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HOW EXTRAORDINARY DOES ONE NEED TO BE TO QUALIFY AS A PERSON OF EXTRAORDINARY ABILITY?

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When *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010), was first decided, it was received with much jubilation as it was thought that the standards for establishing extraordinary ability would be more straightforward and streamlined. *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. If *Kazarian* just stopped there, it would have been a wonderful outcome. Unfortunately, *Kazarian* has been interpreted to also require a vague and second step analysis known as the "final merits determination," which can stump even the most extraordinary. Read on....

As background, an individual can obtain permanent residence in the US by establishing 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). Unlike most other petitions, no job offer is required and one can even self-petition for permanent residency. 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 professional or major trade publications or other media." 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 new *Kazarian* decision reversed, 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.

Unfortunately after the initial victory, *Kazarian*, as interpreted by the USCIS, has resulted in a two part test. In the first part of the test, the USCIS has to determine whether the individual has met three of the 10 criteria to establish extraordinary ability. However, that is not sufficient and does not result in an approval. Even after meeting the first part of the test, the individual has to establish through a vague and undefined "final merits determination" that he or she is extraordinary.

Whether we like it or not, the two part test, based on the USCIS's interpretation of *Kazarian* is here to stay with us – at least for now – and the focus of this article is to suggest ways to confront it and still win petitions for persons of extraordinary ability or outstanding professors and researchers.

In its December 22, 2010 Policy Memorandum, ("Policy Memorandum"), USCIS implemented a "two-part adjudicative approach" for extraordinary ability, outstanding researcher and professor, and exceptional ability immigrant visa petitions. The Service cites *Kazarian* as the basis for modifying the Adjudicator's Field Manual to include a second step in the adjudication process, the "final merits determination." Although *Kazarian* did not actually create a "final merits determination," and objected essentially to the AAO's imposition of extra requirements under the evidentiary criteria in 8 CFR §§ 204.5(h)(3)(iv) and (vi), the Service seized on the following excerpts in *Kazarian* as a basis for justifying a "final merits determination" analysis:

(1) While other authors' citations (or lack thereof) might be relevant to the *final merits determination* of whether a petitioner is at the very top of his or her field of endeavor, they are not relevant to the antecedent procedural question of whether the petitioner has provided at least three types of evidence (emphasis added); and
(2) ...hile the AAO's analysis might be relevant to a *final merits determination*, the AAO may not unilaterally impose a novel evidentiary requirement (emphasis added).
Kazarian v. USCIS, 596 F.3d at 1121.

Under this two part test, the USCIS must essentially accept the evidence of extraordinary ability under the 10 criteria set forth in 8 CFR §204.5(h)(3)(i)-(x). The USCIS cannot object to the submission of the alien's "scholarly articles in the field, in professional or major trade publications or other major media" under §204.5(h)(vi) unless there is consideration of the research community's reaction to those articles, as it did erroneously in *Kazarian.* Still, the USICS may take this extra evidentiary factor into consideration, namely, the lack of reaction in the research community, during the "final merits determination" analysis. It is readily apparent that the analysis under the second step defeats the very essence of the holding in *Kazarian* that the USCIS cannot impose extra requirements under the evidentiary criteria. What it cannot do under the first step, the USCIS can still do under the "final merits determination."

Unfortunately, post *Kazarian* decisions seem to be affirming the two-part test and final merits determination analysis notwithstanding the holding in a prior decision, *Buletini v. INS*, 860 F.Supp. 1222 (E.D. Mich 1994), which held, "nce it is established that the alien's evidence is sufficient to meet three of the criteria listed in 8 C.F.R. § 204.5(h)(3), the alien must be deemed to have extraordinary ability unless the INS sets forth specific and substantiated reasons for its finding that the alien does not meet extraordinary ability." Id. at 1234. Under the burden shifting approach in *Buletini*, the petitioner should be deemed qualified, and the burden then shifts onto the Service to reject the evidence that meet the criteria, if suppose, it finds that the evidence was fraudulent or too dated and stale. In fact, such a burden shifting approach is not unknown in other aspects of immigration law. As my colleague David Isaacson has pointed out, in the asylum context, an applicant who demonstrates that he or she has suffered past persecution on account of a protected ground is rebuttably presumed to have a reasonable fear of future persecution on that same ground. 8 C.F.R. §§ 208.13(b)(1), 1208.13(b)(1). In such cases, by regulation, "the Service shall bear the burden of establishing by a preponderance of the evidence" that a change in circumstances, or the reasonable possibility of relocating within the country of persecution, should lead to a denial of asylum. 8 C.F.R. §§ 208.13(b)(1)(ii), 1208.13(b)(1).

Rijal v. USCIS, 772 F. Supp. 2d 1339 (W.D. Wash. 2011), *aff'd Rijal v. USCIS*, 683 F.3d 1030 (9th Cir. 2012) is a decision that explicitly follows the Policy Memorandum, and ignores the burden shifting approach as set forth in *Buletini.* Although the petitioner in *Rijal*, a Nepali documentary film maker,

submitted a UNICEF prize, the USCIS concluded that it did not meet the evidentiary criterion of "lesser nationally or internationally recognized prizes or awards of excellence" as it was awarded more than 4 years ago and did not provide evidence of the alien's sustained acclaim. While the court criticized the USICS for failing to consider this evidence under 8 CFR §204.5(h)(3)(i) and for similar errors under other evidentiary criteria, it nevertheless held that the petitioner did not suffer prejudice from these errors as "it made those errors with an eye toward the ultimate merits determination." *Rijal* at 1347. Based on a holistic determination of the petitioner's evidence, the court held that the USCIS appropriately found that the petitioner did not demonstrate sustained national or international acclaim. It is clear that the Ninth Circuit in Rijal affirmed the two step test set forth in the Policy Memorandum even though the suggestion of a "final merits determination" was mere dicta in *Kazarian*.

Noroozi and Assadi v. Napolitano, ___ F. Supp. ___ (SDNY Nov. 14, 2012), available on AILA InfoNet at Doc. No. 12111644 (posted 11/16/12), is another recent decision from the Southern District of New York that has agreed with the *Kazarian* two-step analysis. Petitioner Noroozi represented Iran in table tennis at the 2008 Olympics in Beijing. Although neither Noroozi nor the Iranian table tennis team won any medal at the Olympics, the USICS initially approved the EB-1 petition, but then subsequently revoked it. A second EB-1 petition was filed, which was denied on the ground that Noorzi only met two of the criteria, but not three. The court agreed with the USCIS that there was no evidence to substantiate that he played a "leading or critical role" for his team and nor did the "published material" about him pass muster since it focused more on the team and only briefly mentioned Noroozi. Even though the failure to meet the evidentiary criteria could have ended the analysis, the court also discussed how Noroozi did not merit a favorable judgment under the second part "final merits determination." Since Noroozi ranked 284th in the world in table tennis, and finished 65th place in table tennis in the 2008 Olympics, the court noted that this would oblige the USCIS to hypothetically grant EB-1 petitions to the 283 higher ranked table tennis players, and also to the 283 higher ranked players in other sports, assuming they were non-US citizens, as well as to the 64 table tennis players who outperformed Noroozi in the 2008 Olympics. The court's "final merits determination" in *Noroozi* is troubling as the EB-1 was never intended only for the number one player in a sporting field, and this decision should be contrasted with a pre-*Kazarian* decision involving an ice hockey

player in the National Hockey League whose team won the Stanley Cup, but was not an all-stars or one of the highest paid players, but was still found to be qualified under EB-1. See *Muni v. INS*, 891 F. Supp. 440 (N.D. Ill 1995). The "final merits determination" permits USCIS to set subjective baselines with respect to rankings of players in sports even if they would potentially qualify under the ten evidentiary criteria as Muni did after he sought reversal of the denial of his EB-1 petition in federal court. Interestingly, in *Noroozi*, the attorney also became a plaintiff along with the petitioner on the ground that the USCIS denied the EB-1 petition based on the petitioner's association with the attorney who had been unfairly singled out in a DOS cable. That strategy too failed since the court rejected that there was any bad faith on the part of the USCIS in denying Noroozi's EB-1 petition.

Various unpublished AAO decisions suggest that the government's final merits determination will consider evidence whether or not the petitioner has demonstrated : 1) a "level of expertise indicating that the individual is one of the small percentage who have risen to the very top of the field of endeavor," 8 CFR § 204.5(h)(2); and 2) "that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise." § INA 203(b)(1)(A); 8 CFR § 204.5(h)(3). *See also Kazarian*, 596 F.3d at 1119-20. While it makes sense to preserve the argument in the record that the final merits determination is inapplicable and to propose the burden shifting approach under *Buletini* instead, it also behooves a petitioner to argue that his or her client merits a favorable adjudication under the "final merits determination" analysis given that it has been blessed in post-*Kazarian* decisions. The amorphous nature of this standard allows the petitioner's attorney flexibility to make a broad argument just as it gives the USCIS examiner the same flexibility to approve or not approve a case even after the petitioner has submitted evidence under the evidentiary criteria. For instance, if a petitioner has met 3 out of 10 evidentiary criteria, the agile practitioner may be able to argue that the petitioner has demonstrated to be among the small percentage who has risen to the top of the field, sustained national or international acclaim, and recognition of achievements, by highlighting only the strongest evidence rather than evidence submitted under all three criteria. If the scholarly articles are very impressive, but the awards are not and the petitioner may have judged the work of only one PhD student, then the focus could be on the impressive scholarly articles when qualifying him or her under

the final merits determination. Moreover, under the final merits determination, a petitioner may be able to point to other evidence that may not categorically fall under the 10 evidentiary criteria, such as testimonials from eminent authorities in the field, as well as petitioner's stellar academic background. Of course, if the evidence submitted under the evidentiary criteria is all qualitatively superior and extensive, then the practitioner must not rest on these laurels and take pains to highlight this for the "final merits determination."Finally, the practitioner must always remind the USICS that the "final merits determination" is governed by the preponderance of evidence standard, as suggested in the Policy Memorandum too, which requires only 51% certainty.

It need not be this way as Congress probably did not intend for the USCIS to create a subjective final merits determination, when it enacted the priority worker categories under the Employment-based first preference in the Immigration Act of 1990. The starting point for examining the legislative history of the Immigration Act of 1990 is the House Report. See H.R. Rep. No. 723, Pt. 1, 101st Cong., 2d Sess. 4 (Sept. 19, 1990). With respect to aliens of extraordinary ability, the House Report states:

In order to qualify for admission in this category an alien must (1) demonstrate sustained national or international acclaim in the sciences, arts, education, business or athletics (as shown through extensive documentation); (2) be coming to the United States to continue work in that area of expertise; and (3) by virtue of such work benefit the United States. Documentation may include publications in respected journals, media accounts of the alien's contributions to his profession, and statements of recognition of exceptional expertise by qualified organizations. Recognition can be through a one-time achievement such as receipt of the Nobel Prize. An alien can also qualify on the basis of a career of acclaimed work in the field. In the case of the arts, the distinguished nature of the alien's career may be shown by critical reviews, prizes or awards received, box office standing or record sales. In short, admission under this category is to be reserved for that small percentage of individuals who have risen to the very top of their field of endeavor.
H.R. Rep. No. 723 at 69.
There is nothing in this passage that suggests that the USCIS needed to conduct a two-step analysis to determine extraordinary ability. On the contrary, the

House Report broadly suggests a number of possibilities under which an alien can establish extraordinary ability, such as through publications in respected journals, media accounts or statements of recognition of exceptional expertise by qualified organizations. Moreover, the House Report also indicates that "[a}n alien can also qualify on the basis of a career of acclaimed work in the field."

The implementing regulations appropriately relied on the House Report in defining "extraordinary ability" to mean "a level of expertise indicating that the individual is one of the small percentage who have risen to the very top of the field of endeavor." See commentary on implementing regulations at 56 Fed. Reg. 60897 (Nov. 29, 1991). The proposed regulations would have used one of the "few (emphasis added) who has risen to the very top of the field," but after listening to the objection of commentators, the Service substituted the word "few" with "small percentage" in deference to the same, albeit broader, verbiage that was used in the House Report. By developing the ten evidentiary criteria at 8 C.F.R. §204.5(h)(3)(1)-(x), and recognizing that if an alien met three out of the 10 criteria, the Service appropriately followed Congressional intent by allowing this alien to demonstrate extraordinary ability, which is "a level of expertise indicating that the individual is one of the small percentage who have risen to the very top of the field of endeavor." There is nothing more that is required within the regulatory criteria to demonstrate whether an alien was within that "small percentage," and this appears to be consistent with the House Report too. Given the broad examples in the House Report for demonstrating extraordinary ability, the Service also promulgated an additional regulation, 8 C.F.R. § 204.5(h)(4), that permits submission of comparable evidence when the given criteria do not apply to the candidate's occupation or achievements. The DHS Ombudsman's recommendations to improve the quality of extraordinary ability adjudications also discusses that the administrative practice prior to *Kazarian* was to base an applicant's extraordinary ability on complying with 3 out of the 10 evidentiary criteria.

The extraordinary ability provision, as crafted by Congress in 1990, should be viewed in the context of other introductory passages in the House Report preceding the section on extraordinary ability. Congress was clearly concerned about the US labor market facing two problems, which immigration policy could help correct. Id. at 52. "The first is the need of American business for highly skilled, specially trained personnel to fill increasingly sophisticated jobs for which domestic personnel cannot be found and the need for other workers to

meet specific labor shortages." Id. The following passage from the House Report is worth extracting, and while written in 1990, is relevant even in 2013:

The competitive influences of the Asian Pacific Rim, Caribbean Basin, and the European Community are forcing re-evaluation of the U.S. role in the world. Immigration law is not now in synchronization with these global developments. Its current structure inhibits timely admittance of needed highly skilled immigrants. The highest preference in the employment category, relating to people of exceptional ability, currently involves an 18-month wait for a visa. The other employment category, for skilled and unskilled workers, is subject to a 2 ½ year wait. This lack of responsiveness may impede the ability of businesses to plan and operate efficiently and effectively in the global economy.
Id. at 53.
Indeed, it is very clear that IMMACT90, as reflected by the intent of Congress in the House Report, has failed to address the problem of timely admittance of highly skilled immigrants. The waits under the employment-based second preferences (EB-2) for India and China and in the employment-based third preferences (EB-3) for all countries, and worse for India, are far greater in 2013. In the case of the India EB-3, the wait could be several decades long. If immigration law was not in synchronization with global developments in 1990, it is much less so in 2013 especially since the world has become far more globalized and interdependent. Indeed, one way to correct the imbalance is for the USCIS to faithfully interpret the pivotal extraordinary ability provision in light of Congressional concern in 1990, which continues to be even more of concern today, and that is to expeditiously allow an alien of extraordinary ability who meets 3 out of the 10 evidentiary criteria to be able to obtain permanent residence in the employment-based first preference (EB-1), which unlike the EB-2 for India and China, and the EB-3, remains current and has always remained current. A second-step subjective merits analysis, as proposed by the USCIS, would continue to thwart Congressional intent as it would lead to arbitrary denials of aliens who otherwise can demonstrate extraordinary ability, and who would clearly be able to benefit the U.S.

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