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ISN'T BEING EXTRAORDINARY MORE THAN ENOUGH? THERE'S NO NEED FOR USCIS TO ASK FOR A PROSPECTIVE BENEFIT TO THE US

Posted on December 4, 2019 by Cyrus Mehta

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We have previously blogged regarding The Curse of Kazarian v. USCIS in Extraordinary Ability Adjudications Under the Employment-Based First Preference. *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010),as interpreted by the USCIS, has resulted in a two part test for Extraordinary Ability petitions (EB-1). In the first part of the test, the USCIS has to determine whether the individual has demonstrated "sustained national or international acclaim. However, 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.

Evidence to demonstrate "sustained national or international acclaim" – the first part of the test - 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.

Post-*Kazarian* decisions have generally affirmed the two-part test and final merits determination analysis. Albeit at times seeming to nonetheless conflate the two tests in practice. (*See Rijal v. USCIS*, 772 F. Supp. 2d 1339 (W.D. Wash. 2011), aff'd *Rijal v. USCIS*, 683 F.3d 1030 (9th Cir. 2012) (criticizing the USCIS's conclusion that a prize did not meet the evidentiary criterion of lesser nationally or internationally recognized prizes or awards of excellence" but nonetheless finding that the petitioner did not suffer prejudice from these errors as it made those errors with an eye toward the ultimate merits determination). Recently, however, a disturbing pattern has emerged that practitioners must vigorously push back against.

To reiterate, an individual whose achievements have been recognized in the field through extensive documentation, may obtain permanent residence in the United States under the employment-based first preference (EB-1) by establishing extraordinary ability in the sciences, arts, education, business or athletics. *See* INA § 203(b)(1)(A)(i). However, in addition to satisfying the provisions of INA § 203(b)(1)(A)(i), the individual must also show that she seeks entry to continue work in the area of extraordinary ability, and that her entry will also substantially benefit prospectively the U.S. *See* INA § 203(b)(1)(A)(ii) & (iii).

As we have shown, voluminous case law and policy memorandum may assist us in interpreting the provisions of INA § 203(b)(1)(A)(i). Recent Requests for Evidence ("RFE") received by this office, however, suggest that the newest brick in the current administration's "invisible wall" may be to require petitioners to respond to INA § 203(b)(1)(A)(iii), which has heretofore been unmoored from any authoritative interpretation.

We are seeing RFEs requesting extensive documentation to establish how the beneficiary's entry will substantially benefit prospectively the United States pursuant to INA § 203(b)(1)(A)(iii). Here is an example from a very recent RFE received in November 2019:

Documentation to establish that the beneficiary's entry will substantially benefit prospectively the United States

It must be shown how the beneficiary's entry will substantially benefit prospectively the United States. The petition does not indicate that the beneficiary's entry will substantially benefit prospectively the United States. Please submit evidence that the beneficiary's entry will substantially benefit prospectively the United States. Evidence that may be submitted to satisfy this requirement includes, but is not limited to:

- *Letters from current or prospective employers, or individuals who work in the beneficiary's field;*
- *Other evidence explaining how the beneficiary's work will be advantageous and of use to the interests of the United States on a national level*

When faced with such a request, how should a Petitioner respond? On first brush it may seem prudent to substantively respond to such a request. But responding in such a manner could lead one down a veritable "rabbit's hole" with no exit given the lack of authoritative guidance on the matter. One "middle path" approach may be to substantively respond to a request for evidence of prospective benefit, albeit while navigating without a GPS, while simultaneously, and forcefully, arguing that such evidence is nonetheless not required as discussed further below.

A request to show "substantial benefit" at a national level would be more appropriate if the I-140 petition was filed requesting a "national interest waiver" of the Labor Certification Application requirement of EB-2 Petitions under INA §203(b)(2)(B)(i). Briefly, under the standard articulated in *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016), after eligibility for EB-2 classification has been established, USCIS may grant a national interest waiver if a Petitioner demonstrates, by a preponderance of the evidence, that:

- The foreign national's proposed endeavor has both substantial merit and national importance.

- The foreign national is well positioned to advance the proposed endeavor.
- On balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.

Such a conflation between the EB-1 criteria and the National Interest Waiver is clearly inappropriate. INA §203(b)(2)(B)(i) explicitly requires that the job offer and labor certification be waived if the foreign national will serve the national interest of the United States. INA §203(b)(1)(A) requires the foreign national to demonstrate that he or she is a person of extraordinary ability. In fact, the legacy Immigration and Naturalization Service determined over two decades ago that the regulations do not require the submission of any such evidence prospective benefit in relation to EB-1 Petitions. *See* letter from E. Skerrett, Chief, Immigrant Branch, Adjudications, INS (Mar. 8, 1995), reprinted in 72 Interpreter Releases 445–47 (Mar. 27, 1995) ("prospective advantage" may generally be assumed except in rare instances where an extraordinary foreign national's field of work might somehow be detrimental to U.S. interests). Crucially, the regulations do not specifically define prospective advantage, and it has subsequently been interpreted very broadly. *See e.g*. *Matter of Price*, 20 I&N Dec. 953 (Assoc. Comm. 1994) (golfer of beneficiary's caliber will substantially benefit prospectively the United States given the popularity of the sport). *See Special Considerations Relating to EB-1 Cases*, Adjudicator's Field Manual Ch. 22.2, USCIS (November 27, 2019), https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-6330/0-0-0-6423.html. *See also Buletini v. INS*, 860 F. Supp. 1222 (E.D. Mich 1994) ("the assumption that persons of extraordinary ability working in their field of expertise will benefit the United States"). Moreover the USCIS Policy Memorandum, which invented the two-part test from its interpretation of *Kazarian*, is silent regarding how to interpret INA § 203(b)(1)(A)(iii). Therefore, the substantial benefit criterion is ordinarily met through the other two criteria under INA §§203(b)(1)(A)(i) and (ii). There is also no independent regulation implementing INA § 203(b)(1)(A)(iii). Indeed, 8 C.F.R. § 204.5(h)(5), while acknowledging that the EB-1 does not require a job offer, requires evidence that the foreign national is coming to the United States to work in the area of expertise, this is to meet INA §203(b)(1)(A)(A)(ii), and if this is met, then the person has also implicitly been able to demonstrate that they will prospectively benefit the United States. The RFE requiring evidence of prospective benefit to the United States through letters from employers and others invents a

regulation in violation of the notice and comment requirement under the Administrative Procedures Act.

It remains to be seen if this indeed a new theatre in the current administration's war on immigrants. However, practitioners should remain vigilant in their watch and continue to push back on such attempts to apply standards such as this, which are fundamentally ultra vires. Practitioners must continue to attempt to have USICS accept that the petitioner meets 3 out of the 10 criteria, and then fight USCIS under step 2 final merits determination, and finally reiterate that the substantial benefit criterion is ordinarily met through the other two criteria under INA §§203(b)(A)(i) and (II). Under a burden shifting approach, the Petitioner should be deemed qualified, and the burden should be on the Service to reject the Petitioner pursuant to INA § 203(b)(1)(A)(iii) based on specific and substantiated reasons. To do otherwise could allow the curse of *Kazarian* to continue to grow unchecked and untethered from legal principle.