Status

- ❑ If visa number retrogresses after Adjustment of Status filing, child approaching 21 years of age is protected and will not age out

Immigrant Visa Processing

- ❑ If visa number retrogresses after Immigrant Visa filing, child approaching 21 years of age is out of luck

Advantages/Disadvantages

Adjustment of Status

- ✓ 90% of applicants opt for Adjustment of Status

Immigrant Visa Processing