I. INTRODUCTION

The preponderance of evidence standard is ultimately a judgment call. That judgment call must be in keeping with the spirit of the statute, guided by the regulations, tempered with wisdom, and made within the proper context. The astute reader might be anticipating pontification on the tenets of Matter of Chawathe, 25 I&N Dec. 369 (AAO 2010). If so, you’d be off the mark by quite a few years. Instead, this missive will be devoted to advocating for AAO to add to its jurisprudence in two other areas. They are, (1) determining “extraordinary ability”; and (2) determining “ability to pay” (ATP).

II. EXTRAORDINARY ABILITY

Until the Ninth Circuit gave us Kazarian v. USCIS, 596 F.3d 1115 (9th Cir. 2010), the only Precedent Decision devoted to guiding the adjudication of requests for classification as “an alien of extraordinary ability”; code E11, or colloquially EB-1A, see INA § 203(b)(1)(A); 8 U.S.C. § 1153(b)(1)(A); was Matter of Price, 20 I&N Dec. 953 (Acting Assoc. Comm. 1994). Price was decided very soon after Congress defined the visa classification through the Immigration Act of 1990 (IMMACT90). Unfortunately, Price was not very helpful (and still isn’t), because pro-golfer Nick Price’s then-current world renown made his case too easy to approve. There are few cases that are that easy to decide, therefore this was, in my opinion, a poor choice for a Precedent Decision.

Most cases are more like *Kazarian*, and require deeper analysis such as *Rijal v. US Citizenship & Immigration Services*, 772 F. Supp. 2d 1339 (W.D. Wash. 2011), aff’d, 683 F.3d 1030 (9th Cir. 2012), see *Anil Rijal v. USCIS*, No. 11-35249 (9th Cir. June 13, 2012), in which the Ninth Circuit “… adopt[ed] as …[their]… own the well-reasoned published opinion of the district court…”. So, I am advocating for AAO to designate at least one, preferably more than one, new Precedent Decision to further guide adjudicators, practitioners, and would be immigrants on what it takes to meet the various eligibility criteria for this visa classification.

**a. Recap of Price’s Extraordinary Ability Factors**

In 1994, AAO held in pertinent part, that Nick Price, a native and citizen of Zimbabwe, who had been a professional golfer since 1977, had “… clearly established that he [was] an alien with extraordinary ability in athletics when he [had] won such internationally recognized competitions as the 1983 World Series of Golf and the 1991 Canadian Open, ranked 10th on the Professional Golfers’ Association Tour in 1989, collected earnings in 1991 totaling $714,389, provided numerous well-known and celebrated media coverage for his ability on the down. He met the criteria found at 8 C.F.R. § 204.5(h)(3)(i) “awards; (ii) “memberships”; (iii) “published materials”; and (ix) “high salary” at the very least. Arguably, one of his awards could be “… evidence of a one-time achievement (that is, a major, internationally recognized award)”; 8 C.F.R. § 204.5(h)(3). Also, he planned to continue competing. In a final footnote, AAO took administrative notice of seventeen (17) additional victories between certification of the original decision and its publication as Precedent; *Price*, at 953, n. 3. As will be discussed below, the dollar amounts in the 1994, decision, need adjustment to account for inflation. For instance, the $714,389, won in 1991, is worth $1,293,972.90, in 2017, dollars. 2 At this point, I’ll remind the reader of the title of this article and ask: “**What have you got to prove** in order to qualify for **an extraordinary ability visa**?” There are additional criteria that could be better addressed through further examples of more realistic cases, multiple cases, please.

2 [https://www.bls.gov/data/inflation_calculator.htm](https://www.bls.gov/data/inflation_calculator.htm)
b. **Major and Lesser Awards**

While Congress only cited one example of a *major internationally recognized award*, they obviously did not intend it be restricted *only* to Nobel Prizewinners. One needs to remember to account for the *context* of each *specific field of endeavor*. The *sciences, arts, education, business,* or *athletics* each have their own special ways of recognizing their own. There are well respected, perhaps *coveted*, medals and awards for athletes outside of the Olympics. In the U.S., we have the Heisman Trophy which is not given out like candy on Halloween. These are equivalent to *at least* a ‘lesser award’ under the regulations. They are extremely desirable if you want to be a first-round draft pick for an NFL team. “The [Heisman Trophy](https://en.wikipedia.org/wiki/List_of_Heisman_Trophy_winners), one of the highest individual awards in American college football, has been awarded 81 times since its creation in 1935, including 79 unique winners.”

Although it is quintessentially American, it is known and respected in some other countries. Other countries have national awards in various fields that are recognized abroad. Some are also ‘lesser awards’ but others are world renowned. America’s ‘Oscar’ a.k.a. ‘[Academy Award](https://www.google.com/search?q=academy+award),’ is world renowned. Great Britain’s [BAFTA](https://www.google.com/search?q=BAFTA) Award is also world renowned. Further discussion of examples from around the world as well as *the qualities that make an award special enough to be world renowned*, would help in these adjudications.

### III. **ABILITY TO PAY**

Meanwhile, *Matter of Sonegawa, 12 I&N Dec. 612 (R.C. 1967)* allows for a Petitioner to make the case that the “*totality of the circumstances*” affecting the petitioning business to be considered, but only if the evidence truly warrants such consideration. That sounds a bit confused or like “doublespeak”. In other words, the
agency may use a more subjectiv​e approach in the form of a qualitative analysis and evaluation in order to determine a Petitioner's ability to pay the proffered wage. AAO has explained its approach as using a process of elimination, as follows in this ubiquitous ‘blurb’.

“In determining ability to pay, we examine whether a petitioner paid a beneficiary the full proffered wage each year from a petition’s priority date. If a petitioner did not pay the full proffered wage each year, we examine whether it generated annual amounts of net income or net current assets sufficient to pay any differences between the annual proffered wage and actual wages paid. If net income and net current assets are insufficient, we may consider other factors affecting a petitioner's ability to pay. See Matter of Sonegawa, 12 I&N Dec. 612, 614-15 (Reg’l Comm'r 1967). [FN5]”


Matter of S-H, ID# 400461 [AAO Apr. 21, 2017], at p. 5

a. All or None in a Case Based on Circumstantial Evidence

As explained above, the determination as to a petitioning employer’s ability to pay the alien beneficiary the proffered wage, follows a strict hierarchy during this critical analysis. The logic in this analytical approach flows downhill from the pinnacle of actual full payment to the murky waters of a qualitative dissection and distillation of all evidence in light of specific circumstances. There is also the overriding consideration in this circumstantial case approach that the instant petition not be viewed in isolation. In other words, petitions for multiple beneficiaries, pay all of them. A qualitative huge difference in such cases. As in that the instant petition not be seen as independent. Thus, if an employer submits multiple petitions for multiple beneficiaries, then they must show the ability to pay the proffered wage each year from a petition’s priority date. If a petitioner did not pay the full proffered wage each year, then we examine whether it generated annual amounts of net income or net current assets sufficient to pay any differences between the annual proffered wage and actual wages paid. If net income and net current assets are insufficient, then we may consider other factors affecting a petitioner’s ability to pay. See Matter of Sonegawa, 12 I&N Dec. 612, 614-15 (Reg’l Comm'r 1967). [FN5]”


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ak&g=chrome.2.69i57i015.4445j0i7&sourceid=chrome&ie=UTF-8 evasive, ambiguous language that is intended to deceive or confuse. http://www.dictionary.com/browse/doublespeak

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