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THE CURSE OF *KAZARIAN V. USCIS* IN EXTRAORDINARY ABILITY ADJUDICATIONS UNDER THE EMPLOYMENT-BASED FIRST PREFERENCE

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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.

As background, an individual can obtain permanent residence in the US under the employment-based first preference (EB-1) 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:

- Receipt of lesser nationally or internationally recognized prizes or awards.
- 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.
- Published material about the person in professional or major trade publications or other major media.
- Participation as a judge of the work of others.
- Evidence of original scientific, scholastic, artistic, athletic or business-related contributions of major significance.
- Authorship of scholarly articles in the field, in professional or major trade publications or other media.
- Artistic exhibitions or showcases.
- Performance in a leading or cultural role for organizations or establishments that have a distinguished reputation.
- High salary or remuneration in relation to others in the field.
- 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 dicta 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."

Post *Kazarian* decisions have generally affirmed 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. Moreover, even while courts have adopted the final merits analysis, they seem to also be upholding the USCIS's conflation of the step one analysis with the step two analysis.

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, ignored the burden shifting approach as set forth in *Buletini* and conflated the two steps. 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 court 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*. However, instead of remanding the case because of the USCIS's faulty step one analysis in rejecting the evidence, the *Rijal* court held these errors to be harmless under the step two final merits determination.

Noroozi and Assadi v. Napolitano is another decision, albeit unpublished, from the Southern District of New York that has agreed with the *Kazarian* two-step analysis, but also seemed to agree with the USCIS's conflation of the two. 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 Noroorzi 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. Although 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.

In more recent cases, the USCIS has continued to conflate the step one with the step two analysis by rejecting that the petitioner met the evidentiary criteria and thus bypassing the step two final merits determination altogether. A petitioner may seek review under the Administrative Procedure Act asking a federal court to find that the USCIS decision was arbitrary and capricious by conflating the two steps. Therefore, if we in any event have to deal with *Kazarian*, one strategy is to force USCIS to adopt the two steps if it only denied the case under step one. Thus, in *Eguchi v. Kelly*, another unpublished decision, the USCIS denied an EB-1 petition of a Brazilian bullfighter. Eguchi submitted evidence that he won Brazil's PBR Rookie of the Year in 2008. USCIS rejected the award on the ground that "such an award by its very nature is limited to neophytes, excluding more experienced bull riders. And therefore, such an honor does not measure your standing or selection from among those who are well established in the field *or show your extraordinary ability* under this criterion." The court disagreed since USCIS was conflating the step two final merits determination when the regulation only required Eguchi to submit evidence of receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor, which he did. Eguchi also submitted articles from various publications, including Yahoo! Sports, ESPN, and PBR's website. The articles acknowledge Eguchi's high rankings, victories, and earnings in PBR events. USCIS concluded that Eguchi submitted no evidence that PBR's website is a major trade publication. The court held that it was self-evident that the website of the world's premier professional bull riding association is a major publication for professional bull riding. The court also cited *Muni v. INS., supra, at 444* which concluded that the petitioner did not need to show that National Hockey League's ("NHL's") own magazine was major trade publication. Eguchi submitted evidence that he had earned over $700,000 in

PBR events and ranked 44th on the association's all-time money list—a ranking of the top earners in PBR history. He also submitted a history of PBR, which states that "ore than 1,200 bull riders from the U.S., Australia, Brazil, Canada, and Mexico hold PBR memberships. But USCIS disputed this evidence on the ground that Eguchi's earnings did not compare with the top 3 earners, whose earning have grossed between 3.9 and 5.15 million dollars, thus failing to establish that he is one of that small percentage who have risen to the very top of their endeavor. The court again smacked down USCIS that it impermissibly conflated step 1 with step 2. At step one, according to the court, Eguchi was not obligated to prove that his salary illustrates that he is one of a small percentage who have risen to the very top of the field of endeavor and enjoy sustained national or international acclaim. Rather, Eguchi need only provide documentation showing that he has commanded a high salary or other significantly high remuneration for services, in relation to others in the field. According to the court, USCIS only focused on the top 2 or 3 earners in the sport but ignored the earnings of 1,200 PBR members.

Although the court in *Eguchi v. Kelly* found the USCIS's denial to be arbitrary and capricious, and remanded, this author is unaware of the outcome of this case after it got remanded. It remains to be seen whether USCIS in similar cases will find a way to deny the petition again under the step two final merits determination analysis after a court has remanded based on the faulty analysis under step one. However, it still at least behooves the practitioner have a court hold the USCIS to the two step analysis rather than let USCIS conveniently deny the petition under step one. This is precisely what happened in *Visinscaia v. Beers*, 4 F. Supp. 3d 126 (D.D.C. December 16, 2013) involving an EB-1 petition for a ballroom dancer from Moldova. The court agreed with the USCIS that the petitioner failed to provide evidence that she influenced the field with her dance techniques, although it seemed that the USCIS conflated step two with step one. The court also agreed with USCIS that the petitioner had not played a leading role in a dance club in Moldova, which petitioner claimed had a distinguished reputation in Moldova, but USCIS countered that the club's reputation did not extend beyond the borders of Moldova. Here too, the USCIS conflated step two with step one, which the Court endorsed. Finally, the USCIS interpreted the artistic exhibitions criterion as only including "visual arts", where "tangible pieces of art ... were on display" and not dance performances. This was a strained interpretation of the regulation, but the court still gave

deference to the agency's interpretation. Finally, the court also agreed with the rejection of the USCIS's strained interpretation that "lesser national and international awards" must involve winning more than one such award, and the petitioner in that case only won one world championship in the World Dance Sport Federation Junior II Ten category.

Petitioners must at least try to get USICS to accept that the petitioner meets 3 out of the 10 criteria, and then fight USCIS under step 2 final merits determination. If the USCIS can knock out the petitioner under step 1, the game is over. The author highly recommends the reader to *Recent Trends in EB 1 Extraordinary Ability and Outstanding Professor/Researcher Green Card Petitions* by Dan Berger, Emma Binder, Philip Katz, David Wilks, and Stephen Yale□Loehr. This insightful article surveys recent decisions of the AAO in the EB-1 extraordinary ability and Outstanding Professor/Researcher arena. It provides useful guidance regarding what kinds of evidence will be accepted under the 10 evidentiary criteria. Under the outstanding contributions of major significance evidentiary criterion, the authors point to AAO decisions that suggest that the contribution must have “measurably” expanded the scholarship such as in the case of an insect researcher whose discovery of ninety□six new species of jumping spiders represented “10% of the overall documented information regarding certain spider families.” With respect to the authorship of scholarly articles prong, the authors have analyzed decisions where the “AAO is critical of inconsistent and declining publication records. According to the AAO, a publication rate that has declined in the past five years or so may indicate a lack of sustained acclaim, even if the individual published prolifically in prior years.”

Still, this begs the question that *Kazarian* sought to clarify, which is that the evidence submitted by the petitioner need not inherently be extraordinary under step one. That has to be determined in the step two final merits determination analysis. But, unfortunately, the *Kazarian* two step analysis is fundamentally flawed for it will continue to confuse and confound USCIS adjudicators and courts where the merits determination is often made under step one, and if it is not, the evidence is rejected under step two. If only one can convince a federal court to adopt the clearer standard in *Buletini v. INS*, the two step analysis under *Kazarian* will continue to roil EB-1 extraordinary ability adjudications.

A prior version of this blog, ***How Extraordinary Must One Be to Qualify as a***

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