



AILA National Office
Suite 300
1331 G Street, NW
Washington, DC 20005

Tel: 202.507.7600
Fax: 202.783.7853

www.aila.org

MEMORANDUM

TO: Donald Neufeld, Associate Director, Service Center Operations
Barbara Q. Velarde, Deputy Associate Director, Service Center Operations
Denise Vanison, Chief, Office of Policy and Strategy

FROM: American Immigration Lawyers Association

RE: "Evaluation of Evidentiary Criteria in Certain Form I-140 Petitions," PM-602-0005.1 (December 22, 2010)

Comments to the Final *Kazarian* Guidance

DATE: May 27, 2011

Dear Don, Denise, and Barbara:

In follow up to our discussions on April 7, 2011, AILA provides the following comments to the USCIS Policy Memo, "Evaluation of Evidentiary Criteria in Certain Form I-140 Petitions," PM-602-0005.1 (December 22, 2010) ("guidance"). We are compelled to reiterate the concerns detailed in our September 3, 2010, comments to the Interim Memo and our September 23, 2010, comments to the companion [E-1-1 RFE Template](#).

AILA believes that the guidance in the *Kazarian* memo continues to fall short of the goal of providing examiners with sufficient analytical tools to properly weigh and evaluate evidence in support of EB-1-1, EB-1-2, and EB-2 "exceptional ability" petitions. AILA remains concerned by the overly-restrictive interpretation of the evidence required to meet the burden of proof in the first step of the guidance's analysis. However, our primary concern is with the continuing ambiguity in the "final merits analysis." This ambiguity is a direct result of USCIS' reliance on *Kazarian* for an adjudicative approach that was never articulated by the Court in *Kazarian*.

The Ninth Circuit in *Kazarian* provided important guidance on the proper evaluation of evidence presented in each of the regulatory categories. Nevertheless, the court's decision in *Kazarian* rested solely on the fact that "*the applicant had failed to satisfy the regulatory requirement of three types of evidence.*" Finding that the applicant only established two types of evidence, the court provided no further

commentary or guidance on applying a “final merits” analysis. Rather, it cites favorably to several federal court decisions that USCIS appears bent on ignoring; beginning with *Buletini vs. INS*, 860 F. Supp. 1222 (E.D. Mich. 1994) and cases that follow the formula and methodology established by the decision in *Buletini*.

The Court in *Buletini* held that in creating specific evidentiary criteria, legacy INS sought to “*make compliance easier by apprising aliens of the evidence they need to present.*” Specifically, *Buletini* held that once the petitioner provides documentation establishing at least three of these evidentiary criteria, the petitioner has demonstrated prima facie eligibility for approval. The burden of proof then shifts to USCIS to demonstrate by “*specific and substantiated reasons*” why the alien is nonetheless not qualified for the benefit. Nothing in *Kazarian* contradicts this clear and easily followed standard, which provides both petitioners and adjudicators with clear guidance on the requirements to establish the extraordinary alien and outstanding researcher or professor categories.

Thus, AILA continues to assert that the *Buletini* approach is the correct framework for USCIS analysis of EB-1-1 petitions. It meets USCIS’ stated goals of transparency and consistency, while providing adjudicators with a much needed clear and objective standard of review. It is not a coincidence that several federal courts have applied this standard, including the decision in *Kazarian*. In addition to *Buletini*, the courts in *Muni v. INS*, *Racine v. INS*, and *Gulen v. Chertoff*, all evaluated whether the plaintiffs met at least three of the ten criteria, and held that having met the required evidentiary burden of proof, plaintiffs were eligible as aliens of extraordinary ability, absent any evidence indicating the contrary.

USCIS has informally discounted, and formally remained silent about, *Buletini* and its lineage. However, adjudications under USCIS’ guidance has served to undercut the clear standards set forth in the regulations, giving adjudicators free reign to define “extraordinary.” Although guidance reminds adjudicators not to “*unilaterally impose novel substantive or evidentiary requirements beyond those set forth in the regulations,*” the guidance, ironically, encourages this arbitrary adjudicatory environment.

Our specific comments to the December 22, 2010, *Kazarian* guidance are as follows:

1. Page 2, last full paragraph from the bottom:

“Outstanding professors and researchers should stand apart in the academic community through eminence and distinction based on international recognition.” This appears nowhere in the final rule or in the regulations. Rather, it is mentioned in the preamble to the July 5, 1991 proposed rule. This suggests that it was rejected as the standard when the final rule was promulgated. AILA is concerned that it is now re-introduced in the *Kazarian* guidance, as there does not appear to be a legal basis to do so.

Proposed regulations do not represent an agency's considered interpretation of its statute. *McNamee v. Dep't of the Treasury*, 488 F.3d 100, 109 (2d Cir. 2007). It thus follows that proposed regulations have no legal effect. *United States v. Springer*, 354 F.3d 772, 776 (8th Cir. 2004) citing *Sweet v. Sheahan*, 235 F.3d 80, 87 (2d Cir. 2000). See also *LeCroy Research Sys. Corp. v. Commissioner*, 751 F.2d 123, 127 (2d Cir. 1984) ("Proposed regulations are suggestions made for comment; they modify nothing."); *Barton Mines Corp. v. Commissioner*, 446 F.2d 981, 990 n.4, 993 n.7 (2d Cir. 1971) (refusing to consider import of proposed regulations in rendering decision); *Wuillamey v. Werblin*, 364 F. Supp. 237, 243 (D.N.J. 1973) (a proposed rule does not have "the force of law").

Moreover, the proposed text of the regulations did not use this language. . See 56 Fed. Reg. 30703 (July 5, 1991) (proposed changes to 8 CFR § 204 including no mention of "eminence and distinction" standard). See also 56 FR 60897 November 29, 1991 (adopted rule not utilizing "eminence and distinction" language); 8 CFR § 204 (no use of "eminence and distinction based on international recognition" standard in adjudication of Outstanding Professors or Researchers petitions). Accordingly, this assertion found in 56 Fed. Reg. 30703 cannot, in and of itself, modify the standard for adjudicating petitions for Outstanding Professors or Researchers.

2. Page 4, last full paragraph from the bottom:

"USCIS officers should then evaluate the evidence together when considering the petition in its entirety to determine if the petitioner has established...the required high level of expertise."

Page 13, 2nd full paragraph (also page 13, last two paragraphs):

"for the analysis in part two, the alien's participation should be evaluated to determine whether it was indicative of the alien being one of the small percentage who have risen to the very top of the field of endeavor."

These two sections appear to be contradictory, as the first states that the "totality of the evidence" should be analyzed to determine if the whole of the parts establishes the "high level of expertise." Yet the second section suggests that, as with the previous AFM, each criterion must independently demonstrate the "high level of expertise." Thus it seems to be instructing officers to make two separate evaluations in the final merits analysis, for each criterion individually, and again, for the entire evidence as a whole.

3. Page 14, first para:

"If the USCIS officer determines that the petitioner has failed to demonstrate these requirements, the USCIS officer should not merely make general assertions

regarding this failure. Rather, the USCIS officer must articulate the specific reasons as to why the USCIS officer concludes that the petitioner...has not demonstrated ...extraordinary ability.”

While we appreciate that officers are advised to “articulate specific reasons” it appears that there is no further instruction offered in the guidance on what constitutes valid and *bona fide* reasons to deny a petition once the applicant has met the sufficient number of regulatory criteria. Rather, it invites officers to substitute their own judgment for that of the experts and in place of supporting documentation. Moreover, it thwarts efforts to achieve transparency, consistency, and predictability, and ultimately, due process, and fundamental fairness as it eliminates any clear standard from the adjudicatory process.

4. Page 6 – “Limited Determination”

It is not clear why this section is titled “limited determination.” Our understanding is that Part One of the analysis is a complete determination of whether evidence to satisfy a specific criterion is established. As currently drafted, it suggests that meeting the criteria in and of itself has little to no value. This undercuts the authority of DHS’ own regulatory criteria.

5. Regulatory Criteria –

A. Page 7,17 Published Material About the Alien

We agree with the guidance’s statement that the “*published material should be about the alien...not just ...the employer.*” However, we are concerned that the Service Centers are operating under the presumption that the “published material be primarily about the beneficiary and the beneficiary’s work.” As indicated in our comments to the E-1-1 RFE template, there is no basis in the regulations for this requirement. Moreover, such a requirement was repeatedly rejected by the federal courts. In *Muni v. INS*, the court held that articles that mentioned Muni constituted “published material about [Muni] in professional or major trade publications or other major media, relating to [his] work in the field for which classification is sought,” and were sufficient to satisfy this criterion. A similar holding was set forth in *Racine v. INS*.

B. Page 8, Judge of the Work of Others

The main concern with this section is the requirement of very specific documentation to establish that the alien did in fact judge the work of others. This seems contrary to the preponderance of the evidence standard. For example, if an alien submits documentation of repeated requests to review manuscripts, it is more likely than not that s/he did in

fact perform the reviews. Otherwise, it would seem unlikely that journals would continue to make such a request.

C. Page 8, Original Contributions of Major Significance *in* the field
Page 18, Original Contributions

As detailed in our comments to the E-1-1 RFE Template, 8 CFR §204.5(h)(3)(v) requires evidence of the alien's original contributions of major significance *in* the field, not, as suggested by the language in the guidance, *to* the field. The guidance directs adjudicators to look for evidence that "*peer reviewed articles...have provoked widespread commentary.*" While the guidance continues by offering the alternative of "*received notice from others working in the field or entries (particularly a goodly number) in a citation index,*" the prominence of "*provoking widespread commentary*" in both the guidance and in the E-1-1 RFE template suggests that such evidence is required. The guidance seems to focus more on a quantitative analysis ("how many or how broad?"), rather than a qualitative analysis. A qualitative analysis may be more appropriate, as it could address the reputation of the journal or conference where the work appeared, and the prestige of the experts commenting on the significance.

AILA appreciates the language in the guidance directing adjudicators to consider the probative value of expert testimonials. However, we would like to alert USCIS to the fact that in practice, RFEs and NOIDs often fail to explain the deficiencies in the letters or ignore them altogether. The irony is that the RFE or NOID usually requests "testimony and/or support letters from experts." We do not expect adjudicators to be familiar with every field of endeavor; however, we do expect that they would give credence to credible testimonial evidence.

AILA also reiterates its concern that the regulatory criterion at 8 C.F.R. §204.5(i)(3)(i)(E) is confused with the regulatory at 8 C.F.R. §204.5(h)(3)(v). The former only requires that contributions be original, while the latter requires they be of "major significance." The language in the guidance imposes an extra-regulatory burden by requiring applicants for the outstanding researcher/professor to demonstrate not only the originality of their contributions, but also the "*impact on subsequent work.*" This is not the appropriate line of inquiry, as it goes beyond demonstrating the originality of the alien's contributions.

D. Pages 9/19 Authorship of Scholarly Articles

In both our comments to the draft guidance and the E-1-1 RFE template, AILA expressed its concern that the USCIS definition of what constitutes

a “scholarly article” appears restrictive and misleading. We reiterate this concern and remind USCIS that the regulation requires “authorship of scholarly articles in the field, in professional or major trade publications, or major media.” Opining on this criterion, the Court in *Gulen v. Chertoff* held that “... *a work becomes scholarly by virtue of its author and its subject matter, not its intended audience.*” We would urge USCIS to adopt this interpretation.

E. Page 10, Leading or Critical Roles

AILA reiterates its concerns that both the guidance and the current E-1-1 RFE template do not adequately explain how to fulfill the regulatory standard. The language in both remains fairly circular, requesting “details regarding why the beneficiary’s performance in the role was leading or critical.” This merely restates the regulatory language without providing any guidance on what was lacking in the submitted materials, or what the ISO is seeking. A more comprehensive analysis should address the beneficiary’s duties and responsibilities, the beneficiary’s supervisory responsibilities, the beneficiary’s contributions to the organization or establishment, *et cetera*.

Additionally, a distinction should be made between “leading” and “critical” roles. While “leading” role suggests a position of leadership, “critical” role may be a non-leading, non-managerial position by someone whose qualitative contributions prove vital to the organization. For instance, if an alien played an irreplaceable role in the success of an important research study, it should meet the requirements of the “critical role” criterion.

F. Page 6/16 – Membership in Associations Requiring Outstanding Achievement

This section focuses on what does not satisfy this criterion rather than what does.