Cyrus D. Mehta, *The Curse of* Kazarian v. USCIS *in Extraordinary Ability Adjudications Under the Employment-Based First Preference.* 1 AILA L. J. 47 (2019).

Overview

Applicants for an "extraordinary ability" visa must meet three out of ten criteria. Since the 9th Circuit decision *Kazarian v. USCIS* (2010), the USCIS has adopted a second step when analyzing how extraordinary the evidence presented really is. While the second step of analysis is not required by the statute, it's been enshrined through case law, so the best thing for attorneys to do is to make sure USCIS follows through with the first step (accepting evidence meeting three criteria) BEFORE proceeding to a "final merits determination" of those criteria. Better chance of fighting it out in that second step if USCIS doesn't conflate the two steps and just dismiss the initial evidence of extraordinary ability out of hand.

Kazarian v. USCIS, 596 F.3d 1115 (9th Cir. 2010)

- Concerned with the publication of scholarly work and whether it's necessary to establish what the scholarly community *thought* about the work—court said no, the statute just requires the fact of publication.

- "In *Kazarian*, the main bone of contention was what constitutes 'authorship of scholarly articles in the field, in professional or major trade publications or other media.'" (48)

- *Kazarian I* (2009): Court agreed with USCIS that you have to vet the reaction to the scholarly work to determine whether it's extraordinary or not.

- *Kazarian II* (2010): Court reversed, noting that 8 CFR §204.5(h)(3)(vi) just requires a demonstration of achievement: "The regulation does not require consideration of the research community's reaction to those articles, which was essentially an invention of USCIS." (49)

EB-1 Visa Requirements

- "an individual can 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." (48)
- International/international acclaim
- Documentation of individual's achievements
- Intent to continue working in this area
- May be a self-petition, no job offer necessary
- Easy in: receive a big award (Nobel, Oscar, GRAMMY)
- If no major award, then three of the following will suit (q.48):
    - Receipt of lesser nationally or internationally recognized prizes or awards
    - Membership in an association in the field requiring outstanding achievement
    - Published material about person in major trade publications/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 in relation to others in the field
- Commercial success in the performing arts

USCIS's 2nd Step of Analysis

- "Unfortunately, after the initial victory, *Kazarian II*, as interpreted by USCIS, has resulted in a new and burdensome two-part test. In the first part of the test, USCIS must determine whether the individual has met three of the ten criteria to establish extraordinary ability. However, that alone is not sufficient and does not result in an approval. Even after meeting the first part of the test, the individual has to establish through a vague and undefined 'final merits determination' that he or she is extraordinary." (49)

- So in the first step, the USCIS can't look for other evidence of extraordinary ability (like scholarly reaction to a published article)—but in their invented second step, they can do so.
  - "USCIS may take into consideration this extra evidentiary factor, namely, the lack of reaction in the research community, during the 'final merits determination' analysis. It is readily apparent that the analysis under the second step defeats the very essence of the holding in *Kazarian II* that USCIS cannot impose extra requirements under the evidentiary criteria. What it cannot do under the first step, USCIS has found a way to do under the 'final merits determination.'" (50)

Pre- and Post-*Kazarian* standards

- ***Buletini v. INS*, 860 F.Supp. 1222 (E.D. Mich. 1994):** After the three criteria are met, the alien is presumed to have demonstrated extraordinary ability; now the burden shifts to USCIS to make the case that these don't rise to that level.

- ***Rijal v. USCIS*, 772 F.Supp. 2d 1339 (W.D. Wash. 2011), *aff'd*, 683 F.3d 1030 (9th Cir. 2012):** USCIS didn't consider evidence of extraordinary ability fairly, but these errors were made with an eye to the global final merits determination, so it's okay. "Instead of remanding the case because of USCIS's faulty step-one analysis in rejecting the evidence, the *Rijal* court held these errors to be harmless under the step-two final merits determination." (50-51)

- "The 'final merits determination' permits USCIS to set subjective baselines with respect to rankings" (e.g., sports players, scientists, etc.) "even if they would potentially qualify under the 10 evidentiary criteria." (51)

Advice to Practitioners

- "While it makes sense to preserve the argument in the record that the final merits determination is inapplicable and to propose the burden-shifting approach under *Buletini* instead, it also behooves an attorney to argue in the alternative that his or her client merits a favorable adjudication under the final merits determination given that this analysis has been blessed in post-*Kazarian* decisions." (51-52)

- During the final merits determination, highlight the strongest parts of the evidentiary criteria.

- "Finally, the practitioner must always remind USCIS that the preponderance of evidence standard, which requires only 51 percent certainty, governs the final merits determination, as suggested in the December 22, 2010 policy memorandum." (52)

- Note the propensity of USCIS to conflate the two steps, and hold them accountable.
    - "A petitioner may seek review under the Administrative Procedure Act, asking a federal court to find that the USCIS decision was arbitrary and capricious by conflating the two steps." (52)

- Bullfighter case (*Eguchi v. Kelly*) – "for the step-one analysis Eguchi needed only to provide documentation showing that he commanded a high salary or other significantly high remuneration for services in relation to others in the field. According to the court, USCIS only focused on the top two or three earners in the sport but ignored the earnings of the other 1,200 PBR members." (53)

- "Petitioners must first persuade USCIS that the petitioner meets three out of the ten criteria, and then fight USCIS under the step-two final merits determination." (54)

- Underlying Q: "Must the evidence submitted by the petitioner inherently be extraordinary under step one?" (54)