

MISSING THE POINT[S]: “RAISE-ING” A BIAS AGAINST EXTRAORDINARY TALENT IN THE ARTS

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I. INTRODUCTION

“Why should I waste my talent and my work ethic on a lowly Specialty Occupation visa when I really, I should have an Extraordinary Ability visa...” Jessica Huang, the mother in ABC’s sitcom *Fresh Off the Boat*¹ opines to her roommate in a flashback.² “For someone who possesses superior talents who enriches our nation,” she reads off of an immigration pamphlet.³ When Jessica’s roommate asks what kind of superior talents she has, Jessica answers, “What kind don’t I have? Acting, singing, puppeteering!”⁴ Later, a bold Jessica Huang walks up to an official at the immigration office and proceeds to audition for her Extraordinary Ability visa.⁵ The immigration officer bluntly rejects

¹ *Fresh Off the Boat* is an American sitcom loosely based off the memoir of Chef Eddie Huang. The comedy follows an immigrant Taiwanese family, the Huangs, as they attempt to assimilate into American society and culture and pursue the American Dream. More information about the show is available here: <http://abc.go.com/shows/fresh-off-the-boat>.

² *Fresh Off the Boat*: How to be an American (ABC television broadcast, Jan. 3, 2017).

³ *Id.*

⁴ *Id.*

⁵ *Fresh Off the Boat*: How to be an American (ABC television broadcast, Jan. 3, 2017).

Jessica's off-key rendition of a Fleetwood Mac song as proof of her extraordinary ability and plainly informs her, "In order to qualify for an Extraordinary Ability visa, you need to prove this is your paid profession, awards, letters from noteworthy peers, articles written about you."⁶ Amidst the fictional portrayal of Jessica Huang's journey to becoming an American, one aspect is grounded in reality – the Extraordinary Ability visa is a legitimate visa awarded to immigrants who can prove their exceptional abilities in their chosen professional domain through awards, professional publications, and letters from noteworthy peers, among other criteria.⁷

The importance American society places on the arts is prevalent throughout its history from its presence in the Copyright Clause⁸ to opening the door for extraordinary individuals in the arts as allowed in the Immigration Act of 1990.⁹ The current immigration policy specifically sets aside employment visas for extraordinary individuals in the arts.¹⁰ "Extraordinary ability" immigrant visas are a special classification under the broad immigrant visa category.¹¹ Extraordinary ability visas (also known as EB-1 or E-1 visas) are employment-based visas that allow the holder to immigrate to the U.S. based on the merits of their job skills, education, work experience, and other qualifying factors unique to each employment-based category or preference.¹²

While EB-1 applicants have generally been given deference in their own specific category, the new immigration plan, known as the Reforming American Immigration for Strong Employment Act or RAISE Act, under the Trump administration, proposes to integrate the EB-1 category under a catch-all merit-based immigration system.¹³ The Trump administration's principles and policies on immigration explicitly states an initiative to establish "a merit-based immigration system that protects U.S. workers and taxpayers, and ending chain migration, to promote

⁶ *Id.*

⁷ 8 C.F.R. § 204.5 (Lexis Advance through the August 2, 2017 issue of the Federal Register. Pursuant to 82 FR 8346 ("Regulatory Freeze Pending Review"), certain regulations will be delayed pending further review. See Publisher's Note under affected rules. Title 3 is current through September 8, 2017); *see also* 8 U.S.C.S. § 1153(b)(1)(A).

⁸ Art. 1, § 8, cl 8, (granting Congress the power to "promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.").

⁹ Immigration Act of 1990, 1990 Enacted S. 358, § 121, 104 Stat. 4987-90 (1990) (setting aside 40,000 of the 140,000 employment-based visas for "aliens who are member of the professions holding advanced degrees or aliens of exceptional ability").

¹⁰ *Id.*

¹¹ 8 U.S.C.S. § 1153(b)(1)(A); *see also* 8 U.S.C.S § 1151(d).

¹² *Immigration Terms and Definitions Involving Aliens*, INTERNAL REVENUE SERV., <https://www.irs.gov/individuals/international-taxpayers/immigration-terms-and-definitions-involving-aliens> (last visited Oct. 16, 2017).

¹³ Reforming American Immigration for Strong Employment Act, S.354, 115th Cong. (as introduced to the Senate, Feb. 13, 2017).

financial success and assimilation for newcomers.¹⁴ Specifically, the merit-based immigration system will “establish a new, points-based system for the awarding of Green Cards (lawful permanent residents) based on factors that allow individuals to successfully assimilate and support themselves financially.”¹⁵ The points systems awards points for applicants based on their age, education level, English language proficiency, extraordinary achievements in either winning a Nobel Prize or an Olympic medal and job offers and range of salary. Only applicants who score over thirty points will be invited to apply for immigration.¹⁶

Despite the relative straightforwardness of the proposed merit-based point system, the proposed points system promulgated by the RAISE Act attempts to force all employment-based immigrants under one broad umbrella, without any consideration for industry-specific needs or special achievements. While this broad standard of “extraordinary talent” may work for individuals in more structured industries such as the sciences, where achievements and recognition are more easily quantified, it ignores the industry-specific criteria and accomplishments of individuals in the evolving and emerging creative fields such as content creators. For certain industries, such as film, television, and digital media, the premium point-awarding accomplishments like a post-secondary degree or a Nobel Prize are not necessary indicators of extraordinary skill, accomplishment, or ability. In effect, the RAISE Act’s system de-prioritizes professionals who work in the arts and disregards the individuals whose works help shape, create, and disburse American culture into the world.

Given these considerations, the RAISE Act’s generic requirements which bar highly-skilled and talented content creators¹⁷, specifically in film and television, would not only negatively impact Hollywood – an industry already lacking in diversity – but also adversely impact the American film and television economy as a whole. As such, this Note proposes that in order to maintain the regard the immigration system has

¹⁴ *President Donald J. Trump’s Letter to House and Senate Leaders & Immigration Principles and Policies*, THE WHITE HOUSE, OFF. OF THE PRESS SEC’Y (Oct. 8, 2017), <https://www.whitehouse.gov/the-press-office/2017/10/08/president-donald-j-trumps-letter-house-and-senate-leaders-immigration>.

¹⁵ *Id.*

¹⁶ Reforming American Immigration for Strong Employment Act, S.354, 115th Cong. (as introduced to the Senate, Feb. 13, 2017).

¹⁷ Dictionary.com defines “content” as “something that is to be expressed through some medium, as speech, writing, or any of various arts.” (*Content*, Dictionary.com, <http://www.dictionary.com/browse/content>, (last visited Jan. 13, 2018)). The Pew Research Center officially defines “content creation” as “material people contribute to the online world”. (Amanda Lenhart and Deborah Fallows, et. al., *Content Creation Online*, PEW RESEARCH CENTER, <http://www.pewinternet.org/2004/02/29/content-creation-online-2/> (last visited Jan. 13, 2018)). For our purposes, we will definite “content creator” as an individual who creates something that is expressed through any of the various arts including the online world. Such individuals may hold the traditional titles of “producer”, “director”, “writer”, etc . . .

always continuously given qualified professionals of extraordinary ability, the RAISE Act should be more inclusive of specific industry needs by (1) creating a hybrid system that allows the current EB-1 “extraordinary ability” immigrant visa category to remain intact next to the points system or (2) broaden the scope for the kinds of achievements that qualify as “extraordinary” to include industry specific awards or achievements that can be shown to be equivalent to a Nobel Prize or an Olympic medal.

Part I of this Note provides background information on the history behind the current extraordinary-talent visa procedure under the Immigration Act of 1990 and the changes proposed by the Trump Administration through the Reforming American Immigration for a Strong Economy Act. Part II illustrates the trends of the media and entertainment industry, including the impact the immigrant community has had and continues to have on the industry. Part III details two proposed alternatives to the limitations placed by the proposed RAISE Act.

II. BACKGROUND

In 1990, President George H.W. Bush signed the Immigration Act of 1990 (IMMACT90) into effect with the message, “S.358 dramatically increases the number of immigrants who may be admitted to the United States because of the skills they have and the needs of our economy. This legislation will encourage the immigration of exceptionally talented people, such as scientists, engineers, and educators.”¹⁸ The Immigration Act of 1990, also referred to as IMMACT90, amended the previous 1965 immigration act and increased the number of legal immigrants that could enter the United States each year.¹⁹ Changes created by IMMACT90 included provisions that facilitated family-based, employment-based and diversity-based immigration.²⁰ While IMMACT90 limited yearly immigration quotas to just 700,000 visas a year, it also carefully allocated the total number of visas among different categorizations based on what the Senate believed was in the best interest of the nation.²¹ Under IMMACT90, 140,000 visas out of the 700,000 cap were set aside for

¹⁸ Gerhard Peters and John T. Woolley, *George Bush: Statement on Signing the Immigration Act of 1990*, THE AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=19117> (last visited Oct. 18, 2017).

¹⁹ Muzafar Chishti and Stephen Yale-Loehr, *The Immigration Act of 1990: Unfinished Business a Quarter-Century Later*, MIGRATION POL’Y INST. (July 2016).

²⁰ *Id.*

²¹ *Id.* at 2-3 (citing testimony from Senate hearing that setting a specific annual level of immigration was important in determining the priorities and the best interests of the nation).

employment-based immigrants.²² The 140,000 employment-based visas were then further allocated across four categories: 40,000 visas were set aside for “priority workers”, which included aliens of extraordinary ability; another 40,000 visas were allocated for “aliens who are member of the professions holding advanced degrees or aliens of exceptional ability”; the last 40,000 visas were set aside for “skilled workers, professionals, and other workers”, and the remaining 10,000 visas went to “special immigrants” such as religious workers.²³ Among the four employment-based visa categories, “extraordinary ability” visas are unique in that they are considered “first-preference” or top priority.²⁴ The Immigration Act of 1990 created the model for the immigration system that is under effect today.

A. *Who is Extraordinary?*

Since 1990, the cap for employment-based immigration has not changed.²⁵ Each year, approximately 140,000 immigrant visas are available for aliens and their spouses and children who seek to immigrate based on their job skills.²⁶ In the scheme of all immigrants entering the United States, employment-based immigrants only count for 13.7% of the total new lawful permanent residents each year.²⁷ Within the group of lawful permanent residents, only around 4% of all employment-based immigrants are classified as first preference “aliens of extraordinary ability” and hold EB-1 visas.²⁸ The EB-1 category caters specifically to three subcategory of individuals who are “persons with extraordinary ability in the sciences, arts, education, business, or athletics”, outstanding internationally recognized researchers, or multinational managers or executives.²⁹ Out of the three subcategories, a “person with extraordinary

²² *Id.* at 3.

²³ Immigration Act of 1990, 1990 Enacted S. 358, § 121, 104 Stat. 4987-90 (1990).

²⁴ *Employment-Based Immigration: First Preference EB-1*, USCIS, <https://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-first-preference-eb-1> (last visited Sept. 29, 2017).

²⁵ Muzafar Chishti and Stephen Yale-Loehr, *The Immigration Act of 1990: Unfinished Business a Quart-Century Later*, MIGRATION POL’Y INST., at 1 (July 2016) (noting “Congress has not significantly revised the U.S. immigration selection system since the law was passed . . .”).

²⁶ *Permanent Workers*, USCIS, <https://www.uscis.gov/working-united-states/permanent-workers> (last visited Sept. 29, 2017).

²⁷ Ryan Baugh, et al., U.S. DEPT. OF HOMELAND SEC., OFF. OF IMMIGR. STAT., U.S. LAWFUL PERMANENT RESIDENTS: 2017, at 4 (March, 2017).

²⁸ *Id.*

²⁹ Immigration Act of 1990, 1990 Enacted S. 358, § 121, 104 Stat. 4987-88 (1990) (specifically the amendment to 8 U.S.C. 1152 § 203, which inserts a new subsection outlining that the allotment for employment-based visas for priority works shall include immigrants who are aliens of extraordinary ability, outstanding professors and researchers, and certain multinational executives and managers).

ability” receives the greatest amount of preference.³⁰

EB-1 visas petitions are regulated under 8 U.S.C. §204.5.³¹ As defined by the statute, applicants for the extraordinary ability must demonstrate that they are “one of that small percentage who have risen to the very top of the field of endeavor.”³² A petitioner for extraordinary ability can prove their status in one of two ways; they can either provide evidence of a one-time achievement in the form of a major, internationally recognized award or submit evidence that fulfills three out of ten criteria³³:

Documentation of the alien’s receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor;³⁴

Documentation of the alien’s membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields;³⁵

Published material about the alien in professional or major trade publications or other major media, relating to the alien’s work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation;³⁶

- i. Evidence of the alien’s participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specialization for which classification is sought;³⁷
- ii. Evidence of the alien’s original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field;³⁸
- iii. Evidence of the alien’s authorship of scholarly articles in the field, in professional or major trade publications or other major media;³⁹
- iv. Evidence of the display of the alien’s work in the field at

³⁰ *Employment-Based Immigrant Visa*, U.S. DEPT. OF ST. BUREAU OF CONSULAR AFF., <https://travel.state.gov/content/visas/en/immigrate/employment.html> (last visited Oct. 16, 2017).

³¹ 8 C.F.R. § 204.5 (Lexis Advance through the August 2, 2017 issue of the Federal Register. Pursuant to 82 FR 8346 (“Regulatory Freeze Pending Review”), certain regulations will be delayed pending further review. See Publisher’s Note under affected rules. Title 3 is current through September 8, 2017).

³² *Id.*

³³ *Id.*

³⁴ 8 C.F.R. § 204.5(h)(3)(i).

³⁵ 8 C.F.R. § 204.5(h)(3)(ii).

³⁶ 8 C.F.R. § 204.5(h)(3)(iii).

³⁷ 8 C.F.R. § 204.5(h)(3)(iv).

³⁸ 8 C.F.R. § 204.5(h)(3)(v).

³⁹ 8 C.F.R. § 204.5(h)(3)(vi).

- artistic exhibitions or showcases;⁴⁰
- v. Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation;⁴¹
 - vi. Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field;⁴²
 - vii. Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.⁴³

The statute also notes that where the enumerated standards are not readily applicable to the applicant's occupation, the petitioner may submit comparable evidence that establish his or her eligibility for extraordinary ability classification.⁴⁴ Additionally, unlike other visas, even those within the first preference category, an alien of extraordinary ability in the arts is not required to show an offer of employment or a labor certification as part of their application.⁴⁵ Even when a petitioner submits evidence fulfilling the requirements set forth by § 204.5, it does not automatically qualify him or her for an EB-1 visa.⁴⁶

After a petitioner submits evidence supporting his qualification for an EB-1 visa, his application is reviewed by an USCIS officer who must consider the submitted evidence cumulatively.⁴⁷ There are two schools of thought as to how to approach adjudication of EB-1 petitions.⁴⁸ The first

⁴⁰ 8 C.F.R. § 204.5(h)(3)(vii).

⁴¹ 8 C.F.R. § 204.5(h)(3)(viii).

⁴² 8 C.F.R. § 204.5(h)(3)(ix).

⁴³ 8 C.F.R. § 204.5(h)(3)(x).

⁴⁴ 8 C.F.R. § 204.5(h)(4).

⁴⁵ 8 C.F.R. § 204.5(h)(5); see also *Employment-Based Immigration: First Preference EB-1*, USCIS, <https://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-first-preference-eb-1> (last visited Sept. 29, 2017).

⁴⁶ Memorandum from the U.S. Citizenship and Immigration Servs. on Evaluation of Evidentiary Criteria in Certain Form I-140 Petitions (*AFM Update AD 10-41*) (Aug. 18, 2010) (available [online https://www.uscis.gov/sites/default/files/USCIS/Outreach/Interim%20Guidance%20for%20Comment/Kazarian%20Guidance%20AD10-41.pdf](https://www.uscis.gov/sites/default/files/USCIS/Outreach/Interim%20Guidance%20for%20Comment/Kazarian%20Guidance%20AD10-41.pdf)) (“In order to promote consistency in decision-making, ISOs will use the two-part approach set forth in the Kazarian decision for all petitions filed for Aliens of Extraordinary Ability, for Outstanding Professors or Researchers, or for Aliens of Exceptional Ability. The ISO must first evaluate the evidence on an individual basis to determine if it meets the criteria, and then must consider all of the evidence in totality in making the final merits determination.”).

⁴⁷ *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (holding that to establish that once a petitioner demonstrates that his extraordinary abilities meet or exceed the regulatory criteria of 8 C.F.R. § 204.5(h)(3)(i)-(x), the evidence should be considered, cumulatively, in a final merits determination of whether the alien is “more likely than not” at a degree of expertise significantly above that ordinarily encountered).

⁴⁸ Charles Gafner & Stephen Yale-Loehr, *Attracting the Best and the Brightest: A Critique of*

school simply requires that an applicant meet at least three of the ten criteria set forth by the EB-1 statute to be classified extraordinary.⁴⁹ However, the prevailing standard is the second school of thought which requires an applicant to meet three of the ten criteria set forth by the EB-1 statute, followed by a determination of an immigration officer as to whether the applicant's qualifications make him or her extraordinary.⁵⁰ The rather circular adjudicatory lens requires that an applicant meet the minimum number of criteria to be considered an alien of extraordinary ability, however to meet such standards the applicant must already, inherently, be extraordinary.⁵¹

The standard for interpreting how the extraordinary ability statute intended USCIS officers to adjudicate EB-1 applicants has largely been developed through a library of small, but significant case law. Several staple cases illustrate the difficult process of obtaining an EB-1 visa. In the landmark case, *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010), USCIS established that once a petitioner demonstrates that his extraordinary abilities meet or exceed the regulatory criteria of 8 C.F.R. § 204.5(h)(3)(i)-(x), the evidence should be considered, cumulatively, in a final merits determination of whether the alien is "more likely than not" at a degree of expertise significantly above that ordinarily encountered.⁵²

In *Kazarian*, the plaintiff, Poghos Kazarian, was an Armenian citizen who sought an extraordinary ability visa for his work as a theoretical physicist.⁵³ Kazarian submitted evidence regarding his extraordinary ability as a theoretical physicist, including letters of references from noted academics in his field of endeavor, evidence of his self-published physics textbook, scholarly articles acknowledging Kazarian's scientific contributions, as well as his own trade publications and evidence of his lecture series at various universities and conferences.⁵⁴ Despite this evidence, USCIS denied Kazarian's petition under the reasoning that Kazarian failed to satisfy the evidentiary criteria enumerated by the statute.⁵⁵ On appeal, the Ninth Circuit found that USCIS had erred in finding that Kazarian had satisfied zero of the ten enumerated criteria. The Ninth Circuit found that Kazarian satisfied two of the ten criteria listed in the statute. However, Kazarian still did not meet the threshold

the Current U.S. Immigration System, 38 *FORDHAM URB. L.J.*, 183, 196-198 (2011) (discussing the two schools of thought related to interpreting the adjudicatory standard as provided by the EB-1 regulations).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Charles Gafner & Stephen Yale-Loehr, *Attracting the Best and the Brightest: A Critique of the Current U.S. Immigration System*, 38 *FORDHAM URB. L.J.*, 183, 196 (2011).

⁵² *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010).

⁵³ *Id.* at 1117-18.

⁵⁴ *Id.*

⁵⁵ *Id.* at 1119.

needed for classification as an individual of extraordinary ability.⁵⁶

The Ninth Circuit, when looking at Kazarian, was careful to consider the relevant regulatory language emphasizing that “neither USCIS nor an AAO may unilaterally impose novel substantial or evidentiary requirements beyond those set forth in 8 C.F.R. § 204.5”⁵⁷ Kazarian does not create a wholly subjective test, nor does it diminish the importance of the regulatory criteria for exceptional ability. The final merits determination is supposed to rely on the long-standing jurisprudence surrounding the evaluation of extraordinary ability.

Similarly, in an earlier case, *Buletini v. I.N.S.*, 860 F.Supp. 1222 (E.D. Mich. 1994), also puts forth, “once it is established that the evidence is sufficient to meet three of the criteria listed in 8 CFR 204.5..., the alien must be deemed to have extraordinary ability unless the INS sets forth specific and substantiated reasons for its finding the alien, despite having satisfied the criteria, does not meet the extraordinary ability standard.”⁵⁸ Hence, once an alien meets the regulatory criteria under the applicable subsections of 8 C.F.R. § 204.5, the burden is on the USCIS to establish why the evidence presented is defective or unreliable such that it cannot support the conclusion that the alien qualifies for the classification sought.

The more recent case of *Rijal v. USCIS*, 772 F. Supp. 2d 1339 (W.D. Wash. 2011), follows the reasoning set by both Kazarian and Buletini. In *Rijal*, the District Court stated that in order for the plaintiff to be awarded the classification as an individual of extraordinary ability, he must satisfy “one of two evidentiary burdens. First, the alien can rely on evidence of ‘a one-time achievement (that is a major, international recognized award)’ 8 C.F.R § 204.5(h)(3). Alternatively, an alien can provide at least three of the statutory categories for evidence.”⁵⁹ In *Rijal*, the plaintiff, Anil Rijal, a celebrated Nepalese film and television producer, claimed he deserved classification as an individual of extraordinary ability for the purposes of an EB-1 visa. Rijal submitted evidence regarding his achievements, including receiving the Grand Prize at the New York International Children’s Film Festival and UNICEF Prize at the Japan Prize Contest.⁶⁰ Rijal also submitted evidence of publications referring to his work, his participation in a panel of judges, and displays of his work at exhibitions and showcases.⁶¹ However, Rijal was denied classification under an EB-1 immigrant visa because his evidence did not show

⁵⁶ *Kazarian*, 596 F.3d at 1122.

⁵⁷ *Id.* at 1121.

⁵⁸ *Buletini v. I.N.S.*, 860 F.Supp. 1222 (E.D. Mich. 1994).

⁵⁹ *Rijal v. USCIS*, 772 F. Supp. 2d 1339 (W.D. Wash. 2011).

⁶⁰ *Id.* at 1345.

⁶¹ *Id.* at 1346-47.

“sustained acclaim”.⁶²

As demonstrated by Kazarian, Buletini, and Rijal, the requirements necessary for the immigrant EB-1 extraordinary ability visa focuses exclusively on each applicant’s abilities in comparisons to his or her peers in his or her specific fields of endeavor. The standard for extraordinary ability of an EB-1 is not compared to that of the average individual, rather, it is meant to illustrate the individual’s status as one who has risen to the top of their field.⁶³ Furthermore, it takes into consideration the reputation and actual prestige of the applicant’s achievement in his or her industry. As emphasized by the District Court in Rijal, the immigrant EB-1 extraordinary ability statute was purposely constructed to be an extremely restrictive designation given to only the very best individuals in their specialized fields.⁶⁴ Furthermore, these cases illustrate the prevailing dominance of the second school of thought requiring that an individual seeking extraordinary ability status be inherently “extraordinary” before he or she can even submit an application for consideration. Regardless of which school of thought is the correct interpretation of EB-1 regulations, both perspectives require that all applicants must provide substantial evidence of their qualifications as aliens of extraordinary ability.

The EB-1 statute further indicates the singularity of the first-preference extraordinary ability by waiving the need for EB-1A applicants to show proof of labor certification or an offer of employment.⁶⁵ A labor certification verifies that there are insufficient available, qualified, and willing U.S. workers to fill the position being offered at the prevailing wage and hiring a foreign worker will not adversely affect the wages and working conditions of similarly employed U.S. workers.⁶⁶ In place of an offer of employment, 8 C.F.R. § 204.5(h)(5) specifically states, “No offer of employment required. Neither an offer for employment in the United States nor a labor certification is required for this classification; however, the petition must be accompanied by clear evidence that the alien is coming to the United States to continue work in the area of expertise. Such evidence may

⁶² *Id.* at 1347.

⁶³ *Rijal*, 772 F. Supp. 2d at 1342 (citing 8 C.F.R. § 204.5(h)(2), which explicitly explains “‘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’”).

⁶⁴ *Id.* at 1343 (specifically the Court stressed, “By design, the ‘extraordinary ability’ designation is ‘*extremely restrictive*’ (emphasis in original)); see also *Kazarian v. USCIS*, 596 F.3d 1115, 1120 (9th Cir. 2010) (also stating “The scant case law indicates that ‘[t]he regulations regarding this preference classification are extremely restrictive’”).

⁶⁵ 8 C.F.R. § 204.5(h)(5); see also *Employment-Based Immigration: First Preference EB-1*, USCIS, <https://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-first-preference-eb-1> (last visited Sept. 29, 2017).

⁶⁶ *Labor Certification*, USCIS, <https://www.uscis.gov/tools/glossary/labor-certification> (last visited Sept. 29, 2019).

include letter(s) from prospective employer(s), evidence of prearranged commitments such as contracts, or a statement from the beneficiary detailing plans on how he or she intends to continue his or her work in the United States.”⁶⁷ Under this exception, the applicant is only required to show evidence that their intent in coming to the United States is to continue work in their field of endeavor. The prevailing legal standard on this point is that if an EB-1 applicant demonstrates extraordinary ability and also intent to continue work in the United States, then there is a presumption of a prospective benefit to the United States. This is demonstrated by a long history of USCIS guidance, legislative history, administrative decisions and decisions of the courts.⁶⁸

The lack of a labor certification is significant in that it implies that the level of ability in extraordinary ability applicants is inherently so specialized or so obviously surpasses that of the average workforce, that there is no danger of either group of individuals competing for the same jobs. In effect, this provision essentially acknowledges that the level of ability and benefit provided by the applicant is so exceptional that it is unlikely another member of the workforce has similar enough abilities at the same extraordinary level to would warrant fear of being displaced.

Thus, it is clear from USCIS’s application of the extraordinary ability requirements and the interpretation of the statute held by the various courts that the threshold for classification as a person of extraordinarily ability is extremely difficult. The threshold to obtaining such a visa was structured to be “extremely restrictive”, awarding the status to only select individuals who cumulatively demonstrate that they are of the small percentage that have risen to the very top of their fields of endeavor.⁶⁹

B. RAISE-ing Points

The Reforming American Immigration for Strong Employment Act or RAISE Act was introduced to the Senate in February 2017, at the beginning of the Trump Administration.⁷⁰ The legislation represents one

⁶⁷ 8 C.F.R. § 204.5(h)(5) (Lexis Advance through the August 2, 2017 issue of the Federal Register. Pursuant to 82 FR 8346 (“Regulatory Freeze Pending Review”), certain regulations will be delayed pending further review. See Publisher’s Note under affected rules. Title 3 is current through September 8, 2017).

⁶⁸ See H.R. Rep. No. 101-723, 59 (Sept. 19, 1990); 2012 WL 8593537, at 4; 2009 WL 1449824, at 9; 2003 WL 22719390, at 1; 2013 WL 5538274, at 13; 2010 WL 3010393, at 8; 2010 WL 6526613, at 10; *Buletini v. INS*, 860 F.Supp. 1222 (1994); and Immigr. Proc. Handbook § 16:13, Austin T. Fragomen, Jr., Careen Shannon, Daniel Montalvo, Database updated June 2015.

⁶⁹ *Lee v. Ziglar*, 237 F. Supp. 2d 914, 918 (N.D. Ill. 2002).

⁷⁰ S.354 – *RAISE Act*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/senate-bill/354>, (last visited Sept. 13, 2017).

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of the largest changes to the American immigration system since the Immigration Act of 1990. The RAISE Act attempts to significantly reduce levels of legal immigration in the United States by eliminating some family-based categories and diversity visas, redefining the other immigrant categories and substituting the current employment-based visa system with a rigid points system.⁷¹

Under the proposed RAISE Act, prospective employment-based immigrants are placed in an “Eligible Applicant Pool” where they will wait for an invitation to apply for a visa.⁷² Every six months, USCIS shall invite the highest ranked applicants to file a petition for a points-based visa.⁷³ To be eligible for the applicant pool, a prospective immigrant must obtain a total of thirty points as prioritized by its criteria⁷⁴:

- i. Age: awarding a maximum of 10 points to individuals age 26-30;⁷⁵
- ii. Education: awarding a maximum of 13 points to holders of a U.S. Professional or Doctoral STEM;⁷⁶
- iii. English Language Proficiency: awarding a maximum of 12 points to individuals in the 10th decile (fluent);⁷⁷
- iv. Extraordinary Achievement: awarding a maximum of 25 points to Nobel Laureate or comparable recognition in a scientific or social scientific study;⁷⁸
- v. Job Offer: awarding a maximum of 13 points individuals whose annual salary offered is at least 300% of the median household income in the state of employment;⁷⁹ and
- vi. Investment in and Active Management of a New Commercial Enterprise: awarding a maximum of 12 points to individuals who make an investment of \$1.8 million in the New Commercial Enterprises in the United States.⁸⁰

In addition to the new points system, the proposed replacement for employment-based immigration would also require a labor certification

⁷¹ *The RAISE Act What Lies Beneath the Proposed Points System?*, AM. IMMIGR. COUNCIL <https://www.americanimmigrationcouncil.org/research/raise-act>, (last visited Sept. 13, 2017).

⁷² Reforming American Immigration for Strong Employment Act, S.354, 115th Cong., § 5, 17-18 (as introduced to the Senate, Feb. 13, 2017).

⁷³ AILA Doc. No. 17080732 (Aug. 7, 2017).

⁷⁴ Reforming American Immigration for Strong Employment Act, S.354, 115th Cong., § 220, 25-34 (as introduced to the Senate, Feb. 13, 2017).

⁷⁵ *Id.* at 27-28.

⁷⁶ *Id.* at 29-31.

⁷⁷ *Id.* at 25-27.

⁷⁸ Reforming American Immigration for Strong Employment Act, S.354, 115th Cong., § 220, 34 (as introduced to the Senate, Feb. 13, 2017).

⁷⁹ *Id.* at 32-33.

⁸⁰ *Id.* at 34.

from prospective employers confirming that the employment conditions offered to the immigrant applicant would not displace a U.S. worker.⁸¹ By re-introducing the labor certification requirement, the RAISE Act's new system obliterates the acknowledgement under the current scheme that EB-1 applicants are so extraordinary they cannot displace any members of the workforce as it is unlikely another member of the workforce has similar abilities at the same extraordinary level.

The scheme of the proposed RAISE Act thwarts the intent of the first-preference extraordinary ability immigrant visa. The EB-1 immigrant visa identifies hopeful extremely highly-skilled immigrants planning to work in their fields of endeavor based on the inherent benefit their extraordinary ability is presumed to contribute to the United States. However, the current proposed version of the RAISE Act simplifies the elaborate criteria set forth by 8 C.F.R. § 204.5 into a calculation of points based on educational attainment, English language proficiency, age, extraordinary achievement, job offers, and investment in new commercial enterprises.⁸² Even though the RAISE Act does address extraordinary ability in one section, the provision limits "extraordinary ability" to mean only Nobel Laureate or comparable recognition in scientific or social scientific study or individual Olympic medal or first place in an international sporting event in which the majority of the best athletes were represented, within the last eight years preceding the date the application for placement is submitted.⁸³

Under this criterion, applicants who are creative content creators are inherently barred from even the opportunity to be placed in the pool for an immigrant visa due to the general nature of the kinds of quantifiable qualifications their field of endeavors imposes. Under the RAISE Act, to be considered for immigration, a prospective professional must accrue at least thirty points before they are deemed "qualified" for the applicant pool.⁸⁴ The maximum points that can be awarded by the system, if the applicant were to receive the maximum points in each enumerated section is eighty-five points.⁸⁵ While this number easily surpasses the minimum

⁸¹ AILA Doc. No. 17080732 (Aug. 7, 2017).

⁸² Reforming American Immigration for Strong Employment Act, S.354, 115th Cong. (as introduced to the Senate, Feb. 13, 2017).

⁸³ *Id.*

⁸⁴ *Id.* at 27 (as explicitly stated in the proposed amendment, "An alien is eligible to submit an application for placement in the eligible applicant pool under section 203(b)91) if the applicant has accrued a total of 30 points under this section.").

⁸⁵ AILA Doc. No. 17080732 (Aug. 7, 2017) (calculating only the highest number of points in each category: Age: 26-30, 10 points; Education: U.S. Professional or Doctoral STEM, 13 points; English Language Proficiency: 10th decile (fluent), 12 points; Extraordinary Achievement: Nobel Laureate or comparable recognition in a scientific or social scientific study, 25 points; Job Offer: Annual salary offered is at least 300% of the median household income in the state of employment, 13 points; and Investment in and Active Management of a New Commercial Enterprise: Investment of \$1.8 million in the U.S. NCE, 12 points).

score of thirty, actually acquiring the achievements necessary to receive that “perfect” score is substantially harder and arguably practically impossible. The perfect scoring candidate under the RAISE Act would be described as an individual in their mid-twenties (but no older than thirty), with a professional or doctoral STEM degree, is fluent in English, has won a Nobel prize, earns at least 300% of the median household income of the individual’s state of employment (ranging from at least \$133,002 to more than \$236,835⁸⁶) and is able to invest \$1.8 million in new commercial enterprises in the United States.⁸⁷ In short, such a person, to borrow from English screenwriter Deborah Moggach’s adaptation of Jane Austen’s classic description, “I never saw such a woman (or in this case, person). She (or he) would certainly be a fearsome thing to behold”.⁸⁸ Needless to say, such an ideal immigrant individual would be rare (and unlikely to immigrate to the United States if they already enjoy such a level of accomplishment and success in their home country). In effect, the RAISE Act eliminates avenues for immigration for a group of individuals the prior statutory regime regarded as so important, so necessary, and so rare, that Congress created and passed legislation granting these extraordinary talents extremely favorable rules as a way to encourage them to become part of the United States.

Realistically speaking, even if we took an undisputed extraordinarily talented content creator and applied their credentials to the RAISE Act, it would still be unlikely for such an individual to film director. Consider, for example, the creative content creator, Tom Tykwer.⁸⁹ Tom Tykwer, the German filmmaker and director responsible for *Cloud Atlas*⁹⁰ and the Netflix series *Sense8*⁹¹, did not complete university.⁹² Despite his lack of post-secondary education, Tykwer has received national recognition in his home country of Germany and he was also nominated for a Golden Globe.⁹³ Under the general provisions of the RAISE Act, a content creator like Tom Tykwer would only have twenty-nine of the thirty points

⁸⁶ Gloria G. Guzman, Household Income: 2016, U.S. CENSUS BUREAU (Sept. 2017) (calculating 300% of the income from lowest median income state (Arkansas: \$44,334) and highest median income state (Maryland: \$78,945) in 2016).

⁸⁷ *RAISE Act (August 2017) Section-by-Section*, AM. IMMIGR. COUNCIL (Aug. 7, 2017), <http://www.aila.org/infonet/aila-section-by-section-analysis-of-raise-act>.

⁸⁸ Juliette Wells, “A Fearsome Thing to Behold”? *The Accomplished Woman in Joe Wright’s Pride & Prejudice*, JANE AUSTEN SOCIETY OF NORTH AMERICA, <http://www.jasna.org/persuasions/on-line/vol27no2/wells.htm> last visited Nov. 16, 2017).

⁸⁹ Tom Tykwer, <http://www.tomtykwer.com/> (last visited Sept. 15, 2017).

⁹⁰ *Cloud Atlas*, INTERNET MOVIE DATABASE, <http://www.imdb.com/title/tt1371111/> (last visited Sept. 15, 2017).

⁹¹ *Sense8*, INTERNET MOVIE DATABASE, <http://www.imdb.com/title/tt2431438/> (last visited Sept. 15, 2017).

⁹² Tom Tykwer, <http://www.tomtykwer.com/> (last visited Sept. 15, 2017).

⁹³ Tom Tykwer Awards, INTERNET MOVIE DATABASE, <http://www.imdb.com/name/nm0878756/awards> (last visited Sept. 15, 2017).

required to qualify for immigration (even assuming he had a foreign bachelor's degree "excellent" English ability and the maximum points offered for salary).⁹⁴

In contrast, if Tykwer applied under the 8 C.F.R. § 204.5, he would be able to submit evidence in at least five categories including, (1) receipt of a lesser nationally or internationally recognized prizes or awards⁹⁵; (2) publish material about the applicant in a professional or major trade publication or other major media relating to the applicant's field of endeavor⁹⁶; (3) evidence of the display of the applicant's work in the field at artistic exhibition or showcases⁹⁷; (4) evidence of commercial success in the performing arts, as shown by box office receipts⁹⁸ and (5) evidence of the applicant's participation, either individually or a panel, as a judge of the work of the same or allied field for which classification is sought.⁹⁹ Furthermore, Tykwer is likely to surpass the standard of "sustained acclaim" stressed in Rijal as he has continuously been nominated for and received recognition for his work since his feature-debut in 1993.¹⁰⁰ Thus, Tom Tykwer presents a strong case for extraordinary ability classification under the EB-1 statute.

Even if we consider a content creator whose resume is arguably stronger than Tom Tykwer – for instance, Guillermo del Toro - the same result occurs. Guillermo del Toro is a Mexican filmmaker, director, screenwriter, producer, and novelist responsible for such iconic films including, *The Shape of Water*, *Pan's Labyrinth*, *Pacific Rim*, and the *Hellboy* series, among other popular titles.¹⁰¹ Guillermo del Toro's

⁹⁴ Lisa Marie Segarra & David Johnson, *Find Out If President Trump Would Let You Immigrate To America*, TIME (Aug. 7, 2017), <http://time.com/4887574/trump-raise-act-immigration/> (using interactive immigration quiz for test case of Tom Tykwer, assuming Tom Tykwer: is over 50 years old, has at least a foreign bachelor's degree, has excellent English ability, has a salary of at least \$155,800, does not have a Nobel Prize or Olympic medal in the last eight years, and does not plan on investing money in the U.S.).

⁹⁵ *Id.*

⁹⁶ A Google search of Tom Tykwer results in articles about the content creator in publications including, *The Washington Times*, *Variety*, *The Hollywood Reporter*, *Deadline*, and the *New York Times*, among other media and trade outlets.

⁹⁷ Dennis Lim, *Chances are Good for a Tangent*, *The New York Times* (Sept. 11, 2011) <http://www.nytimes.com/2011/09/11/movies/tom-tykwer-director-of-3-and-run-lola-run.html> (specifically highlighting Tykwer's exhibition at the Museum of Modern Art (MoMA) in New York City); see also Tom Tykwer, TV GUIDE, <http://www.tvguide.com/celebrities/tom-tykwer/bio/185219/> (last visited Sept. 15, 2017) (noting the showing of his independent films at various film festivals including the Hof International Film Festival).

⁹⁸ *Cloud Atlas* (2012), THE NUMBERS, <http://www.the-numbers.com/movie/Cloud-Atlas#tab=more> (last visited Sept. 15, 2017).

⁹⁹ Scott Roxborough, *Tom Tykwer Named Berlin Festival Jury President*, THE HOLLYWOOD REPORTER (Nov. 2, 2017, 5:50 AM) <http://www.hollywoodreporter.com/news/tom-tykwer-named-berlin-festival-jury-president-1054161>.

¹⁰⁰ Tom Tykwer, TV GUIDE, <http://www.tvguide.com/celebrities/tom-tykwer/bio/185219/> (last visited Sept. 15, 2017).

¹⁰¹ Guillermo del Toro, Internet Movie Database, <http://www.imdb.com/name/nm0868219/>

credentials put him in the range of twenty-nine to thirty points.¹⁰² Despite having attended college and worked on numerous staples titles to that are among some of the most iconic works in both American film and television, the difference of the single point that would qualify Guillermo del Toro for immigration depends on whether or not his English ability could be considered “excellent” (eleven points) or “fluent” (twelve points).¹⁰³

As illustrated by the aforementioned real-life example of extraordinary individuals, the RAISE Act points systems limits potential extraordinarily talented individuals from entering the country because it does not consider the field-specific achievements that the EB-1 visa deems important. Put simply, creative industries that encompass content creation do not require content creators to have high-level academic degrees or a list of quantifiable awards. Instead, creative industries, especially those catering to our consistently evolving entertainment and media tastes, value practical skills, specialized training, and a history of culturally creations that result in intangible real-world social value that can be appreciated by its cultural impact. There is a clear gap in fairly considering extraordinary individuals in the arts when compared to their more traditional professional counterparts.

Considering the evolving nature of the creative industries, the current infrastructure of the extraordinary ability visa scheme is better equipped at handling the novel and expanding demands of the cultural arts. When looking at how the points presented by the RAISE Act could be applied to potential applicants and their careers, like Tom Tykwer and Guillermo del Toro, it seems clear that the currently proposed points system is too inexact to suitably consider the needs of the arts and entertainment industry.

Legal professionals in the field of immigration law have also questioned whether a points-based system appropriately scrutinizes the nontraditional careers of extraordinary individuals in the arts.¹⁰⁴ For example, some content creators who forego a traditional academic degree may receive specialize training in the form of writing workshops or acting

(last visited Jan. 27, 2018).

¹⁰² At the time this note was written, Guillermo del Toro had not yet won the Oscar for “Best Director” for his film *The Shape of Water*. As such, his recent Oscar win is not accounted for the purposes of this analysis.

¹⁰³ Lisa Marie Segarra & David Johnson, *Find Out If President Trump Would Let You Immigrate To America*, TIME (Aug. 7, 2017), <http://time.com/4887574/trump-raise-act-immigration/> (using interactive immigration quiz for test case of Guillermo del Toro, assuming Guillermo del Toro: is over 50 years old, has at least a foreign bachelor’s degree, has excellent English ability, has a salary of at least \$155,800, does not have a Nobel Prize or Olympic medal in the last eight years, and does not plan on investing money in the U.S.).

¹⁰⁴ Chad Blocker, *Draining the Pool: Visa categories related to the entertainment industry may be strongly affected by changes in U.S. immigration policy*, LOS ANGELES LAWYER, 35, 38 (2017), <http://www.lacba.org/docs/default-source/lal-back-issues/2017-issues/may-2017.pdf>.

certificates from acting programs.¹⁰⁵ In such an instance, how will those certifications or training programs compare in relation to traditional post-secondary education? Furthermore, will the reputation of non-traditional programs be considered in equating them to their American counterparts? Even more specifically, as one immigration law firm partner points out, “The same actor may have 30 acting credits in his or her career. Would those acting credits be awarded the same way as five years of work experience at a global financial institution or technology company?”¹⁰⁶ The proposed points system under the RAISE Act is not equipped to properly assess the nuanced accomplishments that are prevalent in the way creative industries measure and judge success and extraordinary ability. These benchmarks are too varied and industry specific to be captured in a categorized points-based evaluation method.

It should be noted that the RAISE Act is not the first attempt to implement a merit-based immigration system. In 2013, the Senate passed S. 744 which attempted to implement a merit-based immigration system.¹⁰⁷ However, unlike the RAISE Act, S. 744 did not try to eliminate employment-based immigration as a whole.¹⁰⁸ In short, the proposed RAISE Act greatly contrasts with the principles guiding the Immigration Act of 1990 that expanded and created the employment-based immigration system and the EB-1 extraordinary ability visa category.

III. INDUSTRY TRENDS

In January 2017, Trump signed Executive Order 13769, colloquially known as the “Muslim Ban” which was intended to block refugees from Syria and citizens from seven predominantly Muslim nations from entering the United States.¹⁰⁹ However, the actual implementation of the

¹⁰⁵ According to the Bureau of Labor Statistic’s Occupational Outlook Handbook, “Some associations offer certifications for writers and authors. Certification can demonstrate competence and professionalism, making candidates more attractive to employers.” It also provides for actors, “Many actors enhance their skills through formal dramatic education. Many who specialize in theater have bachelor’s degrees, but a degree is not required . . . Actors who do not have a college degree may take acting or film classes to learn their craft. Community colleges, acting conservatories, and private film schools typically offer these classes.”

¹⁰⁶ Chad Blocker, *Draining the Pool: Visa categories related to the entertainment industry may be strongly affected by changes in U.S. immigration policy*, LOS ANGELES LAWYER, 35, 38 (2017), <http://www.lacba.org/docs/default-source/lal-back-issues/2017-issues/may-2017.pdf>.

¹⁰⁷ S. 744 – *Border Security, Economic Opportunity, and Immigration Modernization Act*, CONGRESS.GOV, <https://www.congress.gov/bill/113th-congress/senate-bill/744/text>, (last visited Dec. 12, 2017).

¹⁰⁸ *A Guide to S.744: Understanding the 2013 Senate Immigration Bill*, AM. IMMIGR. COUNCIL (Jul. 10, 2013) <https://americanimmigrationcouncil.org/research/guide-s744-understanding-2013-senate-immigration-bill>.

¹⁰⁹ Protecting the Nation from Foreign Terrorist Entry into the United States, 82 Fed. Reg. 8977, (Jan. 27, 2017).

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ban led the Department of Homeland Services to ban all Green Card holders from entering the country.¹¹⁰ The ban was still in full effect during the 2017 Oscars in February which prevented foreign filmmakers from appearing at the Oscars to receive their awards.¹¹¹

Despite the Department of Homeland Security's assurances that individuals who posed "no serious threat" to the United States would still be granted entry on a case-by-case basis, several filmmakers and, effectively, content creators, decided to boycott the 2017 Oscars. As one article eloquently relayed, "Oscar-nominee Asghar Farhadi – whose film *The Salesman* is nominated for Best Foreign Language film – is just one of the individuals who has been immediately affected by the ban. Although the Department of Homeland Security announced that some individuals whom they deem to pose "no serious threat" to the U.S. have been granted entry on a case-by-case basis, Farhadi has told them where to stick it."¹¹²

Asghar Farhadi was joined by another content-creator and the real-life subject of an Oscar-nominated film, "A Syrian woman who is the subject of a different Oscar-nominated film has also been barred from travelling to the U.S. *Watani: My Homeland*, which tells the true story of a Syrian family forced to flee Aleppo for sanctuary in Germany, has been nominated in the Documentary Short category. The movie's star, Hala Kamil, is a woman who has previously visited America as a guest of the United Nations. Now, she's not allowed to enter the country."¹¹³

Since the initial Muslim Ban, there have been several legal challenges to Trump's immigration bans. In January 2018, the Supreme Court announced that it would decide on the legality of Trump's travel ban in the upcoming year.¹¹⁴ In the meantime, the Supreme Court allowed the subsequent revised versions of the original ban to take full effect.¹¹⁵ Despite these protests and challenges, the message from Trump's Muslim Ban has already been sent. The result of Trump's ban mirrors

¹¹⁰ Thaddeus Talbot, *You Have the Right to Know How Trump's Muslim Ban Was Implemented. So, We Sued*. ACLU (Apr. 13, 2017, 5:15PM) <https://www.aclu.org/blog/immigrants-rights/you-have-right-know-how-trumps-muslim-ban-was-implemented-so-we-sued>.

¹¹¹ Seth Kelley, *Trump's Visa Ban to Reportedly Keep Oscar-Nominated Director Asghar Farhadi From Attending 2017 Awards*, VARIETY, (Jan. 28, 2018, 9:58 AM) <http://variety.com/2017/film/news/trump-muslim-ban-director-asghar-farhadi-2017-oscars-1201972194/>.

¹¹² Sarah Gibson, *How Trump's Immigration Ban Is Hindering the Oscars*, HIGHSNOBIETY (Feb. 3, 2017) <https://www.highsnobiety.com/2017/02/06/oscars-2017-muslim-ban-trump-influence/>.

¹¹³ *Id.*

¹¹⁴ Lawrence Hurley, *Supreme Court to decide Legality of Trump Travel ban*, REUTERS (Jan. 18, 2018, 2:12 PM) <https://www.reuters.com/article/us-usa-court-immigration/supreme-court-to-decide-legality-of-trump-travel-ban-idUSKBN1F82EY/>.

¹¹⁵ Amrit Cheng, *The Muslim Ban: What Just Happened?*, ACLU (Dec. 6, 2017, 3:45 PM) <https://www.aclu.org/blog/immigrants-rights/muslim-ban-what-just-happened/>.

consequences that could arise from a full implementation of the RAISE Act including blocking citizens of Chad, Iran, Libya, Somalia, Syria, and Yemen from securing immigrant visas including Green Card employment-based visas.¹¹⁶ Even though the intent of the “Muslim Ban” was only supposed to block refugees from Syria and the seven other enumerated nations, in practice, the ban foreshadowed potential effects of what would happen to the entertainment industry if it was cut off from the creative source of its products.

Immigrant presence in the creative industries, especially film and television, is not a new phenomenon despite their lack of visibility in Hollywood and on the small screen. First-generation Eastern European Jewish immigrants are credited with creating the foundation for our modern-day entertainment industry.¹¹⁷ Furthermore, the majority of Hollywood film directors who have two or more Academy Awards are either immigrants or children of immigrants.¹¹⁸ Currently, according to the latest arts industry study by the National Endowment for the Arts, foreign-born individuals make up 16.7% of arts professional in content creation jobs.¹¹⁹ While this number may seem small, the impact of this group of individuals is practically significant.

Following the aftermath of the Oscars, industry leaders in the broadcast television industry began considering their casting options for the 2017 pilot season.¹²⁰ Pilot season marks the beginning of the

¹¹⁶ *Id.* (the ACLU elaborates, “The ban bars citizens of Chad, Iran, Libya, Somalia, Syria, and Yemen from securing immigrant visas, which result in lawful permanent resident status, or a green card, including family-based and employment-based visas. Various nonimmigrant visas — like tourist and temporary business visas, student visas, and exchange visas — are also eliminated for people from Chad, Libya, Syria, Yemen, and Iran . . .”).

¹¹⁷ Charles Hirschman, *The Contributions of Immigrants to American Culture*, DAEDALUS (2013) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3856769/#S1title>

¹¹⁸ *Id.* (providing examples such as: German-born William Wyler, who received three Academy Awards for directing *Mrs. Miniver* in 1942, *The Best Years of Our Lives* in 1946, and *Ben Hur* in 1959. According to the author, “Wyler’s movies explore deep questions about American society and culture, such as the readjustment problems faced by veterans after World War II and how accusations of homosexuality could destroy careers and community. Wyler’s portrayal of characters allowed the audience to understand and to empathize with complex human motives.” Another immigrant figure was Billy Wilder an Austrian-born director and screenwriter. Billy Wilder began his career writing scripts in Berlin before coming to the United States in the 1930s. Wilder won two Academy Awards for directing *The Lost Weekend* in 1945 and *The Apartment* in 1960. Some of his other writing and directing titles include *Some Like It Hot* (1959), *Stalag 17* (1953), *Sunset Boulevard* (1950), *Double Indemnity* (1944), *Sabrina* (1954), and *The Fortune Cookie* (1966). The author describes Billy Wilder’s mark on Hollywood with, “The characters in Wilder’s movies were rarely heroic; they struggled with real problems complicated by their all-too-human weaknesses. The sophisticated dialogue in Wilder’s movies—marked by ‘sardonic humor’ and ‘droll, biting wit’—gave little sign that the author learned English as a mature adult.”)

¹¹⁹ *Artists and Arts Workers in the United States Findings from the American Community Survey (2005-2009) and the Quarterly Census of Employment and Wages (2010)*, NAT’L ENDOWMENT FOR THE ARTS (2011).

¹²⁰ Nellie Andreeva, *Pilot Season 2017: How Would Trump’s Immigration Policies Impact Casting*, DEADLINE (Jan. 31, 2017, 8:50 PM), <http://deadline.com/2017/01/pilot-season-2017->

upcoming television season where broadcast networks consider and put in their bids for new shows and content they believe will provide lucrative in the forthcoming year.¹²¹ “Due to the large number of pilots being cast at the same time against strong competition for talent from cable and streaming services, the broadcast networks try to throw a wide net, auditioning foreign actors, primarily in Europe (largely the U.K.) and Australia. The networks and studios have to be much more careful this time as an actor they hire may have ancestry related to one of the countries on the list that could trigger a red flag and deny the thesp[ian] entry into the U.S. to do the pilot, even if they have a valid work permit.”¹²² The lack of proper performers and content creators for the United States entertainment, and television industry in particular, make it harder for networks to cast actors and limit the kinds of works networks are willing to consider due to the creator’s ability to remain and work in the U.S. As one industry insider relays to the press, “I hear anecdotal evidence of delays in routine immigration procedures for foreign-born Hollywood employees, including green card renewals. Many, fear that the host of immigration policy changes would slow the process down even further. ‘Essentially actors have just moved to the bottom of the priority list,’ one industry source said. And given the ongoing war between the Trump administration and Hollywood, it appears unlikely for studios to be given preferential treatment in obtaining work visas for pilot actors.”¹²³

The aftermath of the Muslim Ban shows the importance of immigrants in the arts and entertainment industry. If a travel ban of selected countries already has such an immediate effect on the future of the film and television industry, then a broad immigration policy that is skewed against immigrants with extraordinary abilities in the arts will likely result in much deeper consequences.

A. Potential Impact

To understand the current scope of content creators in the creative industries, specifically in the film and television sectors, I interviewed a Senior Director of Original Programming and Development at

donald-trump-immigration-policies-ban-pilot-casting-impact-1201899253/.

¹²¹ Nellie Andreeva, *Pilot Season 2017: How Many Pilots Is Each Network Ordering?*, DEADLINE (Jan. 23, 2017, 2:33 PM) <http://deadline.com/2017/01/pilot-season-2017-pilot-count-abc-cbs-nbc-fox-the-cw-1201892268/>.

¹²² Nellie Andreeva, *Pilot Season 2017: How Would Trump’s Immigration Policies Impact Casting*, DEADLINE (Jan. 31, 2017, 8:50 PM), <http://deadline.com/2017/01/pilot-season-2017-donald-trump-immigration-policies-ban-pilot-casting-impact-1201899253/>.

¹²³ *Id.*

NBCUniversal.¹²⁴

The Senior Director leads all original long-form programs and develops live-action and animated properties. He works closely with producers, writers, and creators who approach the network with new ideas for original shows, many of whom are foreign-born individuals. He also plays a critical role in approving casting choices, selecting production companies, and sourcing the right content creators for specific projects.¹²⁵ According to the Senior Director, the potential limitations placed by the proposed RAISE Act could persuade the American television industry to move its productions to Canada.¹²⁶ Such an effect would strangle creative industries in the United States. Furthermore, for creative executives like the Senior Director, it impacts their ability to commit to new and innovative content because they face the looming risk that whomever they place on a project will only be accessible for a limited amount of time.¹²⁷

Naturally, there are alternatives to finding and replacing a content creator. However, oftentimes, in the industry, these options may not be practical or advantageous in the long term. One option would be to hire or replace the foreign content creator with local or domestic creative professionals. However, unlike industries that operate on technical or applicable skills that can be learned and replicated, the nature of the creative arts is closely connected with the specific vision and abilities of the individual. In short, people notice when there are creative personnel changes, particularly in long-running shows. Additionally, the Senior Director also brings up the consideration that when creative companies and production houses hire content creators, they do so in the long-term capacity in case the show becomes a success.¹²⁸ In that respect, the employers invest as much resources in the content creator as it does the content. Some of these economic incentives may be higher salaries, retirement plans, health benefits, etc. While companies could approach the foreign creators in their home countries, thereby negating the need for these individuals to be in the United States long-term, the Senior Director points out that going to the content creator, instead of bringing them into the United States, could also mean having to take the economy of that production outside of the country as well.¹²⁹ For example, when the

¹²⁴ K. Updike is the Senior Director of Original Programming and Development for one of NBCUniversal's cable entertainment networks. With over twenty years of experience in the entertainment industry, he has worked on numerous award-winning original television series. Prior to his role at NBCUniversal, Updike was the Vice President of Production of an animation studio.

¹²⁵ Interview with K. Updike, Senior Director of Original Programming and Development, NBCUniversal, in New York, NY. (Oct. 17, 2017).

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Interview with K. Updike, Senior Director of Original Programming and Development,

company pays the content creator, the funds would be translated into foreign currency and spent in the foreign market instead of the United States.¹³⁰ In many ways, it is not unlike outsourcing labor.

Cumulatively, the considerations raised by the Senior Director can also be seen within the broader success of films made by diverse content creators and their onscreen counterparts. The 2017 Hollywood Diversity Report found that films with relatively diverse casts (at least twenty-one-percent to thirty-percent minority) had the highest medial global box office receipts and the highest median return on investment.¹³¹ According to the data, films with twenty-one-percent to thirty-percent minority casts made a median global box office figure of \$105 million.¹³² In contrast, films with less than ten-percent diversity which made a media global box office figure of only \$41.9 million, less than half the amount.¹³³ Furthermore, between 2011 to 2015, relatively diverse films excelled at box offices regardless of genre, showing that the success of diverse films and content is a sustained occurrence and not a momentary trend.¹³⁴ These findings are also reflected in the television industry where shows with diversity also experience some of the highest median ratings.¹³⁵ It is acknowledged that “diverse” and “minority” does not automatically mean that these communities are wholly made of immigrants. However, the positive trend between diversity and a media product’s success shows that the industry’s bottom line only improves with more varied voices, experiences, and stories.

As previously discussed, creative products are closely related the unique individual who created the artifact. Thus, in this case, foreign-born content creators can only add to the diversity and bottom line of the film and television industries. It is more advantageous for the United States to be able to open its doors to extraordinary content creators. Allowing extraordinary content creators to immigrate to the United State would allow the creative industries to have access to more unique and innovative talent. Additionally, these extraordinary creators who immigrate to the United States contribute to the country by allowing creative companies to keep part of their production economies in the United States where the content creators interact in the U.S. market as both consumers and taxpayers.

NBCUniversal, in New York, NY. (Oct. 17, 201).

¹³⁰ *Id.*

¹³¹ DARNELL HUNT ET AL., RALPH J. BUNCHE CTR. FOR AFR. AM. STUD. AT UCLA, 2017 HOLLYWOOD DIVERSITY REPORT: SETTING THE RECORD STRAIGHT, 2 (2017).

¹³² *Id.* at 62.

¹³³ *Id.*

¹³⁴ DARNELL HUNT ET AL., RALPH J. BUNCHE CTR. FOR AFR. AM. STUD. AT UCLA, 2017 HOLLYWOOD DIVERSITY REPORT: SETTING THE RECORD STRAIGHT, 66 (2017).

¹³⁵ *Id.* at 67-68.

IV. PROPOSAL

The proposed points system promulgated by the RAISE Act attempts to force all employment-based immigrants under one broad umbrella, without any consideration for industry-specific needs or special achievements of highly-skilled “extraordinarily talented” individuals in the evolving and emerging creative fields. The system proposed by the RAISE Act creates an inherent bias for individuals in the sciences. Thus, it de-prioritizes individuals who work in the arts and ignores the individuals whose work arguably helps shape, create, and disburse American pop culture both domestically and internationally.

In order to keep the U.S. entertainment industry competitive and maintain its reputation as “the market” for the arts, the administration should broaden the scope of the points system. This can be done in two ways: (1) through a hybrid system that allows the current EB-1A “extraordinary ability” immigrant visa category to remain intact next to the system, or (2) broaden the scope for the kinds of achievements that qualify as “extraordinary” to include nationally or internationally recognized industry-specific awards or achievements that can be shown to be equivalent or similar in prestige to a Nobel Prize or an Olympic medal.

A. A Hybrid System

The EB-1 immigrant visa, by the very nature of its text implies that individuals under the category are not meant to compete with the general public. As such, the United States should consider a hybrid system in which the EB-1 visa remains intact next to the proposed points system.

The current EB-1 framework provides the flexibility that is missing from the proposed RAISE Act’s point system. As it currently stands, classification as “extraordinarily talented” under the EB-1 scheme allows applicants to either show evidence of a one-time achievement such as a major internationally recognized award or submitting evidence proving three of ten enumerate criteria set by the statute.¹³⁶ The language of the statute concentrates on the applicant’s level of qualification in relation to the individual’s specific field of endeavor. The statute provides opportunity for applicants to submit evidence of the alien’s receipt of lesser, but equally recognized awards, publications in major media or

¹³⁶ 8 C.F.R. § 204.5 (Lexis Advance through the August 2, 2017 issue of the Federal Register. Pursuant to 82 FR 8346 (“Regulatory Freeze Pending Review”), certain regulations will be delayed pending further review. See Publisher’s Note under affected rules. Title 3 is current through September 8, 2017.

industry publication, adjudicatory roles, and any leading or critical roles as expected from their status as an extraordinary talent, among other comparable criteria.

A hybrid system which implements the industry-specific flexibility found in the current EB-1 requirements to supplement the RAISE Act's generic points system would be a more faithful way to execute the evaluation of extraordinary foreign-born content creators immigrating to the United States. A hybrid system would be able to award points that more carefully consider an extraordinary applicant's industry achievements as a whole and not on a factor that is arguably arbitrary to industry (such as whether or not they should be awarded one extra point because their English ability is "excellent" rather than "fluent").

B. Broaden the Scope of "Extraordinary Achievements"

Given the completeness in which the RAISE Act attempts to incorporate all employment-based visas in one streamlined points system, an alternative to the previous hybrid system would be to expand the proposed Act's scope of what it considers "extraordinary achievement". The RAISE Act limits "extraordinary achievement" to "a Nobel Laureate" or "comparable recognition in a field of scientific or social scientific study" or and earning an "individual Olympic medal or placed first in an international sporting event in which the majority of the best athletes in an Olympic sport were represented".¹³⁷ Since this Note concerns only content creators, we will only discuss the classification in regard to recognition comparable to a Nobel Laureate. Rather than limiting "extraordinary achievement" to just a Nobel Laureate or comparable recognition in a field of scientific or social scientific study, the RAISE Act should broaden the language of that criteria to reflect a standard similar to the "one time achievement" provided in 8 C.F.R. § 204.5(h)(3).

Currently, 8 C.F.R. § 204.5(h)(3) specifies that an EB-1A applicant may prove their status as an individual of extraordinary talent by showing evidence of three of the ten enumerated categories or show "evidence of a one-time achievement (that is, a major, internationally recognized award)."¹³⁸ Though USCIS does attempt to contextualize "one-time achievement" by listing the Pulitzer, Oscar, and Olympic medal as indications of the type of awards indicative of a "one-time achievement"¹³⁹, the statutory language does not specifically count them

¹³⁷ Reforming American Immigration for Strong Employment Act, S.354, 115th Cong., 32 (as introduced to the Senate, Feb. 13, 2017).

¹³⁸ 8 C.F.R. § 204.5(h)(3).

¹³⁹ *Employment-Based Immigration: First Preference EB-1, USCIS,*

to be the only examples of this standard. Instead, the statute specifically qualifies “one-time achievement” as “a major, internationally recognized award”.¹⁴⁰

Furthermore, *Rijal v. USCIS*, explicitly acknowledged that “No one suggests that an alien must win a Nobel Prize to qualify . . . What awards are less prestigious and recognized than the Nobel Prize qualify as major, international awards is a question that the law does not answer. There is little question, moreover, that Congress felt it unnecessary and perhaps inadvisable to define ‘major’ in this context. It entrusted that decision to the administrative process.”¹⁴¹ When considering the language of the statute and established case law for immigration adjudications, it is clear that a Nobel Prize is not the only genre of major internationally recognized award that indicates an individual’s extraordinary ability status. The flexibility in allowing the administrative process to determine what awards and achievements constitute as “major, internationally recognized award”, suggests that statute was written in a way to leave room for expansion based on the evolution of the standards of recognition in different sectors of the arts and entertainment industry over time.

The “Extraordinary Achievements” category within the RAISE Act does provide some flexibility for recognition comparable to a Nobel Laureate recipient “as determined by the Commissioner of U.S. Citizenship and Immigration Services”.¹⁴² However, those comparable awards are limited to recognition in the field of scientific or social scientific study.¹⁴³ As defined by Dictionary.com, “social science” encompasses the fields of history, economics, and related fields that investigate aspects of society or forms of social activity.¹⁴⁴ Merriam-Webster defines “social science” as “a branch of science that deals with the institutions and functioning of human society and with the interpersonal relationships of individuals as members of society” and “a science (such as economics or political science) dealing with a particular phase or aspect of human society.”¹⁴⁵ Given these definitions, it is clear that awards within the realm of content creation would not be applicable. As such, the extraordinary achievement portion of the RAISE Act is too

<https://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-first-preference-eb-1> (last visited Sept. 29, 2017) (specifically stating in the Extraordinary Ability column on evidence “You must meet 3 of 10 criteria* below, or provide evidence of a one-time achievement (i.e., Pulitzer, Oscar, Olympic Medal)).

¹⁴⁰ 8 C.F.R. § 204.5(h)(3).

¹⁴¹ *Rijal*, 772 F. Supp. 2d at 1345.

¹⁴² Reforming American Immigration for Strong Employment Act, S.354, 115th Cong., 32 (as introduced to the Senate, Feb. 13, 2017).

¹⁴³ *Id.*

¹⁴⁴ *Social Science*, Dictionary.com, <http://www.dictionary.com/browse/social-science?s=t>, (last visited Jan. 13, 2018).

¹⁴⁵ *Social Science*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/social%20science>, (last visited Jan. 13, 2018)

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restrictive and eliminates fields related to the arts, specifically the creative arts, from its considerations.

In order to integrate the most faithful version of the employment-based extraordinary ability considerations into the “Extraordinary Achievement” section of the RAISE Act, the act cannot have a preference for accomplishments in the fields of science. The EB-1 visa was intended to identify the small percentage of individuals who have risen to the top in their respective fields within the broader areas of the “sciences, arts, education, business, or athletics.”¹⁴⁶ Under the RAISE Act scheme, the areas of science, business, and education can be represented within the “comparable recognition in the field of scientific or social scientific study”, as determined by the USCIS Commissioner. The area of athletics is clearly represented by section’s recognition of the Olympic medal and other international sporting events. The only fields that have not been translated over from the EB-1 are the fields of endeavor related to the arts.

As such, to avoid discrimination of an entire field of work that includes not only content creators, but also performers, writers, designers, and other originators of cultural capital, the RAISE Act must expand its definition of “extraordinary achievements” to include major internationally recognized awards for industries related to the arts.

V. CONCLUSION

When former President Lyndon B. Johnson signed the Arts and Humanities Bill, he acknowledged, “We in America have not always been kind to the artists and the scholars who are the creators and the keepers of our vision. Somehow, the scientists always seem to get the penthouse, while the arts and the humanities get the basement.”¹⁴⁷ President Johnson also remarked, “Art is a nation’s most precious heritage. For it is in our works of art that we reveal to ourselves, and to others, the inner vision which guides us as a Nation. And where there is no vision, the people perish.”¹⁴⁸ We should consider what kind of vision guides a Nation that has proposed a merit-based immigration points system that seems to relegate the arts and humanities back into the

¹⁴⁶ *Employment-Based Immigration: First Preference EB-1*, USCIS, <https://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-first-preference-eb-1> (last visited Sept. 29, 2017) (stating “You must be able to demonstrate extraordinary ability in the sciences, arts, education, business, or athletics through sustained national or international acclaim).

¹⁴⁷ Gerhard Peters and John T. Woolley, *Lyndon B. Johnson: 534 – Remarks at the Signing of the Arts and Humanities Bill*, THE AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=27279> (last visited Jan. 29, 2018).

¹⁴⁸ *Id.*

basement.

The current points system proposed by the RAISE Act strongly favors traditional benchmarks of accomplishment found in the hard sciences and business fields. It leaves no room for extraordinary individuals in the arts to present their case, especially those extraordinary professionals in evolving roles and occupations like content creators in the film and television industries. The advantages of immigrants in the creative arts has been prevalent throughout the growth of the American entertainment industry, from Eastern European immigrants establishing the modern-day film industry to immigrant writers and creators crafting stories that transcend borders and cultures.¹⁴⁹ Furthermore, American media products with at least one-third diversity among its cast and crew have dominated the global media market for the last several years. As such, a hybrid system of the proposed RAISE Act with the flexibility and industry-specific considerations of the current EB-1 extraordinary talent visa framework would balance the scale between growing talent in both the arts and sciences.

To borrow once more from President Johnson, “The arts and the humanities belong to the people, for it is, after all, the people who create them.”¹⁵⁰ The United States is known a melting pot of cultures brought from immigrants from all over the world. Immigrants are the people of the United States and they create the arts that represent the nation. With that in mind, can we really allow the creators of the nation’s greatest heritage to be reduced to a list of points?

¹⁴⁹ Charles Hirschman, *The Contributions of Immigrants to American Culture*, DAEDALUS (2013) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3856769/#S1title>.

¹⁵⁰ Gerhard Peters and John T. Woolley, *Lyndon B. Johnson: 534 – Remarks at the Signing of the Arts and Humanities Bill*, THE AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=27279> (last visited Jan. 29, 2018).