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KAZARIAN V. USCIS: DISCREDITING THE CIRCULARITY ARGUMENT IN EB-1 PETITIONS

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The recent decision in *Kazarian v. USCIS*, --- F.3d ----, 2010 WL 725317 (C.A.9 (Cal.)), http://www.ca9.uscourts.gov/opinions/view_subpage.php?pk_id=0000010327, goes a long way in discrediting the circularity argument that the USCIS often deploys to shoot down petitions filed under the extraordinary ability category (EB-1). Even though the petitioner lost in this case, the new re-issued decision is still a victory for those who wish to seek green cards as persons or extraordinary ability or as outstanding professor or researchers.

Kazarian essentially holds that a petitioner claiming extraordinary ability need not submit extraordinary evidence to prove that he or she is a person of extraordinary ability. If one of the evidentiary criteria requires a showing of scholarly publications, the petitioner need not establish that the scholarly publications in themselves are also extraordinary in order to qualify as a person of extraordinary ability. This is a circular argument, which Kazarian appropriately shot down.

All credit goes to my friend and colleague, Bernie Wolfsdorf, AILA's current President, who decided to take on this hopeless case pro bono after it was first denied in 2009. Nobody thought that the Ninth Circuit panel would even agree to review the case again. This writer is proud to have been part of an informal group of lawyers who occasionally assisted with thoughts and ideas on the amicus brief, which Nadine Wettstein, so adroitly crafted on behalf of the American Immigration Council. The whole purpose of seeking review of the decision was not to overturn the denial, but to request the Court of Appeals in the Ninth Circuit to remove, or rather discredit, the circular reasoning of the USCIS with respect to accepting evidence to prove extraordinary ability that was

not required by the regulation. We believed that by removing this reasoning in Kazarian, it would give the USCIS Service Centers less ammunition to deny EB-1 petitions by rejecting evidence that can otherwise prove that one is a person of extraordinary ability.

As background, an individual can establish 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. See INA § 203(b)(1)(A)(i). Furthermore, the individual seeks entry to continue work in the area of extraordinary ability and his or her entry will substantially benefit prospectively the U.S. See INA § 203(b)(1)(A)(ii) & (iii). No job offer is required. Evidence to demonstrate "sustained national or international acclaim" could be a one-time achievement such as a major international award (for example, a Nobel Prize, Oscar or Grammy). If the applicant is not the recipient of such an award then documentation of any three of the following is sufficient:

1. Receipt of lesser nationally or internationally recognized prizes or awards.

2. Membership in an association in the field for which classification is sought, which requires outstanding achievement of its members, as judged by recognized national or international experts.

3. Published material about the person in professional or major trade publications or other major media.

4. Participation as a judge of the work of others.

5. Evidence of original scientific, scholastic, artistic, athletic or business-related contributions of major significance.

6. Authorship of scholarly articles in the field, in professional or major trade publications or other media.

7. Artistic exhibitions or showcases.

8. Performance in a leading or cultural role for organizations or establishments that have a distinguished reputation.

9. High salary or remuneration in relation to others in the field.

10. Commercial success in the performing arts.

See 8 CFR § 204.5(h)(3)(i)-(x). An applicant may also submit comparable

evidence if the above standards do not readily apply.

In *Kazarian*, the main bone of contention was what constitutes "authorship of scholarly articles in the field." In the original decision, *Kazarian v. USCIS*, 580 F.3d 1030 (Kazarian 1), the Ninth Circuit agreed with the Appeals Administrative Office (AAO) that "publication of scholarly articles is not automatically evidence of sustained acclaim; we must consider the research community's reaction to those articles." The Court in *Kazarian 1* acknowledged that this reasoning "may be circular, because publication, on its own, indicates approval within the community." However, the Court went on to justify the AAO's circular reasoning probably unmindful of the adverse impact that it would have for future EB-1 petitioners, "Because postdoctoral candidates are expected to publish, however, the agency's conclusion that the articles must be considered in light of the community's reaction is not contrary to the statutory mandate that the alien have achieved "sustained national or international acclaim." (citation omitted).

It was precisely this reasoning that the petitioner *Kazarian's* new brief, along with the amicus brief of the American Immigration Council attacked, on the ground that it was inconsistent with the governing regulation, 8 CFR § 204.5(h)(3)(vi), which simply states, "Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media." The regulation does not require consideration of the research community's reaction to those articles, which was essentially an invention of the USCIS.

Fortunately, the new decision in *Kazarian* acknowledged the AAO's faulty reasoning, which *Kazarian 1* affirmed, and the following extract from the decision is worth noting: "The AAO's conclusion rests on an improper understanding of 8 CFR § 204.5(h)(3)(vi). Nothing in that provision requires a petitioner to demonstrate the research community's reaction to his published articles before those articles can be considered as evidence, and neither USCIS nor the AAO may unilaterally impose novel substantive or evidentiary requirements beyond those set forth at 8 CFR § 204.5. "

It is hoped that the USCIS pays heed to the *Kazarian* court's admonition of its flawed circularity analysis and stops insisting on evidence that has no basis in its own regulations. Deserving petitioners claiming extraordinary ability who benefit the United States ought to be able to gain permanent residence without

jumping through needless hoops and hurdles.. And if the USCIS does not relent, petitioners should continue to discredit the government's circularity argument. In addition to *Kazarian*, other federal district courts have been critical. *See Buletini v. INS*, 860 F. Supp. 1222 (E.D. Mich. 1994)(criticizing the government's circular argument requiring that "plaintiff must prove he is a doctor of extraordinary ability in order to prove that he is a doctor of extraordinary ability"); *Gülen v. Chertoff*, Civil Action No. 07-2148, 2008 WL 2779001 (E.D. Pa. July 16, 2008), at *4 ("Because Gülen has met the requirements of three of the subcategories of 8 C.F.R. § 204.5(h)(3), the AAO's determination that he has not demonstrated extraordinary ability is contrary to applicable law and must be reversed"). *Kazarian* is a step in the right direction, following on the heels of equally critical lower federal court decisions on circularity, and will also benefit another important community so vital to this country, outstanding professors and researchers, who can also claim permanent residence through another provision of EB-1, INA § 203(b)(1))(B), where the evidentiary criteria with extraordinary ability overlap.