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WILL KAZARIAN CHANGE THE 0-1 VISA?

Posted on April 28, 2014 by Cyrus Mehta

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The value of the O-1 visa is its flexibility, an adaptive quality that enables it to respond to the different needs of different petitioners. Any formulaic approach that restricts the full and open expression of such subtlety not only reduces the value of the O-1 but undermines its bedrock utility. That is why the stated willingness of the USCIS to apply a subjective *Kazarian*-style final merits analysis in the O-1 context, even after the applicant has satisfied the evidentiary criteria, should arouse our most serious concern. This is true for several reasons. Not only does such a constricted view of the O-1 prevent it from being all that it can be, but it blurs the distinction between the O-1 and the EB1-1 extraordinary ability immigrant petition, two different visa categories with different purposes. Just as the approval of an O-1 nonimmigrant petition does not ensure similar approval of an EB1-1 immigrant petition, the analytical tools used by USCIS examiners to evaluate the merits of these distinct categories must themselves remain separate.

With this as our starting point, what do the regulations tell us about the O-1? The O-1 visa is a useful visa for people, under INA §101(a)(15)(o), who can demonstrate extraordinary ability in the sciences, arts, education, business or athletics. Unlike the H-1B visa, it is not subject to an annual cap. It can also be availed of by artists and entertainers, people who are traditionally self-employed, as long as an agent serves as a sponsor. Although the "extraordinary ability" standard is a high one, artists can prove their eligibility under a lower "distinction" standard pursuant to INA §101(a)(46). Those qualifying for an O-1 visa in the motion pictures or television industry have to demonstrate extraordinary achievement, rather than extraordinary ability. There are thus three different standards under the O-1 visa.

Extraordinary ability in science, education, business or athletics means "a level

of expertise indicating that the person is one of the small percentages who have arisen to the very top of the field of endeavor." 8 CFR 214.2(o)(3)(ii).

The extraordinary criteria, as set forth in 8 CFR 214.2(o)(iii), are as follows:

(A) Receipt of a major, internationally recognized award, such as the Nobel Prize; or

(B) At least three of the following forms of documentation:

(1) Documentation of the alien's receipt of nationally or internationally recognized prizes or awards for excellence in the field of endeavor;

(2) 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;

(3) Published material in professional or major trade publications or major media about the alien, relating to the alien's work in the field for which classification is sought, which shall include the title, date, and author of such published material, and any necessary translation;

(4) Evidence of the alien's participation on a panel, or individually, as a judge of the work of others in the same or in an allied field of specialization to that for which classification is sought;

(5) Evidence of the alien's original scientific, scholarly, or business-related contributions of major significance in the field;

(6) Evidence of the alien's authorship of scholarly articles in the field, in professional journals, or other major media.

(7) Evidence that the alien has been employed in a critical or essential capacity for organizations and establishments that have a distinguished reputation;

(8) Evidence that the alien has either commanded a high salary or will command a high salary or other remuneration for services, evidenced by contracts or other reliable evidence.

(C) If the criteria in paragraph (o)(3)(iii) of this section do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence in order to establish the beneficiary's eligibility.

Extraordinary Achievement in the motion pictures and television means a "very high level of accomplishment in the motion picture or TV industry evidenced by a degree of skill and recognition significantly above that ordinarily encountered." 8 CFR 214.2(o)(3)(ii).
As already noted, an O-1 in the arts has to prove only distinction. While "extraordinary achievement" and "distinction" may appear to be two separate standards, the criteria for demonstrating extraordinary achievement in the motion picture or TV industry or distinction in the arts are almost identical, and set forth at 8 CFR 214.2(o)(3)(iv) and (v), which are as follows:

(A) Evidence that the alien has been nominated for, or has been the recipient of, significant national or international awards or prizes in the particular field such as an Academy Award, an Emmy, a Grammy, or a Director's Guild Award; or

(B) At least three of the following forms of documentation:

(1) Evidence that the alien has performed, and will perform, services as a lead or starring participant in productions or events which have a distinguished reputation as evidenced by critical reviews, advertisements, publicity releases, publications contracts, or endorsements;

(2) Evidence that the alien has achieved national or international recognition for achievements evidenced by critical reviews or other published materials by or about the individual in major newspapers, trade journals, magazines, or other publications;

(3) Evidence that the alien has performed, and will perform, in a lead, starring, or critical role for organizations and establishments that have a distinguished reputation evidenced by articles in newspapers, trade journals, publications, or testimonials;

(4) Evidence that the alien has a record of major commercial or critically acclaimed successes as evidenced by such indicators as title, rating, standing in the field, box office receipts, motion pictures or television ratings, and other occupational achievements reported in trade journals, major newspapers, or other publications;

(5) Evidence that the alien has received significant recognition for achievements from organizations, critics, government agencies, or other recognized experts in the field in which the alien is engaged. Such testimonials must be in a form

which clearly indicates the author's authority, expertise, and knowledge of the alien's achievements; or

(6) Evidence that the alien has either commanded a high salary or will command a high salary or other substantial remuneration for services in relation to others in the field, as evidenced by contracts or other reliable evidence; or

If the above criteria do not readily apply, only those establishing distinction in the arts can submit comparable evidence. People trying to qualify for an O-1 visa under the extraordinary achievement standard for motion pictures and the TV industry cannot submit comparable evidence.

All O-1 petitions must be accompanied by consultations from the appropriate unions, and if they do not exist, may contain opinions from expert sources.

Recent unpublished decisions from the Appeals Administrative Office are applying the two-part approach in *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010). When *Kazarian* was first decided, it was received with much jubilation as it was thought that the standards for establishing extraordinary ability under a green card category pursuant to INA § 203(b)(1)(A)(i) 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. We point readers to Cyrus Mehta's blog, How Extraordinary Does One Have to Be to Qualify as a Person of Extraordinary Ability, for a detailed analysis of the *Kazarian* decision and how the USICS has interpreted it.

In its December 22, 2010 Policy Memorandum, ("Policy Memorandum"), United States Citizen and Immigration Services (USCIS) implemented a "two-part adjudicative approach" for extraordinary ability, outstanding researcher and professor, and exceptional ability immigrant visa petitions. Here is the first, but unfortunately not the last, indication of a desire by the USCIS to utilize the final

merits methodology of *Kazarian* in case types not mentioned in or justified by *Kazarian* itself. While the USCIS doubtless may view the extension of *Kazarian* to the O-1 as a logical expansion of its prior application to EB1-(2) outstanding researcher and EB-2 exceptional ability cases, skeptics may properly question whether this ever-widening deployment signifies not a greater precision but a lack of programmatic restraint. 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 (v), 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 as it applies to an EB-1(1) extraordinary ability petition, 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."

The authors question whether it is appropriate for the AAO to adopt the

Kazarian two step analysis to O-1 petitions. *Kazarian* involved an extraordinary ability petition under INA § 203(b) (1)(A)(i), which is the employment-based first preference category (EB-1), through which an alien obtains lawful permanent residence. While the extraordinary ability criteria under the EB-1 may be identical to the O-1 extraordinary criteria for science, education, business and athletics, the criteria for extraordinary achievement in the motion picture and TV industry and for distinction in the arts are markedly different. Moreover, the O-1 visa petition requires a consultation from a union or expert opinion. A favorable opinion from the relevant union for an artist ought to be given deference by the USICS. Injecting *Kazarian* into the O-1 visa adds needless subjectivity into the decision making process.

Kazarian' s two-part test and final merits determination analysis runs counter to prior decisions such as, *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. Similarly, in *Muni v. INS*, 891 F. Supp. 440 (N.D. Ill. 1995), a federal court reversed a denial for a professional hockey player where INS did not apply the proper criteria for extraordinary ability, and based its decision on the ground that he was not an all-star or one of the highest paid players. 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. If the *Kazarian* final merits determination analysis was deployed at that time, both *Muni and Buletini*, a leading physician in Albania, may have suffered a different fate. As our 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).

Moreover the USCIS Policy Memorandum, which invented this two-part test from its interpretation of *Kazarian*, does not indicate that it would apply this test to O-1 visa adjudications, even though it has extended the two-art test to outstanding professors and researchers and aliens of exceptional ability. On the other hand, the USCIS Adjudicator's Field Manual (AFM) section on O-1s (33. 4(d)) states, as follows:

For an O-1 or O-2 case, the adjudicator must determine whether the alien meets the standards as outlined in the regulations cited above; however, he/she cannot make a favorable determination simply because the petitioner has submitted three of the forms of documentation mentioned. It must be a decision based on whether the total evidence submitted establishes that the alien of extraordinary ability has sustained national or international acclaim and recognition in his field of endeavor; or in the case of an alien of extraordinary ability in the arts and extraordinary achievement in the motion picture or television industry, whether he or she has a demonstrated record of high level accomplishment or a high level of achievement (or "distinction").

However, it is not clear from this passage whether the USCIS intended to specifically apply the *Kazarian* "final merits determination" approach. The USCIS, and the predecessor Immigration and Naturalization Service, has always insisted that the alien overall meet the standard of extraordinary ability, but this was never meant to be as expansive as the *Kazarian* final merits determination. Rather, under the *Buletini* standard, the burden was on the government to the INS sets forth specific and substantiated reasons for its finding that the alien does not meet extraordinary ability.

The positive aspect of *Kazarian*, which established that the USCIS cannot create extra-regulatory criteria during the adjudication of a visa petition, without formally amending the regulation through notice and comment to stakeholders, ought to be applicable to all visa petitions. On the other hand, introducing the vague and subjective "final merits determination" to O-1 visas will needlessly add subjectivity to the process, when Congress specifically required that O-1 visa petitions be accompanied by union consultations and expert opinions. *Kazarian* was also a decision that deals with the extraordinary criteria under the EB-1, while the O-1 visa has three different standards – extraordinary ability, extraordinary achievement and distinction. The guidance fails to alert USCIS adjudicators on how they could specifically apply the "final merits determination" standard to extraordinary achievement and distinction.

It is also important to restrict the application of the *Kazarian* final merits determination to other visa adjudications, or else there will be no limitation to the reach of the final merits determination. Will is also impact H-1B and L visa adjudications? The long-range impact of what charitably be called "doctrine creep" is not hard to fathom. If the USCIS were to use the *Kazarian* final merits exercise much as it now deploys the Neufeld Memo, the meaning of "extraordinary ability" would be transformed beyond all ready recognition, much as the right of control has evolved beyond the imagination of the regulation that created it. When Congress enacted the standards for visa petitions, it intended adjudicators to faithfully apply those standards to either approve or deny the petitions. The infusion of the *Kazarian* "final merits determination" to visa adjudications would allow USCIS adjudicators to impermissibly stray from those standards.

Beyond that, to wrap the O-1 in an analytical straitjacket is yet another disturbing example of legislation through interpretation by the USCIS. While the INA itself does not change, what it means most certainly does change. All this comes about without the assent of Congress, whether expressed or implied, and in the absence of any notice and comment rulemaking mandated by the Administrative Procedures Act, thus eliminating the possibility of participation by concerned stakeholders. We all remember how the Administrative Appeals Unit decision in the *New York State Department of Transportation case* completely changed the meaning and practice of the National Interest Waiver. More recently, the USCIS jihad against the L-1B visa category and what amounts to a de facto rejection of the very concept of specialized knowledge has, in practice, repealed this visa provision to a very large extent. Is the O-1 now to suffer the same fate? What may be the most hard to detect damage resulting from invoking *Kazarian* in the O-1 arena is the fact that the evidence submitted by an O-1 petitioner is now to be judged by criteria that cannot be defined or even anticipated in advance Any attempt by the USCIS to use *Kazarian* to complicate the O-1 must be resisted. Complexity that exists for its own sake, not as an aid to an intellectually honest assessment but as a substitute for it does not advance the national interest. In a democratic society, the logic of any successful national policy must be transparently obvious to those who have to obey and support it. That is why the blurring of distinction between the O-1 and the *Kazarian* final merits determination is not only of little benefit to its intended beneficiaries, but actually frustrates any coherent attempt to make

the system more amenable to consistent interpretation and effective enforcement.

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