FEDERAL AGENCIES, PRACTICE RESOURCES, LIAISON ACTIVITY

Practice Pointer: Misapplication of *Kazarian* in O-1A RFEs

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A number of practitioners have received RFEs for O-1A petitions with language contradicting the USCIS policy memorandum implementing *Kazarian v. USCIS* 596 F.3D 1115 (9 Cir. 2010). RFEs issued to different petitioners and attorneys in the fields of science, education, business and athletics, suggest USCIS is using a template. The template disregards its own policy guidance issued for *Kazarian* claiming that each piece of evidence must independently prove the beneficiary has extraordinary ability or else it cannot satisfy the evidentiary criterion.

Specifically, these RFEs reverse and misapply the analytical framework of the Dec. 22, 2010 *Kazarian* policy memo to O-1 Petitions: Evaluation of Evidence Submitted with Certain I-140 Petitions, PM 6002 005.1 (AILA InfoNet at Doc.No. 11020231). These RFEs apply an extra-regulatory analysis that the policy memo prohibits. The two-step analytical framework set forth in *Kazarian* requires an adjudicator to first consider whether the evidence submitted meets the regulatory criteria, *before* reaching the question of whether the beneficiary has demonstrated extraordinary ability in its totality. The policy memo applies this two-step framework, specifying:

USCIS agrees with the *Kazarian* court's two-part adjudicative approach to evaluating evidence submitted in connection with petitions for aliens of extraordinary ability: (1) Determine whether the petitioner or self-petitioner has submitted the required evidence that meets the parameters for each type of evidence listed at 8 CFR 204.5(h)(3); and (2) Determine whether the evidence submitted is sufficient to demonstrate that the beneficiary or self-petitioner meets the required high level of expertise for the extraordinary ability immigrant classification during a final merits determination.

By contrast, the approach taken by USCIS officers in *Kazarian* collapsed these two parts and evaluated the evidence at the beginning stage of the adjudicative process, with each type of evidence being evaluated individually to determine whether the self-petitioner was extraordinary. The two-part adjudicative approach to evaluating evidence described in *Kazarian* simplifies the adjudicative process by eliminating piecemeal consideration of extraordinary ability and shifting the analysis of overall extraordinary ability to the end of the adjudicative process when a determination on the entire petition is made (the final merits determination). Therefore, under this approach, an objective evaluation of the initial evidence listed at 8 CFR 204.5(h)(3) will continue as before; what changes is when the determination of extraordinary ability occurs in the adjudicative process.

Contrary to USCIS guidance in the policy memo, this O-1A RFE template repeatedly conflates steps one and two by evaluating the evidence submitted under each criterion, and demanding that each type of evidence on its own must demonstrate sustained acclaim in order to satisfy the regulation and meet the evidentiary standard. In its RFE template, USCIS erroneously asserts that evidence does not satisfy the relevant regulatory criterion *because* that evidence fails to establish that the beneficiary has sustained national or international acclaim.

To satisfy this criterion, the record must contain sufficient evidence to ***establish not only the plain language of the criterion****, but also show how..., the beneficiary is an alien of extraordinary ability, that he or she has a record of sustained national or international recognition, and is acknowledged as one of the small percentage who has risen to the very top of his or her field.*

When USCIS makes these claims, they do the opposite of what *Kazarian* requires and what the policy memo instructs. By combining a procedural analysis of whether a petitioner has satisfied an evidentiary criterion under the regulations with a substantive final merits analysis of whether that evidence also proves that the person has sustained national or international acclaim, or has reached the very top of the field, USCIS is imposing novel requirements. Not only is this legal analysis under each criterion incorrect, but since such it conflicts directly with the Service's own policy guidance, it has been deemed arbitrary and capricious, in cases such as *Eguchi v. Kelly,* 3:16-CV-1286 (N.D. Texas, July 7, 2017), and falls within the allowable scope of review under Section 706 of the Administrative Procedures Act.

If your client receives an RFE individually evaluating each criterion separately requesting evidence that it shows the person is one of the small percentage who have arisen to the very top of the field of endeavor, you should challenge USCIS on this misapplication of *Kazazian* based on its own Policy Memo. USCIS repeatedly misapplies *Kazazian* and disregards its own Policy Memo by conflating step one (procedural) with step two (substantive final merits).

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