STATE OF THE UNION IN THE UNIVERSE OF EB-1 PETITIONS

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INTRODUCTION

Things have changed in the universe of EB-1 petitions for extraordinary immigrants.[1] For the past several years, immigration practitioners have observed an increase in unreasonable Requests for Evidence (RFEs) and inappropriate denials in this area of practice, while the United States Citizenship and Immigration Services (USCIS) maintained its position that nothing has changed. There have been no new statutes or regulations on the subject of EB-1s. Yet, attorneys who represent the extraordinary and the outstanding have been consistently reporting harsh decisions that contain incorrect legal interpretations and improperly expanded requirements. This was the result of USCIS' practice of loading up regulatory criteria with additional requirements, which, in a bizarre exercise of circular reasoning, demanded that the foreign national meet each criterion as a result of being extraordinary or outstanding. USCIS has augmented and recycled this flawed logic to justify issuing denials to many qualified individuals. And so it went, in a never-ending vicious cycle of denying new petitions by relying on previous incorrect decisions. Until the United States Court of Appeals for the Ninth Circuit shoved USCIS out of its comfort zone by reversing itself in *Kazarian v. USCIS*[2] and confirming that USCIS may not unilaterally and arbitrarily change regulations and qualifying criteria. But did *Kazarian* resolve the problem of inconsistent adjudications and inappropriate decisions? Or did it only scratch the surface of what has become a true catch-22 issue: does the petitioner need to prove extraordinary ability for each regulatory criterion in order to be classified as a foreign national with extraordinary ability?

RECENT HISTORY OF EB-1 ADJUDICATIONS

We do not take the position that qualifying for extraordinary ability is an easy task. In fact, even immigration law practitioners disagree about the correct interpretation of the regulations. One school of thought is that, in addition to meeting three regulatory criteria,[3] a qualitative analysis of the entire body of evidence must be conducted to determine whether the foreign national meets the level of sustained acclaim and recognition. Another view is that, once the three criteria are satisfied, sustained acclaim is deemed established, which must result in a finding of extraordinary ability. The authors subscribe to this latter position.

An individual seeking an immigrant visa in this category must show that his level of expertise in the sciences, arts, education, business, or athletics indicates that he is one of that small percentage who have risen to

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

[2] *Kazarian v. USCIS*, posted at http://www.ca9.uscourts.gov/datastore/opinions/2010/03/04/07-56774.pdf, 3429-44.

[3] 8 CFR §204.5(h)(3)(i)–(x). The authors are not listing the regulatory criteria of the EB-1 classification in the body of the article, as they presume that the readers are well familiar with the criteria.

the very top of the field of endeavor.[4] This standard must be met by presenting evidence that the foreign national has attained sustained national or international acclaim and that the foreign national's achievements have been recognized in the field of expertise.[5] This can be accomplished in one of two ways: 1) showing that foreign national possesses a one-time achievement (that is, a major, internationally recognized award);[6] or 2) showing that the foreign national meets at least three of 10 regulatory criteria.[7] Additionally, the regulations specify that, "[i]f the above standards do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence to establish the beneficiary's eligibility."[8]

We contemplate the following analysis of the regulations:

- Evidence of a one-time achievement carries equal weight as evidence of meeting at least three regulatory criteria;[9]
- If the foreign national meets either the one-time achievement or the three criteria,[10] it means that the foreign national has successfully presented evidence of sustained national or international acclaim and recognition of achievements in the field of expertise;[11] and
- If the foreign national has successfully presented evidence of sustained national or international acclaim and recognition of achievements in the field of expertise (either through a one-time achievement or three regulatory criteria),[12] he has met the standard of being one of that small percentage who have risen to the very top of the field,[13] and, in turn, meets the requirements of extraordinary ability.

We analyze these statements sequentially – one flows from the other and into the next. Thus, petitioners need not demonstrate all three legal standards (*i.e.*, three regulatory criteria, plus sustained national or international acclaim, plus belonging to the small percentage at the top of the field). On the contrary, if the petitioner meets the three criteria, then he meets the level of national or international acclaim, and thus belongs to the small percentage at the top of the field. We draw a distinction between *meeting* three regulatory criteria and merely *presenting evidence* toward three regulatory criteria and concede that the regulations establish safeguards to ensure that only those who rise to the level of extraordinary can meet three criteria. However, once the three criteria are successfully satisfied, the authors believe that the foreign national has met the standard for extraordinary ability and should not be required to demonstrate anything else.

This analysis is confirmed by the Memorandum issued by the then Acting Associate Commissioner of the Immigration and Naturalization Service (INS), Lawrence Weinig who issued the following instructions to the then Director of Northern Service Center of the INS, James Bailey:[14]

> 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 the 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.

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[4] 8 CFR §204.5(h)(2).

[5] 8 CFR §204.5(h)(3).

[6] 8 CFR §204.5(h)(3).

[7] 8 CFR §204.5(h)(3)(i)–(x).

[8] 8 CFR §204.5(h)(4).

[9] 8 CFR §204.5(h)(3).

[10] 8 CFR §204.5(h)(3)(i)–(x).

[11] 8 CFR §204.5(h)(3).

[12] 8 CFR §204.5(h)(3).

[13] 8 CFR §204.5(h)(2).

[14] INS Memorandum, L. Weinig, 69 Interpreter Releases 1052-53 (Aug. 24, 1992).

Among the 10 criteria listed in the regulations, some have been subject to frequent debates between the immigration bar and USCIS. At issue is how to properly determine whether a foreign national meets the criteria, so that he or she can then be classified as extraordinary or outstanding. Recent decisions by the Administrative Appeals Office (AAO) confirm several negative adjudication trends, and a few specific regulatory criteria stood out in what we believe were inappropriate decisions.[15] We highlight these specific criteria in this section.

Documentation of the foreign national's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor:[16]

In its EB-1 decisions, USCIS generally rejects research funding as inadmissible under this criterion, even if it comes from the most prestigious and competitive sources, and even if it awards the foreign national vast monetary amounts.

For instance, the AAO rejected grant funding and dismissed an appeal filed by a biotechnology scientist while finding that he, nonetheless, met two other regulatory criteria:[17]

> …[R]esearch grants simply fund a scientist's work. A substantial amount of scientific research is funded by research grants from a variety of public and private sources. Every successful scientist engaged in research, of which there are hundreds of thousands, receives funding from somewhere.

Similarly, in another appeal dismissal, the AAO refused to consider funding as an award by stating:[18]

> We cannot ignore the fact that research funding through competitive grants is inherent to many fields within the basic and applied sciences. Although prestigious grants may indicate the recognized value of the recipient's research, they are not prizes or awards for documented achievements.

USCIS frequently cites *Matter of Treasure Craft*[19] to argue that it is not sufficient to simply go on record and make unsubstantiated assertions. Yet the above unsupported pronouncements and generalizations, such as "[e]very successful scientist … receives funding" and "research funding through competitive grants is inherent to many fields" formed the basis of numerous denials that rejected research funding as evidence of national or international awards.

Contrary to USCIS' unsupported statements, the National Institutes of Health (NIH), the nation's premier agency dedicated to funding scientific research, reports historically low grant success rates.[20] In 2008 (the most recent year reported), the NIH grant approval rate went down to a mere 21.8%, resulting in approximately 1 out of 5 successful applications. This already low approval rate includes all successful applications, regardless of how many times they were initially rejected and resubmitted, which inflates the actual success rate. In other words, numerous grant applications are rejected on the first few tries and ultimately get approved after months or years of further work on resubmission. These rejections are not reflected in the 21.8% figure. Further, the NIH funding peer-review process specifically addresses the questions of scientific significance and innovation[21] and funds projects that are deemed to meet its very high threshold. Thus, NIH funding is a rare privilege bestowed upon a small percentage of top applicants. Where a foreign national presents evidence of serving as a lead investigator on a prestigious competitive grant, USCIS may not discount such evidence by unfounded assertions to the contrary.[22]

It is clear that the ability to procure any funding does not necessarily qualify a foreign national for the "awards" criterion. Funding must be evaluated in terms of its competitiveness, prestige, amount, national or

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[15] This article aims to highlight current adjudication trends and will only address those regulatory criteria that are frequently misapplied by USCIS.

[16] 8 CFR §204.5(h)(3)(i).

[17] *Matter of [name not provided]*, LIN 07 050 50034 (AAO Jul. 16, 2009).

[18] *Matter of [name not provided]*, LIN 08 158 52452 (AAO May 29, 2009).

[19] 14 I & N Dec.190 (Reg. Comm., September 7, 1972).

[20] http://report.nih.gov/award/success/Success_BylC.cfm.

[21] http://grants.nih.gov/grants/peer_review_process.htm.

[22] *Globenet, Inc. v. Attorney General*, No. 88-1261, 1989 WL 132041, at 8, n. 18 (D.D.C. Jan. 10, 1989).

international reach, and purpose before a conclusion can be made. However, a blanket rejection of grant funding without a qualitative review is an inappropriate treatment of valid evidence and must be challenged.

Published material about the foreign national in professional or major trade publications or other major media[23]

AAO decisions employ the following standard language to disqualify foreign nationals from meeting this criterion: "in order for published material to meet this criterion, it must be *primarily* about the petitioner and, *as stated in the regulations*, be printed in professional or major trade publications or other major media"[24] (emphasis added). We are intrigued by USCIS's distinction that the second part of the statement (where the published material must appear) is stated in the regulations. This is in contrast to the fact that the first part, which asks that the published material be *primarily* about the petitioner, is not.

There is no regulatory requirement that the published material about the foreign national be *primarily* about the foreign national. All that the regulations ask is that *there be* published material about the foreign national in qualified publications. The regulations require specific types of publications (i.e., professional, major trade, or other major media) to allow for a qualitative analysis of submitted evidence. Once it is established that such published material about the foreign national exists, it is inappropriate for USCIS to also demand specific content in those publications. Under this interpretation, publications that list Oscar nominees, Olympic medalists, or describing any other accomplishments involving more than one person (team scientific projects, musical group interviews, film reviews, etc.) would be inadmissible. Thus, most endeavors involving collaborative efforts would become ineligible to meet this criterion.

The courts agree that such restrictive view is inappropriate, and the mere act of publication about the foreign national meets the requirements. In *Muni v. INS*, the District Court for the Northern District of Illinois discussed the AAO's decision, which dismissed articles about the beneficiary because they "did not report anything of great significance."[25] The *Muni* 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' own regulations, all Muni need show is that there is "published material about [him] in professional or major trade publications or other major media** . . . .[26]

The *Muni* case follows the reasoning in *Racine v. INS*, which criticized the legacy INS for not following its own regulations where it held that 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."[27] As for the articles about the foreign national, 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 . . . .[28]

This is a particularly relevant issue in the field of sciences and education. While it is common to have articles with interviews and photos of individuals of extraordinary ability in the arts, athletics and even business, extraordinary scientists and educators do not receive similar treatment from the general population and remain largely unknown. Modern sensationalism and lack of privacy guarantee that every intimate detail of a

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[23] 8 CFR §204.5(h)(3)(iii).

[24] *Matter of [name not provided]*, LIN 07 050 50034 (AAO Jul. 16, 2009). Virtually identical language also appears in *Matter of [name not provided]*, LIN 08 158 52452 (AAO May 29, 2009) and *Matter of [name not provided]*, SRC 07 800 17067 (AAO Apr. 29, 2009).

[25] 891 F. Supp. 440, 445 (N.D. Ill. 1995).

[26] *Id*, emphasis added.

[27] 1995 U.S. Dist. LEXIS 4336.

[28] *Racine v. INS*, 1995 U.S. Dist. LEXIS 4336.

movie star's life remains in public view. But scientists and educators are not movie stars and do not command the same level of public scrutiny and media attention. USCIS must draw this distinction as well.

Evidence of the foreign national's participation, either individually or on a panel, as the judge of the work of others in the same of allied field of specialization[29]

Over the years, numerous USCIS decisions consistently required documentation of various additional factors to augment the criterion of "service as a judge." In a recent decision, the AAO made the following statement: "Not all who sit as a judge of the work of others will have extraordinary ability…".[30] We completely agree. "…[O]r will qualify under this criterion."[31] Now we are confused. If it is confirmed that the foreign national sits as a judge of the work of others, how can he then not qualify under the criterion of serving as the judge of the work of others?

USCIS often argues that the foreign national must explain the factors that led to his selection as a reviewer, and confirm that that he was selected because of his extraordinary or outstanding abilities.[32] In other words, by making this request, USCIS wants the foreign national to demonstrate extraordinary or outstanding abilities just to meet this one criterion, which is a misinterpretation of the law. This contradicts the language of the regulations and conflicts with applicable case law.

The plain language of the regulatory criterion of "judging the work of others" asks for "evidence that the foreign national has participated as the judge of the work of others in the same or allied field of specialization for which classification is sought"[33] and does not state any additional requirements. The regulations do not demand that the foreign national's participation as the judge be the result of his extraordinary abilities, or that it be uncommon or otherwise noteworthy, as often required by RFEs. In other words, participation as the judge of the work of others through peer-review, editorial or similar activities should satisfy this criterion.

Buletini v. INS provides a detailed explanation of this position:

> … 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.[34]

The AAO has issued a number of decisions that conform to this position. Specifically, it deemed the criterion of "judging the work of others" met where the petitioner submitted evidence of providing peer review services and chairing sessions at professional conferences, without requiring additional evidence of the significance of these invitations.[35]

However, there is still no consistency, and, as demonstrated by the *Kazarian* decision,[36] the issue of how to properly apply the "judging the work of others" criterion is far from being resolved. *Kazarian* overturned the AAO's decision that "reviewing 'diploma works' for fellow students at one's own university is not persuasive evidence of acclaim beyond that university" and concluded that judging university dissertations *may*

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[29] 8 CFR §204.5(h)(3)(iv).

[30] *Matter of [name not provided]*, SRC 07 800 17067 (AAO Apr. 29, 2009).

[31] *Id.*

[32] *Matter of [name not provided],* (AAO May 27, 2004).

[33] 8 CFR §204.5(h)(3)(iv).

[34] F. Supp. 1222 (E.D. Mich. 1994) at 1231, emphasis added.

[35] *Matter of [name not provided],* LIN 06 150 51860 (AAO Apr. 3, 2008), *Matter of [name not provided],*SRC 06 183 52584 (AAO Jan. 30, 2008), *Matter of [name not provided],*NSC 06 015 51050 (AAO Apr. 10, 2008).

[36] *See supra* n. 2, at 3441.

count as evidence for this criterion.[37] This is despite the fact that the regulation calls for evidence of judging the work of others "in the same or allied field of specialization for which classification is sought."[38] University study, even at the Ph.D. level, was not the field in which Dr. Kazarian attempted to qualify for an immigrant visa. Academic students are not full members of the professional field in which they study, so it is doubtful that reviewing their work would actually meet the criterion. However, *Kazarian* did not address the question of what exactly constitutes *sufficient evidence* of judging the work of others. Instead, the Court concentrated on whether or not review of "diploma works" qualified as evidence. That it certainly did. Did the evidence meet the criterion? This question remains unanswered.

Submission of comparable evidence if the regulatory standards do not readily apply to the beneficiary's occupation[39]

This regulation has been most mysterious in its application. USCIS has consistently rejected submission of comparable evidence in extraordinary ability cases.[40] The authors have conducted a thorough review of numerous AAO decisions and were unable to locate a single decision where comparable evidence was successfully accepted.

USCIS rejects comparable evidence in one of two ways. The first is by stating that it is only allowed if none of the ten criteria of 8 CFR §204.5(h)(3) apply to the beneficiary's occupation.[41] This logic renders the "comparable evidence" criterion redundant and unusable. For instance, in 2009, the AAO evaluated numerous EB-1 appeals by petitioners claiming extraordinary abilities in diverse occupations and fields of human endeavor, including transcultural management,[42] motion picture production,[43] massage therapy,[44] early childhood education,[45] invention,[46] music,[47] and numerous scientific disciplines. In none of these cases did USCIS find comparable evidence to be admissible.

To conclude that the threshold for eligibility under the "comparable evidence" criterion is establishing that none of the ten criteria apply to the beneficiary's occupation is to strip this regulation of any meaning. The ten regulatory criteria are sufficiently diverse that they encompass most existing occupations. Thus, under this reasoning, the "comparable evidence" regulation would be used only for the most obscure fields in extremely rare circumstances. We find this interpretation of the regulations to be unlikely, as nothing suggests that the "comparable evidence" regulation is reserved only for such extreme scenarios.

Additionally, the regulatory language specifies that comparable evidence may be submitted if the other regulatory standards do not "readily" apply.[48] The word "readily" is specifically used to temper this criterion and create a standard for its correct application. "Readily" is defined as: 1) by choice or preference; or 2) without difficulty,[49] suggesting that comparable evidence may be submitted if other standards are less preferable or present difficulty in application. Thus, the regulation does not mandate that all ten criteria be inapplicable to the beneficiary's occupation, but only that "the above standards [] not readily apply."[50]

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[37] *Id*.

[38] 8 CFR §204.5(h)(3)(iv).

[39] 8 CFR §204.5(h)(4).

[40] *See Matter of [name not provided]*, EAC 04 033 50279 (AAO May 25, 2007), *Matter of [name not provided]*, LIN 08 158 52452 (AAO May 29, 2009), *Matter of [name not provided]*, SRC 01 069 52458 (AAO Nov. 25, 2009).

[41] *See Matter of [name not provided]*, EAC 04 033 50279 (AAO May 25, 2007).

[42] *Matter of [name not provided]*, SRC 01 069 52458 (AAO Nov. 25, 2009).

[43] *Matter of [name not provided]*, LIN 06 210 50435 (AAO May 28, 2009).

[44] *Matter of [name not provided]*, LIN 07 210 54020 (AAO Jun. 16, 2009).

[45] *Matter of [name not provided]*, LIN 07 735 53011 (AAO May 27, 2009).

[46] *Matter of [name not provided]*, LIN 07 026 50038 (AAO Apr. 6, 2009).

[47] *Matter of [name not provided]*, LIN 08 008 54394 (AAO Sep. 10, 2009).

[48] 8 CFR §204.5(h)(3).

[49] *See* http://www.merriam-webster.com/thesaurus/readily.

[50] 8 CFR §204.5(h)(4).

The second way USCIS rejects comparable evidence occurs in situations where a petitioner proposes to compare the comparable evidence to an already existing criterion. USCIS responds by stating that the evidence submitted is more comparable to a criterion other than the one the petitioner is seeking to meet and then concluding that it is insufficient to meet it.[51] First USCIS concedes that comparable evidence is admissible, then reviews the evidence, and finally rejects it by arbitrarily asserting that it is not comparable to the criterion suggested by the petitioner. This most often occurs in cases where scholars submit evidence of invited presentations and lectures at conferences as comparable to the criterion of "display of the [foreign nationa's] work in the field at artistic exhibitions or showcases."[52]

In at least two recent AAO decisions, USCIS concluded that "conference presentations are far more comparable to published articles"[53] rather than display of the foreign national's work in the field. This conclusion was made with no further explanation of why oral scientific presentations in front of an audience are somehow more similar to written publications in journals than to oral artistic presentations in front of an audience.

In its September 2009 ruling, the *Kazarian* Court addressed this issue in the following manner: "[b]ecause the plain language of the regulation refers to 'artistic exhibitions or showcases' and because *evidence of lectures and conference presentations are accounted for in the 'authorship of scholarly articles' criterion*, the agency correctly held that *this criterion did not apply* to Kazarian"[54] (emphasis added). Thus, according to *Kazarian*, lectures and conference presentations are *more* comparable to authorship of scholarly articles and should be counted under that criterion, grouped with other evidence. The Court rejected the argument that this evidence qualified under the separate, "display" criterion.[55] We take issue with the Court's interpretation of how to apply the "comparable evidence" criterion for scientists seeking to submit evidence of their presentations at conferences.

By its terms, the "display" criterion in 8 CFR §204.5(h)(3)(vii) applies to performing arts, and no other criterion specifically calls for evidence of lectures and presentations, which is how academics "display" their work. "Display of work" at scholarly exhibitions is comparable to the "display of work at artistic exhibitions" because, in both cases, the foreign national demonstrates his or her work to an audience; he or she may participate by invitation only; and invitations to display one's work are granted based on merit of achievement and peer review. Consequently, a scholar's display of his or her work at a prestigious international conference is comparable to an artist's display at a widely anticipated artistic exhibition and should be admissible evidence under the "comparable evidence" regulation.

Scholars lecture at conferences and publish articles as two separate functions of academic work. Thus, lectures and conference presentations are distinct from authorship of scholarly articles and merit separate consideration in assessing a scholar's abilities. Additionally, neither the Ninth Circuit Court nor USCIS may point to any regulation compelling the position that lectures and conference presentations should be considered specifically under the authorship criterion. If the unarticulated reason for such a position is the "comparable evidence" regulation, then lectures and presentations should properly and logically fit the "display" criterion. After all, the Court agreed with USCIS that evidence of lectures and presentations is admissible although it does not match a specific criterion, thus using - albeit unwittingly - the "comparable evidence" provision.

The "comparable evidence" regulation does not mandate that the evidence submitted be comparable to a specific criterion which already exists. It merely states that such evidence may be submitted for consideration, and does not require an argument of which existing criterion most closely matches the comparable evidence. Thus, it is inappropriate for USCIS to disqualify admissible evidence by arguing that it matches a criterion

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[51] *See Matter of [name not provided]*, LIN 08 158 52452 (AAO May 29, 2009), *Matter of [name not provided]*, SRC 01 069 52458 (AAO Nov. 25, 2009).

[52] 8 CFR §204.5(h)(vii).

[53] *Matter of [name not provided]*, LIN 08 158 52452 (AAO May 29, 2009), *Matter of [name not provided]*, SRC 01 069 52458 (AAO Nov. 25, 2009).

[54] 580 F.3d 1030, 1037 (9th Cir. 2009). *See also*, *supra* n. 2, at 3442. There are no significant changes in the Court's thinking in its March 2010 rendition of *Kazarian*.

[55] *Id.*, at 1036.

which it does not meet. This defeats the entire purpose of the "comparable evidence" regulation which contemplates that some evidence, while helpful to establish extraordinary ability, will not match any criteria.

Further, the "comparable evidence" regulation was promulgated by USCIS, which confirms that it intended to utilize it. It is ameliorative on its face as it permits the use of evidence which does not naturally fall into the ten criteria and expands the foreign national's options for proving extraordinary ability. The logical construction of the regulation, therefore, is that if the foreign national does not readily meet any one of the enumerated criteria, he may provide comparable evidence. Any other interpretation of the interplay between the regulatory criteria in 8 CFR 204.5(h)(3)(i)-(x) and the "comparable evidence" regulation would render the latter meaningless.

USCIS' refusal to accept comparable evidence in lieu of *one* regulatory criterion, as proffered by the petitioner, belies its position that it would accept such evidence if *none* of the criteria apply. If none of the ten criteria truly applied, are we to believe that USCIS would accept three comparable criteria and approve such an extraordinary ability petition? Since we have yet to see USCIS accept comparable evidence in lieu of even one criterion in a single case, we are understandably concerned.

KAZARIAN V. USCIS

In its March 4, 2010 decision, the Ninth Circuit Court of Appeals criticized the AAO for holding that Dr. Kazarian's "'publication of scholarly articles is not automatically evidence of sustained acclaim'" and "'[it] must consider the research community's reaction to these articles.'"[56] 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. . . . 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.

USCIS has enjoyed many years of "rulemaking"—and refusal of immigrant visa benefits to countless extraordinary ability foreign nationals—through the adjudicatory process. This holding seriously dampens the agency's runaway interpretive spree. USCIS may no longer "unilaterally impose novel substantive or evidentiary requirements," which are contrary to regulations.

Judge Nelson's criticism is properly directed at the AAO/USCIS. However, it must also be directed at the Ninth Circuit's own earlier decision, which adopted the government's argument that publications were not publications until a certain research community's reaction to them was duly gauged.[57] Regrettably, this point was conceded by the earlier *Gulen* decision,[58] which made great strides in conclusively defining the concepts of "the field" and "scholarly" but required "unsolicited contemporaneous documentation that shows that independent experts or organizations in the field consider the published material to be significant or that the beneficiary's findings or methodologies have been widely cited or adopted by the industry or professional community at large."[59] So, it is not surprising that the AAO seized on this harmful language and began its immediate implementation by issuing several extraordinary ability visa denials.

Although reversing itself in its March 4, 2010 opinion, the *Kazarian* Court's holding in this matter is only marginally helpful. It states that "others' citations . . . . are not relevant to the *antecedent procedural question*" of whether Dr. Kazarian met the evidentiary requirements of the "authorship" criterion (emphasis added). Accordingly, a scholar may submit, and the government can no longer dismiss, evidence of articles as

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[56] *See supra* note 2, at 3441-2.

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

[58] The authors believe *Gulen v. Chertoff* (F.Supp.2d 2008 WL 2779001 (E.D.Pa.)) to be highly praiseworthy for reversing the AAO's audacious denial of extraordinary ability status to the world's No. 1 public intellectual. *See* http://www.foreignpolicy.com/articles/2008/06/16/the_world_s_top_20_public_intellectuals.

[59] F.Supp.2d 2008 WL 2779001, 2 (E.D.Pa.).

meeting the evidentiary requirements of the "authorship" criterion. But since "others' citations (or lack thereof) might be relevant to the *final merits* determination" (emphasis added), nothing would prevent USCIS from deciding that yet-to-be-cited scholarly articles do not actually meet the "authorship" criterion. The Court makes similar statements in reversing the AAO's refusal to accept evidence of Kazarian's work as a judge, while making no comment regarding the merits of his reviewing activities: "[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" (emphasis added).[60]

Thus, according to this Court, providing evidence to satisfy USCIS criteria as a matter of an "antecedent procedural question" is one thing. Meeting the criteria is another, and the Court is silent about how to actually meet the criteria, once the evidence has been accepted for consideration.

The *Kazarian* Court makes the following statement about the general application of the legal standard of extraordinary ability:[61]

> 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 [foreign national] has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise.'

The authors disagree with this reading of the regulations. It is our position that the petitioner does not have to 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 foreign national belongs to the small percentage at the very top of the field, which means the foreign national is extraordinary. Indeed, USCIS regulations do not mandate that each criterion be met as a result of one's sustained acclaim or extraordinary ability. The opposite is true; the regulations require that the foreign national satisfy at least three criteria to establish that he or she has attained the requisite acclaim and is, therefore, extraordinary.

Kazarian ultimately brings us back to the problem of "circular reasoning," which has been employed in numerous USCIS denials of EB-1 petitions and was the subject of Judge Pregerson's earlier dissent.[62] For instance, to meet the "authorship" criterion, all that that a foreign national has to show is that he published scholarly articles in the field in professional or major trade publications. Requiring him to also show his acclaim through the research community's reaction to his articles amounted to the circular reasoning rejected by District Courts in *Muni* and *Buletini*. And while the *Kazarian* Court also rejected this requirement, it only did so for the narrow issue of whether uncited articles constituted "evidence" leaving it up to USCIS to decide as to its sufficiency to meet the regulations.

Thus, the *Kazarian* court's bifurcated analysis of first reviewing what constitutes acceptable evidence and then reviewing its merits is likely to continue the confusion in this area of practice. USCIS may be emboldened to concede that the requisite procedural requirements for accepting evidence are met but that the foreign national still fails the "final merits determination" test.

CONCLUSION

Despite the recent *Kazarian* decision, the EB-1 standard of review is still in the state of confusion. While Dr. Kazarian's petition was ultimately denied, the authors believe that the Universe (which, coincidentally, is the subject of his research) will take care of him. According to the Ninth Circuit, his petition for rehearing was moot in light of its most recent opinion and, therefore, was denied. However, the arguments outlined above, which the Ninth Circuit did not entertain, suggest that Dr. Kazarian's petition may not be moot and

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[60] *See supra* note 2, at 3437; emphasis added.

[61] *Id.*

[62] *Supra* n. 53, at 1037.

could result in gaining him permanent residence. The Universe has its own laws,[63] and it arranges life in such a way that it illuminates the truth, exposes mediocrity, and ensures that justice and fairness prevail in the end.

[63] *See* Green, Brian R., The Elegant Universe: Superstrings, Hidden Dimensions, and the Quest for the Ultimate Theory, xiii, 23–84 (2d Ed. 2003).