THE *KAZARIAN* TWO-STEP

by Rita Sostrin[*]

There is no question that extraordinary and outstanding immigrants benefit America. No one would argue against welcoming top international scholars to our academic institutions. As an example, highly-skilled immigrants make up 45 percent of medical scientists, 37 percent of computer programmers, and more than 20 percent of academic instructors in this country.[1] In fact, The U.S. World and News Report uses the proportion of international faculty as a factor in identifying the world's best universities, making it clear that international scholars form an important force in advancing the U.S. academy.[2]

According to *The Economist*, "Rather than sending immigrants home, with their skills, energy, ideas and willingness to work, governments should be encouraging them to come. If they don't, governments elsewhere will."[3] Yet our current immigration laws and policies impede efforts to retain foreign nationals permanently because of restrictions on lawful permanent residence, particularly in the "extraordinary"[4] and "outstanding"[5] classifications that involve subjective review by an Immigration Services Officer (ISO). Whether due to a lack of understanding of the proper application of the legal requirements, or because of the general atmosphere of "no," many top scholars are being turned down in their quest for lawful permanent residence as not being good enough. In 2010, the U.S. Citizenship & Immigration Services (USCIS) denied 38 percent of immigrant visa petitions filed in the Alien of Extraordinary Ability (EB-11) category and 9 percent of petitions filed in the Outstanding Professor or Researcher category (EB-12), a combined 47 percent.[6] The rest of the filings were approved, but these approvals were granted after overcoming numerous Requests for Evidence (RFEs) challenging petitioners to submit additional arguments and documents in order to prove their cases. More than 50 percent of EB-11 and nearly 28 percent of EB-12 filings received such RFEs,[7] putting petitioners in the "hot seat." This treatment of our best and brightest immigrants attempting to qualify for lawful permanent residence is undermines our nation's current struggles to advance as an economic, technological and academic leader in today's complex environment. This unfortunate attitude is attributed to the current state of confusion that resulted from the controversial case, *Kazarian* v. USCIS,[8] which has produced an array of memoranda, policies, and petition denials, and turned the extraordinary ability law on its head. This article will trace the development of

Rita Sostrin (*rsostrin@sostrinimmigration.com*) is a partner at Sostrin Immigration Lawyers, LLP in Los Angeles. Ms. Sostrin focuses her practice on immigration of individuals of extraordinary abilities as well as international academics. Throughout her professional career, Ms. Sostrin has represented a diverse array of clients across the United States and abroad, handling all aspects of employment-based immigration for leading academic institutions, hospitals, and scientific laboratories. She frequently receives invitations to speak at national and regional conferences and write for legal publications. Ms. Sostrin is included in *The International Who's Who of Corporate Immigration Lawyers* and *Chambers USA*. She was honored by the American Immigration Lawyers Association's *Presidential Award* in 2008. She currently serves as a senior editor of the *Immigration Practice Pointers,* (AILA 2011–12) and chair of AILA's Liaison Committee with the California Service Center of USCIS.

[1] P. Orrenius and M. Zavodny, "How Immigration Works for America," *From Brawn to Brains*, Federal Reserve Bank of Dallas 9, (2010).

[2] *The U.S. World and News Report*, World's Best Universities: About the Rankings Methodology, *available at www.usnews.com* (follow "Home" hyperlink; then follow "Education" hyperlink; then follow "World's Best Universities" hyperlink; then follow "World's Best Universities: About the Rankings" hyperlink).

[3] "Let them come," *The Economist*, Aug. 27, 2011, *available at www.economist.com/node/21526893*.

[4] *See* INA §203(b)(1)(A).

[5] *See* INA §203(b)(1)(B).

[6] U.S. Citizenship and Immigration Services (USCIS), Approval and Denial for I-140, Immigrant Petition for Alien Workers, *available at www.uscis.gov* (follow "Working in the United States" hyperlink; then follow "Permanent Workers" hyperlink; then follow "Approval and Denial for I-140, Immigrant Petition for Alien Workers").

[7] USCIS Statistics "Immigrant Petition for Alien Worker (I-140) with Classification of E-11, E-12, E-13 Receipts, Approvals, Denials and Request for Evidence for Fiscal Years 2010–2011 Year-to-Date" (July 20, 2011), *published on* AILA InfoNet at Doc. No. 11072860 (*posted* July 28, 2011).

[8] *Kazarian v. USCIS*, 2010 WL 725317 (9th Cir. 2010).

the *Kazarian* case and examine its influence on today's EB-1 adjudications.

Pre-*Kazarian* Background

The Immigration Act of 1990 (IMMACT90) significantly changed the immigration system by creating classifications of employment-based immigrant visas.[9] The concept of extraordinary ability established then still exists today in both immigrant (EB-11[10]) and nonimmigrant (O-1[11]) contexts. While the regulatory criteria that can qualify an alien as an extraordinary person slightly differ between the EB-11 and the O-1 classifications (the regulations list 10 criteria for the EB-11[12] and eight criteria for the O-1[13]), the statutory standards are identical. In order to qualify as an alien of extraordinary ability, the individual must demonstrate sustained national or international acclaim and recognition for achievements in the field through extensive documentation.[14] The statute does not offer further detail on what is required in order to demonstrate sustained national or international acclaim. Therefore, we must rely on regulations for additional guidance.

Applicable regulations define the meaning of "extraordinary ability" in the framework of immigrant visas as "a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor."[15] The regulations also provide specific instructions on the type of evidence required to meet the statutory legal standard of demonstrating sustained national or international acclaim and recognition of the alien's achievements in the field of expertise. Accordingly, sustained acclaim can be demonstrated through either evidence of a one-time achievement (a major, internationally recognized award, such as the Nobel Prize) or, in the alternative, evidence of "at least three" of the enumerated regulatory criteria.[16] The law also allows petitioners for this classification to submit "comparable evidence" to establish eligibility.[17] Overall, the main advantage of utilizing the extraordinary ability category for an immigrant visa is that the "extraordinary" alien is not obligated to hold an employment offer and may self-petition.[18] Beneficiaries must, however, demonstrate that they are planning to work in their field of expertise.

Petitioners may qualify professors or researchers for immigrant visas (EB-12)[19] by showing that the alien is recognized internationally as outstanding in the field.[20] Such international recognition is established by showing at least two of six enumerated criteria.[21] The professor or researcher is further required to possess at least three years of teaching or research experience.[22] This classification, unlike that for the extraordinary ability alien, does not allow the professor or researcher to self-petition, and a permanent offer of employment is required.[23]

It is the author's position that, once the alien meets at least three regulatory criteria, it satisfies the requirement of "extensive documentation" and, thus, demonstrates the "sustained national or international acclaim" required for extraordinary ability. Similarly, meeting at least two criteria demonstrates "international recognition" required to be classified as an outstanding professor or researcher. In other words, the regulations are clear about what exactly is needed in order to meet the standard of extraordinary or outstanding (*i.e.*, meeting the requisite number of criteria). Had something else been necessary, the regulations would have listed those additional requirements. This analytical approach is confirmed by the memorandum issued by the then acting associate commissioner of legacy Immigration and Naturalization Service (INS), Lawrence Weinig, who issued the following instructions to the then director of the Northern Service Center of legacy INS, James Bailey:[24]

---

[9] Pub. L No. 101-649, 104 Stat. 4978 (1990).

[10] INA §203(b)(1)(A), 8 CFR §204.5(h).

[11] INA §101(a)(15)(O), 8 CFR §214.2(o). For the purposes of this article, the term O-1 refers only to the highest standard of extraordinary ability for O-1 visas applicable to the sciences, education, business, and athletics.

[12] 8 CFR §204.5(h)(3)(i)–(x).

[13] 8 CFR §214.2(o)(3)(iii)(B)(1)–(8).

[14] INA §§203(b)(1)(A), 101(a)(15)(O)(i).

[15] 8 CFR §204.5(h)(2).

[16] 8 CFR §§204.5(h)(3).

[17] 8 CFR §204.5(h)(4).

[18] 8 CFR §204.5(h)(5).

[19] INA §203(b)(1)(B).

[20] 8 CFR §204.5(i)(3)(i).

[21] 8 CFR §204.5(i)(3)(i)(A)–(F).

[22] 8 CFR §204.5(i)(3)(ii)-.

[23] 8 CFR §§204.5(i)(2); 204.5(i)(3)(iii).

[24] Memorandum from L. Weinig, Acting Associate Commissioner, Legacy INS, 69 *Interpreter Releases* 1052–53 (Aug. 24, 1992) (emphasis added).

> The evidentiary lists were designed to provide for easier compliance by the petitioner and easier adjudication by the examiner. The documentation presented must establish that the alien is either an alien of extraordinary ability or an outstanding professor or researcher. *If this is established by meeting three of the criteria for extraordinary aliens or two of the criteria for outstanding professors or researchers, this is sufficient to establish the caliber of the alien*. There is no need for further documentation on the question of the caliber of the alien. However, please note that the examiner must evaluate the evidence presented. This is not simply a case of counting pieces of paper.

There is no question that the legal standard of extraordinary ability is high. However, according to all pre-*Kazarian* law and guidance, once the three (or two, as the case may be) criteria are satisfied, sustained acclaim (or international recognition) is deemed established, which then must result in a finding of extraordinary (or outstanding) ability.

Thus, in the case of an extraordinary ability petitioner, if the alien meets the three criteria, then he or she meets the level of national or international acclaim and, therefore, belongs to the small percentage at the top of the field. Of course, meeting three regulatory criteria is not the same as merely presenting evidence toward three criteria, and the regulations establish appropriate safeguards to ensure that only those who rise to the level of extraordinary can meet three criteria. However, once the three criteria are satisfied, the alien has met the standard for extraordinary ability and should not be required to demonstrate anything else.

Traditionally, this has been the way the extraordinary and outstanding petitions were analyzed, creating a clear and predictable roadmap for aliens vying for the EB-1 classification. In recent years, the debate about whether meeting three criteria is enough to qualify as extraordinary (or two criteria to qualify as outstanding) has continued. USCIS has issued a number of decisions out of its Administrative Appeals Office (AAO) recognizing that it is, indeed, sufficient.[25]

This legal standard was also explained in detail in a district court case that unequivocally concluded that meeting three regulatory criteria satisfies the burden of proof for extraordinary ability. In *Buletini v. INS*, the court stated:

> Proof that an alien meets three of the criteria of the regulation is intended to constitute evidence that the alien has extraordinary ability. … It is an abuse of discretion for an agency to deviate from the criteria of its own regulation. Once it is established that the alien's evidence is sufficient to meet three of the criteria listed in 8 CFR §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, despite having satisfied the criteria, does not meet the extraordinary ability standard.[26]

Additionally, *Buletini* clarified the way the evidence should be reviewed in determining whether or not it meets the regulatory criteria. Specifically, the *Buletini* court provided a detailed explanation of its position that one does not have to prove each regulatory criterion through an independent showing of extraordinary ability and called such an approach a "circular exercise:"

> The Director also augments the fourth criterion of the regulation by requiring plaintiff to demonstrate not only that he participated as a judge of the work of other doctors but also that his participation on the commission "required or involved extraordinary ability." The fourth criterion, however, only requires evidence that the alien participated as a judge of others in his field; it does not include a requirement that an alien also demonstrate that such participation was the result of his having extraordinary ability. Such a requirement would be a circular exercise: the criterion is designed to serve as proof that plaintiff is a doctor of extraordinary ability; the ***Director's requirement would mean that plaintiff must prove that he is a doctor of extraordinary ability in order to prove that he is a doctor of extraordinary ability***.[27]

---

[25] *Matter of [name not provided]*, WAC 02 070 52665 (AAO Feb. 27, 2003); *Matter of [name not provided]*, WAC 01 109 53910 (AAO Apr. 11, 2003); *Matter of [name not provided]*, WAC (AAO Aug. 19, 2003); *Matter of [name not provided]*, NSC (AAO Sept. 10, 2003).

[26] *Buletini v. INS*, 860 F. Supp. 1222, 1231, 1234 (E.D. Mich. 1994) (emphasis added).

[27] *Id.* at 1231 (emphasis added).

The *Buletini* court admonished legacy Immigration and Naturalization Service (INS) for adding requirements that are not found in the regulations:

> *The regulation makes no requirement that an alien detail the qualifications necessary to achieve the alien's salary*. By adding this requirement, the Director again is asking plaintiff to demonstrate not only that he meets the regulation's criteria but also that he was able to achieve the criteria because he is a doctor of extraordinary ability. The Director again is asking plaintiff to engage in a circular exercise. Proof that an alien meets three of the criteria of the regulation is intended to constitute evidence that the alien has extraordinary ability. *If plaintiff is paid significantly more than others in his field, the general deduction to be made is that plaintiff must be a better doctor than those others, and perhaps a doctor of extraordinary ability*.[28]

Additional case law supported *Buletini* in its interpretation of the regulations and their proper application.

Racine v. INS similarly criticized legacy INS for adding nonexistent requirements to its regulations, where the agency denied an EB-1 petition because, among other reasons, none of the articles about the beneficiary said that he was "one of the best in his field." The *Racine* court held that "… under the Act, he need not be one of the best, he need be only one who is in that small percentage at the top of his field."[29] As for the articles about the alien, the court said:

> [T]here is no requirement under the Act that the articles need to state that he is one of the best or even that the articles describe him at the top of his field. *The articles need to demonstrate his work within the field*. The INS has not only inserted a new qualification …, *it has also altered its own definition of extraordinary ability*…[30]

In *Muni v. INS*, the District Court for the Northern District of Illinois granted an appeal and concluded that legacy INS abused its discretion in its evaluation of the evidence submitted in support of an EB-1 petition.[31] It followed the *Buletini* legacy by also holding the agency responsible to provide specific reasons for rejecting submitted evidence:

> We find that the INS abused its discretion here because it failed to consider several facts that supported Muni's petition and *failed to explain why the facts it did consider were insufficient to establish Muni's extraordinary ability*.[32]

The *Muni* court discussed legacy INS's treatment of specific criteria and confirmed that no additional evidence was required to establish each criterion and that the agency had to provide a "legitimate basis" (similar to *Buletini's* "specific and substantiated reasons") for rejecting submitted evidence:

> [T]he INS discounted the awards Muni received, saying that he had not shown what was necessary to qualify for the awards or what significance they have. We disagree. We think the awards—best hitting defenseman, most underrated defenseman—are rather self-explanatory… *The INS had no legitimate basis for refusing to consider the awards as evidence of Muni's ability.*[33]

The *Muni* court went on to discuss legacy INS's dismissal of articles about the beneficiary because they "did not report anything of great significance." The court said:

> [T]he INS gave short shrift to the articles Muni submitted to support his petition. These articles do not establish that Muni is one of the stars of the NHL, but that is not the applicable standard. Under the INS'[s] own regulations, *all Muni need show is that there is "published material about [him]* in professional or major trade publications or other major media… *Yet the INS did not explain why the articles did not qualify as proof of Muni's ability*."[34]

The *Muni* decision concluded with a section titled "Totality of the Evidence," akin to *Kazarian's* "final merits" concept. In it, the court explained that, while the satisfaction of at least three regulatory criteria does not necessarily mandate a finding of extraordinary ability, it does mandate legacy INS to explain why the petitioner failed to meet the legal standard, if the agency finds against the petitioner.[35] In other words, once the three criteria are met, *Muni*,

---

[28] *Id.* at 1226–1227; (emphasis added).

[29] *Racine v. INS,* 1995 U.S. Dist. LEXIS 4336, 1995 WL 153319 (N.D. Ill. Feb. 16, 1995).

[30] *Id.* (emphasis added).

[31] 891 F. Supp. 440 (N.D. Ill. 1995).

[32] *Id.* at 444; (emphasis added).

[33] *Id.*

[34] *Id.* at 445; (emphasis added).

[35] *Id.* at 445–446.

just like *Buletini*, shifts the burden of proof to legacy INS to provide specific reasons why the petitioner failed to qualify as extraordinary.

Finally, *Gulen v. Chertoff* followed this analytical model by twice stating that, if at least three criteria are met, the alien has demonstrated extraordinary ability.[36]

As such, there exists a strong lineage of case law that details how the evidence should be evaluated and that, once the appropriate number of criteria is satisfied, it is USCIS's responsibility to approve the petition or provide specific and detailed reasons for denying it.

Who is *Kazarian*?

Poghos Kazarian, Ph.D., a recent graduate from Yerevan State University with a Ph.D. in Theoretical Physics, entered the United States as a visitor and volunteered at a community college.[37] He filed a self-sponsored immigrant visa petition as an Alien of Extraordinary Ability (EB-11).[38] The original petition was filed in 1999, months after Kazarian, then a 26-year-old scientist, arrived in the United States[39] At that time, a "dance" was set in motion, which has involved numerous "partners," including a line-up of immigration attorneys, a number of USCIS offices, a couple of courts, as well as thousands of future petitioners for extraordinary and outstanding immigrant visas.

In 2000, USCIS denied Kazarian's petition, stating that "[n]othing truly significant and outstanding has been accomplished by him since he published an article at the age of 20."[40] Although an appeal was filed, it was returned because of errors. Subsequently, Kazarian's lawyer was disbarred for fraud,[41] leaving him with a denial and a missed deadline to appeal it.

Kazarian then retained another attorney, who filed a second EB-11 petition on December 31, 2003.[42] The petition spawned what is now known as the *Kazarian* two-step analysis. The turn of events that followed is set out below.

Creation of the *Kazarian* Two-Step

Kazarian's second petition was denied by the California Service Center of USCIS in August 2005. In retrospect, the denial should not have been a surprise. In it, Kazarian's new counsel with a curiously similar name, Kazaryan, highlighted his high school and college graduation with honors, memberships in professional organizations that required nothing other than payment of dues, and other weaknesses that presented Kazarian as a young man with potential rather than a scholar who has risen to the top.[43] Even the petition's "trump card," a letter from Kip Thorne, Ph.D., an internationally renowned, award-winning scholar and professor at the California Institute of Technology, called Kazarian's work "… of the caliber that one would expect from a young professor at a strong research-oriented university in the United States,"[44] which, although complimentary, falls short of the EB-1 standard. The denial was appealed, and the appeal was dismissed by the AAO on September 28, 2006.[45] The AAO found that, despite the evidence submitted, counsel's brief, and a letter filed under a separate cover to the U.S. Attorney General by the petitioner's mother, Kazarian failed to meet a single criterion of the EB-11 regulations.[46] Kazarian then filed a complaint in district court, which granted USCIS's motion for summary judgment.

Kazarian appealed in the U.S. Court of Appeals for the Ninth Circuit. The court issued its original decision denying the appeal on September 4, 2009, which was subsequently, upon a petition for rehearing en banc, withdrawn. The new and final denial, which superseded the original opinion, came on March 4, 2010; it is the current law on the books.

In reversing its prior decision, the court stated that USCIS may not unilaterally and arbitrarily change regulations and qualifying criteria. Specifically, the court criticized the AAO for holding that Kazarian's "publication of scholarly articles is not

---

[36] *Gulen v. Chertoff*, F.Supp.2d 2008 WL 2779001 (E.D.Pa.).

[37] *Matter of Kazarian*, WAC 04 064 51500 (AAO Sep. 28, 2006).

[38] *Id*.

[39] *Id.*

[40] K. Kim, "Physicist discovers science of deportation," *Glendale News-Press*, May 23, 2002.

[41] *Id*; Hawaii State Bar Association, *available at www.myhsba.org* (enter "George Verdin" in search field).

[42] *Kazarian v. USCIS*, 2010 WL 725317 (9th Cir. 2010).

[43] *Matter of Kazarian*, WAC 04 064 51500 (AAO Sep. 28, 2006).

[44] *Id*.

[45] *Id.*

[46] *Id.*

automatically evidence of sustained acclaim" and "[it] must consider the research community's reaction to these articles."[47] It went on to say that:

> 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 can be considered as evidence, and neither USCIS nor an AAO may unilaterally impose novel substantive or evidentiary requirements beyond those set forth at 8 CFR §204.5.[48]

This was certainly a step in the right direction in the EB-1 "dance," and the court's confirmation that USCIS may not make up requirements that do not appear in the regulations is a welcome move. In fact, the *Kazarian* court closely followed *Buletini*, *Racine*, and *Muni*, all of which unanimously reversed legacy INS's attempts to augment the regulatory criteria by asking for additional proof or reasons.

However, the *Kazarian* case raised more questions than it offered answers, and left practitioners and adjudicators wondering how exactly to apply it. The unfortunate legacy of this case is the introduction of the term "final merits determination," which the court mentioned twice as a concept that would be used to establish whether the alien measures up as extraordinary. The *Kazarian* court stated that while certain evidence is "… not relevant to the antecedent procedural question" of whether Kazarian met the evidentiary requirements of the regulations, it "… might be relevant to the final merits determination of whether a petitioner is at the very top of his or her field of endeavor."[49] The court made similar statements in the context of another regulatory criterion: "[n]othing … suggests that whether judging university dissertations counts as evidence turns on which university the judge is affiliated with. Again, while the AAO's analysis might be relevant to a final merits determination, the AAO may not unilaterally impose a novel evidentiary requirement."[50]

In addition to the "final merits" commentary, the *Kazarian* court made the following statement about the general application of the legal standard of extraordinary ability:[51]

> If a petitioner has submitted the requisite evidence, USCIS determines whether the evidence demonstrates *both* a "level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the[ir] field of endeavor" ... *and* "that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise."

This contradicts the author's reading of the regulations and all preceding case law. The petitioner does not have to separately demonstrate *both* belonging to the small percentage at the top of the field *and* sustained acclaim. Demonstrating one also demonstrates the other, according to the regulations. In fact, meeting three criteria demonstrates sustained national or international acclaim, which, in turn, demonstrates that the alien belongs to the small percentage at the very top of the field, which means the alien is extraordinary. By requiring that both the "top percentage" and the "sustained national or international acclaim" be demonstrated, *Kazarian* ultimately brings us back to the problem of "circular exercise," which was discussed and rejected in *Buletini*.

While the debate about the generalities of EB-1 law continues, we are left with the "final merits" concept that has been created by this court. Regrettably, the court was silent about how to actually meet the final merits standard, once the evidence has been accepted for consideration, since Kazarian himself did not qualify under at least three criteria and the court did not get to conduct the final merits determination. As a result, the "final merits" concept remains a mystery.

TWO STEPS OF THE TWO-STEP

What we know of the final merits is that it requires a two-step adjudicative approach, where in addition to meeting three regulatory criteria, a qualitative analysis must be conducted to determine whether the alien meets the level of sustained acclaim and recognition. *Kazarian* provides no guid-

[47] *Kazarian v. USCIS*, 2010 WL 725317 (9th Cir. 2010), at 3440–1.

[48] *Id.*

[49] *Kazarian v. USCIS*, 2010 WL 725317 (9th Cir. 2010), at 3441 (emphasis added).

[50] *Id*.

[51] *Kazarian v. USCIS*, 2010 WL 725317 (9th Cir. 2010), at 3447 (emphasis added).

ance on how to conduct this analysis, and USCIS, which subsequently issued a policy memorandum[52] discussing the application of the case, offered no such guidance, either. In addition, USCIS produced an RFE template[53] to serve as a guide for ISOs to issue RFEs and, subsequently, deny EB-1 petitions that fall below the two-step standard. Although the first of the two steps has been addressed in both the policy memorandum and the RFE template at length, the application of final merits, which in the author's view is the centerpiece of EB-1 adjudication, got little attention.

In the policy memorandum, USCIS spent more than eight pages discussing the first step of the analysis, the application of the regulatory criteria. It spent approximately half of a page discussing the final merits determination:

> Meeting the minimum requirement of providing required initial evidence does not, in itself, establish that the alien in fact meets the requirements for classification as an alien of extraordinary ability under section 203(b)(1)(A) of the INA. As part of the final merits determination, the quality of the evidence also should be considered, such as whether the judging responsibilities were internal and whether the scholarly articles (if inherent to the occupation) are cited by others in the field.
>
> In Part Two of the analysis in each case, USCIS officers should evaluate the evidence together when considering the petition in its entirety to make a final merits determination of whether or not the petitioner, by a preponderance of the evidence, has demonstrated that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise, indicating that the alien is one of that small percentage who has risen to the very top of the field of endeavor.[54]

The RFE template made a similarly vague statement regarding final merits:

> [W]hen ultimately making a final decision regarding eligibility, USCIS will:
>
> - First evaluate the evidence submitted by the petitioner to determine which regulatory criteria the beneficiary meets in part one; then,
> - Evaluate the evidence together in its entirety to make a final merits determination of whether or not the petitioner, by a preponderance of the evidence, has demonstrated that the beneficiary has sustained national or international acclaim and that the beneficiary's achievements have been recognized in the field of expertise, indicating that the beneficiary is one of that small percentage who has risen to the very top of the field of endeavor.[55]

Although both the memorandum and the template invite ISOs to articulate specific reasons for denial, neither states that meeting three criteria creates a prima facie case or provides any other value in the adjudicative process. Both documents, in fact, clearly state that meeting three criteria does not demonstrate extraordinary ability, but provide no clarity for what does.

This minimalist approach leaves petitioners and practitioners at a loss. It seems to give the ISOs carte blanche in making the final decision, regardless of whether the petitioner meets the regulatory criteria. Determination of the final merits appears to rely on the ISO's knowledge of the subject matter and understanding of the petitioner's field in making the final judgment on the case. In other words, under the current scheme, once the criteria are met, the ISO can approve or deny an EB-1 petition, based on their personal opinions as to whether the final merits standard is satisfied, since no specific guidance is available.

It is also obvious that ISOs do not fully understand the "final merits" standard. This is confirmed by the Written Response to Proposed Removal from the American Federation of Government Employees (the labor union of the ISOs employed by the Texas Service Center of USCIS), advocating on behalf of an ISO who was terminated due to unacceptable performance.[56] The response specifically addressed the

---

[52] USCIS Memorandum, "Evaluation of Evidentiary Criteria in Certain I-140 Petitions" (Dec. 22, 2010), *published on* AILA InfoNet at Doc. No. 11020231 (*posted* Feb. 2, 2011).

[53] USCIS Request for Evidence Template, *published on* AILA InfoNet at Doc. No. 11012168 (*posted* Jan. 21, 2011).

[54] USCIS Policy Memorandum, "Evaluation of Evidentiary Criteria in Certain I-140 Petitions" (Dec. 22, 2010), *published on* AILA InfoNet at Doc. No. 11020231 (*posted* Feb. 2, 2011).

[55] Request for Evidence Template, *published on* AILA InfoNet at Doc. No. 11012168 (*posted* Jan. 21, 2011).

[56] Letter from American Federation of Government Employees, "Written Response to Proposed Removal" (Jan. 27, 2011) *available at www.nationofimmigrators.com/Union Letter Citing Kazarian Adjudication Process.pdf.*

unpredictability of and the lack of ISO training in EB-1 law:

> Even trainers have commented on the lack of experience the Training division has having never adjudicated 1st preference [K]a[z]arian cases, that because *the process is so convoluted and subjective* and expectation is constantly evolving.[57]

In its complaint that the terminated ISO was unfairly reprimanded for not reading all of the evidence submitted in support of EB-1 petitions, the response made a revealing comment that "…most officers decide the depth of review due to the volume of the case."[58] Thus, according to this letter, ISOs may not read EB-1 submissions in their entirety in making the final merits determination.

As a result of the vague standards, lack of transparent guidance, and insufficiency of training, numerous petitions filed under the EB-1 category have been denied. There is no question that not every petitioner claiming to be extraordinary or outstanding deserves an EB-1 visa. However, the *Kazarian* case and the ensuing USCIS guidance and RFE template have caused many top scholars and academics, along with leaders of other professional fields, to be disqualified from the EB-1 category. Some examples include the following:

- AAO dismissed an appeal filed by a state agency seeking an outstanding researcher petition for an environmental scientist, having found that the beneficiary meets more than the requisite two criteria, "… is a talented and prolific researcher" and who has had "… international exposure of his work." However, he still missed the final merits mark.[59]
- AAO dismissed an appeal filed by an academic hospital seeking an outstanding researcher petition for a computer science scholar, who has received coveted federal funding, served as a reviewer for academic journals and provided ample evidence of original contributions. The scholar met at least two criteria, but still did not meet the final merits standard.[60]
- AAO dismissed an appeal filed by a nuclear astrophysicist, after concluding that the petitioner met at least three criteria. However, the AAO made the conclusory statement that "… the evidence in the aggregate does not distinguish the petitioner as one of the small percentage who has risen to the very top of the field of endeavor."[61]
- U.S. District Court, Western District of Washington at Seattle, denied an appeal of a petitioner for an immigrant visa of extraordinary ability, concluding that the petitioner failed to meet the final merits analysis, despite meeting at least three regulatory criteria. The court did not require USCIS to provide specific reasons for this conclusion.[62]

One common theme in these denials is that, instead of looking at the "glass as half-full," ISOs go to great lengths to find holes in the evidence and, often, jump to subjectively made conclusions that may not be grounded in reality. Many decisions choose to either ignore or dismiss expert opinions and rely on ISOs' personal opinions and conclusions about the beneficiaries' qualifications. This goes directly against the established burden of proof in immigration matters, preponderance of the evidence, which, if applied correctly, would prompt the examiner to accept submitted evidence instead of searching for reasons to reject it.

It is these types of petitions that rest on subjective analysis by an ISO that strongly rely on the correct application of the burden of proof in evidence review. The memorandum by the William Yates, USCIS Associate Director of Operations, outlining the standard of proof to be met by the petitioner and discussing drafting strategies for RFEs, confirmed that the correct burden of proof by petitioners seeking immigration benefits is "preponderance of the evidence" and not the criminal law standard of "beyond a reasonable doubt:"

> …[A]djudicators too often issue a RFE for additional types of evidence that could tend to eliminate all doubt and all possibility for fraud. . . .
>
> The standard to be met by the petitioner … is "preponderance of the evidence," which means that *the matter asserted is more likely than not to*

[57] *Id.* (emphasis added).

[58] *Id.*

[59] *Matter of [name not provided]*, (AAO May 21, 2010).

[60] *Matter of [name not provided]*, A89 699 531 (AAO Jul. 13, 2010).

[61] *Matter of [name not provided]*, A88 340 652 (AAO May 21, 2010).

[62] *Rijal v. USCIS*, 2/22/11, No. C10-709RAJ (W.D. Wash. 2011), *published on* AILA InfoNet at Doc. No. 11061335 (*posted* June 13, 2011).

> *be true*. Filings are not required to demonstrate eligibility beyond a reasonable doubt.[63]

In the recent precedent case, *Matter of Chawathe*, the appeal was sustained based in part on the USCIS's initial failure to exercise this preponderance of evidence standard. This decision states:

> The "preponderance of the evidence" standard requires that the evidence demonstrate that the *applicant's claim is "probably true,"* where the determination of "truth" is made based on the factual circumstances of each individual case.
>
> Even if the director has *some doubt* as to the truth, if the petitioner submits *relevant, probative, and credible evidence* that leads the director to believe that the claim is "*more likely than not*" or "*probably*" true, the applicant or petitioner has satisfied this standard of proof…[64]

Because the success or failure of EB-1 petitions largely depends on an ISO's decision to accept or reject submitted evidence as confirmation of extraordinary or outstanding abilities, it is imperative that ISOs have a solid understanding of the burden of proof.

Unfortunately, based on both the language of many RFEs and denials requesting "clear,"[65] "presumptive,"[66] and "persuasive"[67] evidence, as well as on the 2010 Annual Report of the Citizenship & Immigration Services Ombudsman,[68] many ISOs are not well-versed in this important concept. According to the Ombudsman Report:

> *[N]o single training module* or period of time is dedicated specifically to developing adjudicator expertise in weighing evidence. *This skill is critical to decision-making* on when to issue an RFE, what additional information to request, and ultimately to deciding whether or not to approve the application or petition. Although the Ombudsman found references to the preponderance of the evidence standard in several training modules, they were *brief, conclusory, and not particularly instructive*.
>
> Missing from both USCIS'[s] training modules and the AFM are focused analyses of factual scenarios representing real world filings…[69]

What's the Next Step?

The current version of the two-step analysis simply fails. It lacks quality, consistency, and transparency, values that USCIS promoted as the agency's for 2011.[70] Instead of the current vague, confusing and unpredictable framework, it is the author's opinion that the *Buletini* standard is the approach that should be implemented. The original, subsequently overturned *Kazarian* majority opinion and dissent both addressed the issue of circular reasoning proscribed in *Buletini*.[71] In fact, it is the dissent in the original *Kazarian* decision by the Ninth Circuit that discussed in detail that USCIS should not be allowed to require "community's reaction" to publications in order to meet the publications criterion. This then formed the basis for the final *Kazarian* case that superseded the original decision:

> As observed by the majority opinion, this extra requirement [of community's reaction] … is circular, because publication itself indicates some approval by the research community. Moreover, the requirement that articles be considered in light of research community's reaction is nowhere found in the statute or regulations. By its own language, the regulation requires evidence of *authorship* and authorship alone.[72]

It is based on this argument, articulated in the dissenting opinion, that the court reversed its original reasoning and ultimately concluded that USCIS was not allowed to require "community's reaction" or anything else that is outside the regulatory language. As a result, the initially dissenting judge wrote a concurring opinion in the second and final iteration of *Kazarian*. Based on this, it is clear that

---

[63] USCIS Memorandum, W. Yates, "Requests for Evidence (RFE) and Notices of Intent to Deny (NOID)" (Feb. 16, 2005), *published on* AILA InfoNet at Doc. No. 05021810 (*posted* Feb. 18, 2005).

[64] 25 I&N Dec. 369 (AAO 2010).

[65] *Matter of [name not provided]*, A88 340 652 (AAO May 21, 2010).

[66] *Matter of [name not provided]*, A89 699 531 (AAO Jul. 13, 2010).

[67] *Matter of [name not provided]*, (AAO May 21, 2010).

[68] Department of Homeland Security, "2010 Annual Report for the Office of the Citizenship and Immigration Services Ombudsman" (June 30, 2010), *published on* AILA InfoNet at Doc. No. 10070860 (*posted* July 8, 2010).

[69] *Id.*

[70] USCIS Transcript, "Press Conference on Strategic Goals and Initiatives for 2011," *published* on AILA InfoNet at Doc. No. 11022260 *posted* Feb. 22, 2011).

[71] *Kazarian v. USCIS*, 580 F.3d 1030, 1036 (9th Cir. 2009).

[72] *Id.*

the *Kazarian* court was in agreement with the Buletini court regarding circular reasoning.

Because *Kazarian* closely followed *Buletini* in its analysis of the regulatory criteria, it is logical to conclude that *Kazarian* also meant for the final merits determination to follow *Buletini's* approach, which is, too, a two-step analysis. According to both *Kazarian* and *Buletini*, the first step is to analyze the evidence and determine whether it meets at least three regulatory criteria of extraordinary ability (or at least two, in the case of outstanding professors and researchers). Once the three (or two) criteria are met, the next analytical step must be conducted, and *Kazarian* fails to explain it. This is, perhaps, because *Buletini* already did. *Buletini* is clear that meeting the three criteria constitutes a prima facie case that the alien is extraordinary. Thus, *Buletini* holds that the burden of proof shifts to USCIS when determining the final merits. The second step, according to *Buletini*, is for USCIS to approve the petition unless it can present "specific and substantiated" evidence to the contrary.[73] Therefore, this second step, christened by *Kazarian* as the "final merits determination," is a safeguard that ensures that petitioners who meet the correct number of criteria receive immigrant visas, unless specific aggravating evidence exists disqualifying them from the EB-1 classification.

USCIS Talks the Talk, but Is It Walking the Walk (or Dancing the Dance)?

And so the *Kazarian* dance continues… In August 2011, Poghos Kazarian's *third* EB-1 petition was denied by USCIS. This time, USCIS stated that he failed to meet the *Kazarian* two-step analysis.[74] Kazarian commented: "I have lived in America and contributed to its astrophysics research interests for so long, I cannot consider myself as anything other than an American scientist."[75]

It is yet to be determined whether Kazarian himself will one day benefit from the EB-1 classification and, as such, become an American scientist. However, there is still hope that the application of *Kazarian* law will be corrected and will ultimately welcome the extraordinary and the outstanding back to America.

On June 17, 2011, in an open forum meeting with the American Immigration Lawyers Association, USCIS Director Alejandro Mayorkas confirmed that the current USCIS guidance with respect to EB-1 adjudication does not capture the *Buletini* approach and that meeting at least three criteria "has presumptive value."[76] Director Mayorkas also stated that, once the three criteria are met, this approach shifts the burden to USCIS to provide "specific and substantiated reasons" why the alien has not met the EB-1 standard.[77] Director Mayorkas advised that he would consider adjusting the current guidance to be in line with *Buletini*.[78]

Following this announcement, on August 18, 2011, the AAO requested stakeholders to submit *amicus curiae* briefs analyzing the two-step *Kazarian* approach.[79] At this writing, the briefs are still being submitted for review.

It is obvious that the USCIS leadership understands the value of retaining the best and brightest immigrants in this country. What is unclear is how the implementation of this lofty vision is being conducted in the field, by real-life ISOs who get to decide the fates of thousands of EB-1 hopefuls. It is the author's wish that the theory and practice will soon become one, and the *Kazarian* two-step will transform from a series of missteps into a well-choreographed victory dance.

---

[73] *Buletini v. INS*, 860 F. Supp. 1222, 1231, 1234 (E.D. Mich. 1994).

[74] Wolfsdorf Immigration Law Group, "Dr. Poghos Kazarian Speaks Out on the 2010 USCIS Kazarian Policy Memo—Read All About It!," Aug. 23, 2011, *available at http://connect.wolfsdorf.com/?p=974*.

[75] *Id.*

[76] AILA Annual Conference, "United States Citizenship & Immigration Services Open Forum," compact disk 86 (June 17, 2011).

[77] *Id.*

[78] *Id.*

[79] USCIS, Feedback Opportunities, *available at www.uscis.gov* (follow "Outreach" hyperlink; then follow "Feedback Opportunities").