Kazarian: The Next Generation

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Why *Kazarian*?

- AAO had been issuing denials of EB-1 cases despite presence of evidentiary criteria.
- AAO did not appear to be applying *Buletini v. INS*, 860 F. Supp. 440 (N.D. Ill 1995) et. al.
- AAO *Kazarian* Decision seemed to gut EB-11.
- The last official word from USCIS on *Kazarian* was a USCIS Policy Memo, "Evaluation of Evidentiary Criteria in Certain Form I-140 Petitions," PM-602-0005.1 (December 22, 2010) ("guidance") which replaced an earlier interim memorandum.

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Clarity or More Confusion?

- Case limited to review of evidentiary criteria.
- AAO imposed impermissible requirements on criteria.
- *Kazarian* only met two criteria: harmless error.
- "Final Merits Determination" is dicta.

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What Do You Do With a Problem Like Dicta?

- Court says AAO analysis "might" be relevant to a "Final Merits Analysis."
- Court never discusses substance or procedure of "Final Merits Analysis."
- Court never rejects *Buletini* or other case law that criticized USCIS circular reasoning.

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Post-*Kazarian* Activity

- March 4, 2010 – *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010).
- April 12, 2010 - Stakeholders Meeting on RFEs for O, P &Q and EB-11.
- August 20, 2010 – Comment request on draft memo on Evidentiary Criteria for I-140s.
- September 1, 2010 – O &P Listening Session.
- September 8, 2010 - AILA comments on Policy Memo PM-602-0005 (AFM Update AD 10-41).

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Post-*Kazarian* Activity

- September 24, 2010 - AILA comments on I-140 RFE template.
- December 22, 2010 - Final Policy Memo on I-140 Evidentiary Criteria and updates to AFM Chapter 22.2 or EB-11, EB-12 & EB-2.
- January 11, 2011 - Final I-140 RFE Template.
- January 31, 2011 - AILA requests examples of RFEs, NOIDs based on new template.

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April 12, 2010 Stakeholders' Meeting

- USCIS announced goals for EB-11, O, P, & Q RFE Templates:
  - Consistency across service centers.
  - Proper classification.
  - Adapt to facts/needs of individual cases.
  - Concise and clear RFEs.

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April 12, 2010 Stakeholder Concerns

- Lengthy, unclear or imprecise RFEs.
- Requested evidence already submitted.
- Submitted evidence disregarded.
- Denials after prior approvals: O-1 but not EB-1.
- Acceptable and comparable/alternative issues.
- Burdensome requirements for unique inapplicable situations.
- Officer training: Experts in every industry.
- Is there something more here?

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RFE Template Project

- USCIS gradually revising all RFE templates.
- RFE templates should include all identified requirements specific to the relevant classification.
- RFE to be crafted based upon evidence already provided and designed to identify and elicit evidence helpful in resolving any deficiencies.

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USCIS *Kazarian* Implementation: Doing The EB-1 Two-Step

- USCIS implements dicta in terms of two step (or three step?!?!) analysis.
- Step 1: Count the evidence and assign criteria.
  - Consider only quantity and nature of evidence.
  - Meeting requisite # of criteria does not establish EB-11.

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Two-Step, cont'd

- Step 2: Weigh all evidence against requisite standard in "Final Merits Determination."
  - Does evidence prove cumulatively by a preponderance of the evidence the applicant is at the very top of his or her field of endeavor?
  - Has beneficiary shown sustained national or international acclaim AND recognition in the field. (Does this mean it's really 3 steps?)

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AILA on Interim I-140 Evidence Memo

- Prior case law addressed final merits determination.
- *Kazarian* itself does make Step 1 a simple counting exercise and requires qualitative evaluation of the evidence for each criterion.
- Final determination not meant to second-guess the qualitative evaluation of the criterion evidence.
- *Buletini* – once the criteria satisfied, USCIS must find alien is extraordinary unless USCIS shows specific and substantiated reasons why beneficiary is not extraordinary despite meeting the criteria.

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The *Buletini* "Shift"

- USCIS *must* find alien is extraordinary unless USCIS shows why beneficiary is not extraordinary despite meeting the criteria. In other words, USCIS can't reject evidence without counter-evidence.
- Supported by the very recent AAO precedent decision, *Matter of Skirball Cultural Center*, 25 I&N Dec. 799 (AAO 2012), which dealt with the P visa category, but the AAO stated that expert testimony may only be rejected or given less weight "if it is not in accord with other information in the record or if it is in any way questionable . . .In the present case the director did not question the credentials of the expert, take issue with their knowledge or otherwise find reason to doubt the veracity of their testimony."

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AILA Comments to RFE Template

- Remind examiners that burden of proof is preponderance of the evidence.
- Assign experienced examiners.
- Include stakeholders in training.
- Mandate supervisory review for RFEs, NOID
- More time to respond to RFEs.
- Clearly articulate deficiencies in RFEs – add section to RFE template to help ISO articulate reasons.

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AILA Comments, cont'd

- Revise "Final Merits Determination" instructions consistent with *Buletini* and AILA's prior comments.
- "Other comparable evidence" criteria rendered unusable by USCIS.
- Several other criteria are field-specific (e.g. scholars, performing artists), thereby reducing the number of available criteria for people outside these fields.
- Suggests language for "Final Merits Determination": "What does not succeed in convincing you that the beneficiary has not sustained acclaim in the field"?

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Final EB-11, EB-12, and EB-2 Memo

- Addresses extraordinary, outstanding, and exceptional ability.
- Did not address most of AILA's comments.
- Retains Two-Step: 1) objective evaluation of the evidence per the criteria and 2) determination of the evidence together as an entire petition: does it meet the requisite standard?
- Articulate specific reasons why beneficiary does not meet requisite standard in RFE, NOID or decision.

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O&P Listening Session

- The following *Kazarian* related issues were raised:
  - Need clarity re: acceptable evidence per criteria.
  - USCIS doesn't seem to understand industries.
  - Need for service center consistency.
  - RFEs ask for duplicate evidence, lack specificity and clarity re: nature of insufficiency, are outside scope of regulations.
  - USCIS reviewing memo on significance of prior approvals.

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What Category Should You Choose?

- EB-11/Extraordinary Ability
  - Higher evidentiary bar-3 categories of evidence.
  - May self-sponsor but employer-sponsored cases fare better.
- EB-12/Outstanding Researcher/Professor
  - Somewhat lesser evidentiary bar-2 categories of evidence - but total number of categories is fewer.
  - Requires offer of employment from academic or research institution or business with a research division employing 3 researchers
- Exceptional Ability/National Interest Waiver
  - Possibly easier standard to meet but is EB-2
  - Requires substantial prospective benefit to the U.S.

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How Do You Choose?

- Review length of potential beneficiary's career.
  - Applicants further along in their careers are typically more successful in EB-11 and EB-12.
  - *Kazarian* memo renews emphasis on sustained acclaim.
- Review degree of recognition.
  - EB-11 can be national or international.
  - EB-12 must be recognized internationally in the academic field specified in the petition defined as "body of specialized study offered at an accredited U.S. institution."

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How Do You Choose, cont'd

- Determine in which categories beneficiary has the strongest evidence.
- Draft petition as "Upside-down pyramid".
  - After background discussion, lead with strongest evidence.
  - Omit discussion of any evidence that would be weak on its own--could undermine petition.
  - Recently, some adjudicators focus on elements of the record not claimed in the petition as evidence of eligibility—not appropriate.

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Evidence: Awards & Memberships

- Awards
  - Gather evidence of the criteria for the award and how many recipients there are each year.
  - Student awards generally discounted by USCIS.
  - Grants generally not "awards" but may still be useful as evidence of acclaim.
- Association Membership
  - Must be selective/by nomination.
  - Show criteria for membership

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Types of Evidence: Contributions

- Original scientific or scholarly contributions
  - For EB-11, must be "of major significance."
  - EB-12, must be "to the academic field."
  - Here a combination of evidence is useful:
    - Publications showing the contribution,
    - Expert letters specifically explaining, in lay terms, major significance of contribution or nature of contribution to the academic field in general (not just to the beneficiary's employer).

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Types of Evidence: Publications

- Get as much info as possible re: applicable journals.
- For scientific journals get "impact factors" from journal home page, Thompson Reuters, or other ranking.
- According to the *Kazarian* guidance memo, a scholarly article has footnotes, endnotes or a bibliography.[1]
- Ask beneficiary what his/her most influential articles were and why? Might highlight these in support letter.
- Highlight foreign or internationally circulated journals.
- EB-12 requires internationally circulated journals.

[1] **This is a footnote:** Anyone who thinks footnotes, endnotes or a bibliography make an article "scholarly" has clearly not read any high school English papers.

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Types of Evidence: Expert Letters

- Should be "well-curated."
- Introductory paragraph should focus on writer's background, achievements and basis of knowledge of the beneficiary.
- Choose some sources that are international.
- Letters should provide specific information on the importance of the beneficiary's work and not simply constitute "hyperbolic language."
- Sometimes less is more

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RFEs & NOIDs

- USCIS does not seem to understand the difference between RFEs and NOIDs, so NOIDs are common in these categories
- RFE/NOID will likely focus more on Part II of the *Kazarian* analysis.
- RFE/NOID will likely state that evidence was submitted in various categories but taken together does not demonstrate sufficiently high level of expertise/international renown
- Difficult to address because similar to the Supreme Court's pornography standard

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RFEs & NOIDs, cont'd

- RFE/NOID strategies: Submit everything with initial petition or hold some evidence back?
- RFE/NOID can be effectively addressed by showing on initial submission or in response that evidence submitted in each category is "best of the best." What does that mean?

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Appeals

- Why bother?
  - Keep in mind that USCIS will hold in abeyance another filing in the same category based on the same facts until the appeal is adjudicated.
- Is the AAO the end of the road or should you try District Court?
- Can you skip the AAO?
- Bad facts make bad law, but sometimes an appeal is necessary even when facts are weak.

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What Does the Future Hold?

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Questions & Answers

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