



Practice Tip: Building the Record for Employment-Based Petitions

The American Immigration Council wants to encourage business immigration practitioners to consider using litigation as a tool to achieve client objectives. When you keep litigation in mind from the outset of a case, your filing is likely to be stronger. And if USCIS does not approve your client's petition, this Practice Tip will help you lay a solid foundation to challenge the denial in federal court and increase the likelihood that the Immigration Council will agree to co-counsel your case.

Before you can challenge the denial of a visa petition in federal court, you must have a strong administrative record. Building that record must begin before you file the visa petition. How do you determine what documentation the employer needs to provide? Start with the basics:

- **What are the statutory requirements?** For example, the O-1 nonimmigrant classification for extraordinary ability lists certain eligible fields with a standard of "sustained national or international acclaim," but carves out a different standard for motion picture and television productions.
- **What do the regulations say?** In the O-1 example, USCIS has provided definitions of "extraordinary ability" and "extraordinary achievement" in the various fields and has identified particular types of documentation to establish eligibility in each field.
- **What if the statute conflicts with the regulations?** For example, in the L-1 classification, one section of the regulations incorrectly identifies a specialized knowledge job as one "requiring specialized knowledge." Yet the INA has less restrictive language—a job "involving specialized knowledge"—which a subsequent section of the regulations also uses. In such cases, direct the agency to the statutory language and provide the documentation that meets the statutory requirement.
- **Has USCIS issued any applicable policy guidance?** Be sure to check the Adjudicator's Field Manual (AFM) and the USCIS Policy Manual (which is being issued piecemeal and replaces the AFM on those topics the Policy Manual has addressed). You should also search AILA's website for other relevant policy memoranda, precedent decisions by the USCIS Administrative Appeals Office (AAO), or AAO decisions that USCIS has directed be adopted as policy. While not always a model of clarity, to the extent that these sources elaborate on the agency's interpretation of certain classification requirements, they can assist you in confirming what criteria must be met and what documentation will fulfill these criteria.
- **Has USCIS issued a Request for Evidence template?** These templates also can be useful for checking whether you have addressed each criterion. AILA and the American Immigration Council's comments on draft templates also are a great source of information about the requirements and legal arguments, if needed, for why the documentation submitted is sufficient and why certain documentation that the petitioner may not have is not required.

For more information regarding the [Council's screening criteria for co-counseling business immigration cases](#), contact Leslie Dellon, the Council's Business Litigation Fellow, at ldellon@immcouncil.org.