



# **Advanced EB-1 Issues (Extraordinary and Outstanding)**

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# Advanced EB-1 Issues



- **Part 1: It's All About *Kazarian***

- Pre-*Kazarian* law: *Buletini*
- The *Kazarian* effect
- Evidence development and strategic concerns in picking a category
- Regulations, AFM, and other sources for support and how to use them
- Developing and using supporting evidence
- Developing and sticking to your “theory” of the case
- Dealing with marginal cases and managing expectations

# Advanced EB-1 Issues



- **Part 2**

- RFEs, NOIDs, and other obstacles
- Knowing the proper standard for the category and correcting USCIS
- Strategies in multiple filings, re-filings vs. appeal

# Extraordinary Ability—Statute



- INA § 203(b)(1)(A)(i) *the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international renown and whose achievements have been recognized in the field by extensive documentation.*

# Extraordinary Ability—Regulation 8 CFR 204.5(h)



- *“Extraordinary ability* means a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor.”
- One time internationally renowned award or at least three of ten types of evidence.
- Extraordinary ability will be utilized in activity in US.
- No labor certification or job offer required.

# Extraordinary—Evidence



- “One time achievement (that is, a major, internationally recognized award)”, OR three of the following
- Lesser national prizes or one internationally recognized prize or award for excellence in his/her field.
- Membership in organizations requiring outstanding achievements for membership “as judged by recognized national or international experts”

# Extraordinary--Evidence



- Published material about the alien in professional or major trade publications
- Judge of the work of others
- Original contributions to field “of major significance”
- Publication of “scholarly” articles in “professional or major trade publications or other major media”

# Extraordinary--Evidence



- Display of alien's work at artistic exhibitions or showcases.
- Leading or critical role for organizations that have a distinguished reputation.
- High salary or other “significantly high remuneration”.
- Commercial successes in the performing arts.
- OR, “comparable evidence”, if foregoing categories “do not readily apply”.

# Outstanding Professor /Researcher



- Alien of international renown in an “academic field”.
- Three years of teaching and/or research.
- Two of six types of evidence.
- If for private research company must show employment of three other full time researchers.
- Private company must have research accomplishments.
- “Permanent” job offer required for researchers.
- If professor, must be tenure track.
- No labor certification required.
- Job offer need not be full time.

# Outstanding--Definitions



- “*Academic field* means a body of specialized knowledge offered for study at an accredited United States university or institution of higher education.”
- “*Permanent* [research] means tenured, tenure track, or for a term of indefinite or unlimited duration...with an expectation of continued employment unless there is good cause for termination.”

# Outstanding--Evidence



- Judge of the work of others
- Original scientific or scholarly research contributions
- Authorship of scholarly books or articles in scholarly journals with international circulation (in the academic field)

# Outstanding--Evidence



- “Evidence that [the alien] is recognized internationally as outstanding in the academic field” as shown by two of six types of evidence:
  - Major prizes or awards for outstanding achievement
  - Memberships in organizations requiring outstanding achievements
  - Professional publications by others
  - Judge of the work of others
  - Original contributions to field
  - Scholarly publications

# EB 1 Petitions—Burden of Proof



- *Preponderance* of the evidence. More likely than not that facts are true and meet statutory/regulatory reqts. *Kazarian, infra*. However, USCIS often seems to employ an unstated “clear and convincing” or “beyond a reasonable doubt”.
- However, these petitions are extremely subjective: what is “outstanding” or “extraordinary”? USCIS is often given deference by courts.
- If there is a safer alternative, which has no deal-killing disadvantages, or if timing is critical (e.g. 5<sup>th</sup> year H1B), sponsorship via labor certification usually a better bet.

# Pre-Kazarian Law



- Legacy INS's interpretation of the IMMACT 1990 definitions
  - Indicates that demonstration of at least three of the ten criteria for extraordinary ability or two of the six criteria for outstanding professor/researcher would be sufficient
- *Buletini v. INS, 860 F.Supp. 1222 (E.D. Mich. 1994).*
  - "Once it is established that the alien's evidence is sufficient to meet three of the criteria listed..., the alien must be deemed to have extraordinary ability unless the INS sets forth specific and substantiated reasons for its finding that the alien, despite having satisfied the criteria, does not meet the extraordinary ability standard."
  - Meeting 3 of the 10 establishes *prima facie* eligibility for approval, shifting the burden to USCIS.
- 1995 Proposed Regulations
  - Would have implemented, with notice and comment, the approach now taken by USCIS since the December 22, 2010 memo
  - Proposed to "...amend the regulations to state that meeting three of the evidentiary standards is not dispositive..." *60 Fed. Reg. 29771* (Jun. 6, 1995).
  - Proposed regulations were ultimately withdrawn

# The *Kazarian* Effect



- ***Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010)**
  - The Ninth Circuit utilized a two part approach to determining the eligibility of an alien for classification as an “Alien of Extraordinary Ability.”
    - (1) Initial, objective review of evidence
    - (2) Final merits determination, weighing evidence as a whole.
  - USCIS adopted the *Kazarian* two step analysis in a policy memorandum released on December 22, 2010.
    - An approach that is as applicable to petitions for outstanding professors or researchers as it is for aliens of exceptional ability.
    - See Policy Memorandum from the Office of the Director, “Evaluation of Evidence Submitted with Certain Form I-140 Petitions; Revisions to the *Adjudicator’s Field Manual (AFM)* Chapter 22.2, AFM Update AD11-14,” PM-602-0005.1 (December 22, 2010)
  - *Kazarian* lesson: Bad facts make bad law. Don’t appeal terrible cases! (Dr. Kazarian was represented pro se).

# The *Kazarian* Effect



- **Aliens of Extraordinary Ability**
  - (1) Does the evidence submitted meet the parameters for each type of evidence listed at 8 CFR 204.5(h)(3)?
  - (2) Does the evidence submitted demonstrate that the beneficiary has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise, indicating that the alien is ***one of that small percentage who has risen to the very top of the field of endeavor?***

# The *Kazarian* Effect

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- Outstanding Professors or Researchers
  - (1) Does the evidence submitted meet the parameters for each type of evidence listed at 8 CFR § 204.5(i)(3)?
  - (2) Does the evidence submitted demonstrate that the beneficiary is ***recognized internationally as outstanding?***

# The *Kazarian* Effect



- Has undoubtedly led to an increase in RFEs, NOIDs, and denials
  - *Kazarian's* final merits determination inserts an overtly subjective element into the adjudication process
  - At present, there is a lack of USCIS guidance on how the final merits determination is conducted
  - As a result, USCIS is still trying to find ways to train its adjudicators to operate in a grey area in such a way as to produce consistent decisions
  - Many adjudicators have forgotten the standard of review, something USCIS has noted.
    - USCIS, in an April 2011 liaison meeting, admitted that preponderance of the evidence training is needed. AILA InfoNet Doc. No. 11060365.
- *Kazarian* has triggered immense backlash with many pushing USCIS to reconsider its position on the final merits determination.
  - Many want to see a burden shifting approach
    - The *Buletini* approach: If beneficiary satisfies Part 1, the burden shifts to USCIS to demonstrate that beneficiary does not deserve classification through specific and substantiated reasoning. See *Buletini v. INS*, 860 F.Supp. 1222 (E.D. Mich. 1994).

# Developing and sticking to your theory of the case



- Carefully develop your strategy early on and make sure it is one you can stick to throughout the process
- Avoid the situation where you have to drastically switch gears after an RFE
  - Don't let an RFE raise issues that should have been anticipated at the start, such as, the contours of the field.

# Developing and sticking to your theory of the case



- Defining the field
  - Extraordinary ability: "...means a level of expertise indicating that the individual is **one of the small percentage who have risen to the very top of the field of endeavor.**"
  - Outstanding Professor/Researcher: "...recognized as outstanding in the **academic field specified in the petition...**"
    - ✖ Academic field defined: "...a body of specialized knowledge offered for study at an accredited United States university or institution of higher education."

# Developing and Sticking to Your Theory of the Case



- **Defining the field**
  - Consider narrowing the field...
    - If the beneficiary is highly specialized in a niche area
  - Consider expanding the field...
    - If, for an alien of extraordinary ability, it would be easier to be among the small percentage at the top of the field when ranked against a larger field, e.g. top ten out of one hundred, instead of tenth out of ten.

# Strategic concerns in picking a category



- In the post-*Kazarian* world of EB-1 petitions, you must always keep the final merits determination in mind.
- The final merits determination must be considered when determining how much evidence is sufficient for a category and how it is presented.
- As much as we would like the *Buletini* approach to EB-1 petitions, it is not the approach employed by USCIS.
- For the moment, we are stuck with *Kazarian* and need to learn how to best deal with it
- Once you can meet the regulatory criteria, you have to focus on building your argument for the final merits determination.
- “Outstanding” seems to employ lower standard than “Extraordinary”: if you’ve employer sponsorship, then choose Outstanding.

# Evidence Development and Strategic Concerns in Picking a Category



- Remember that:
  - For extraordinary ability, the alien must, at minimum possess **convincing** evidence in three of the ten regulatory categories... unless he/she has a Nobel or other major international prize
  - For outstanding professor/researcher, the alien must, at minimum, possess **convincing** evidence in two of the six regulatory categories.
- While you want to meet as many categories as possible, don't overreach.
  - Don't submit weak evidence that USCIS can easily discard and which will taint the overall picture you are trying to paint
- If you have strong evidence that doesn't squarely fit into a certain criterion, make the argument!
  - Many *AAO* decisions provide restrictive interpretations of the categories, but, if the evidence is convincing enough and the adjudicator isn't versed in AAO case law, it may slide through.

# Developing and Using Supporting Evidence



- Once you have settled on a strategy and, generally, know which criteria are winnable, closely review the regulatory criteria and AAO case law.
  - Understand what documentation is needed to satisfy each criterion.

# Supporting Evidence



- “Expert” letters
  - Are critical, but must be carefully used.
  - Expert letters must serve to augment and further explain the evidence submitted.
  - Letters are very important when trying to establish the alien’s original contributions
    - As USCIS states (December 22, 2010 memo): “USCIS officers should take into account the probative analysis that experts in the field may provide in opinion letters regarding the significance of the alien’s contributions in order to assist in giving an assessment of the alien’s original contributions of major significance. That said, not all expert letters provide such analysis. Letters that specifically articulate how the alien’s contributions are of major significance to the field and its impact on subsequent work add value. Letters that lack specifics and simply use hyperbolic language do not add value, and are not considered to be probative evidence that may form the basis for meeting this criterion.
  - Pay close attention to the that last sentence!
  - Not useful to repeat that person is “extraordinary” or “outstanding” in letter: demonstrate HOW the standard is met.

# Supporting Evidence--Letters



## Who should the letters come from?

- The more important the writer, the better—Department head, VP, etc.
- Peers: be very selective.
- Government letters in the field always help, but may be hard to get.
  - Influential government agency: gold!
- International letters are always good, especially from prestigious international institutions
- CIS has emphasized that persons who know the foreign national will be expected to give a great letter. Try to get letters from people who only know FN through his/her work. Important to state: I don't know Mary Smith personally, but I know her work..."
- Avoid "promising young researcher", "talented", "has a great career ahead" which speak to potential rather than achievements attained

# Supporting Evidence--Letters



## Who should write the letters?

- Never, never, just tell FN to “get five or ten letters”. You must be heavily involved in drafting letters.
- Make sure wording in letters does not sound like it came from a template.
- How many letters are enough? Foreign nationals obsess on this point. Our benchmark: ten. If there are not ten people in the world who think FN is outstanding/extraordinary, then is he/she really?
- That said, if you only have one or two letters, and they are from “household names” in the field, then that might suffice.
- Remember, most adjudicators are not scientists. Force FN to describe field in terms understandable by a fourth grader.

# Supporting Evidence--Letters



## When is an Offer Letter required?

- **A job offer is required for Outstanding Researcher petitions**
  - RFE's are commonly issued requesting an offer letter even if Petitioner support letter includes the details of the job offer
  - Although not required, an extra letter with only the details of the job offer (title, salary, and benefit information) may help avoid an unnecessary RFE
- **A job offer is not required for Extraordinary Ability petitions**
  - Although a Petitioner is not required, an offer letter or employer letter describing the job offer and need for the applicant's services can be beneficial to the EB-1A

# Supporting Evidence



- **Make sure the evidence submitted is sufficient to satisfy the criteria and thoroughly explained in your cover letter.**
  - Do not let give USCIS the freedom to draw its own conclusions.
  - Instead, use your cover letter to present them with clear directions as to how to review the evidence.
- **Build each piece of evidence up for the final merits determination**
  - All evidence needs to do two things: satisfy the first step and be used to build the beneficiary's case at stage two.

# Supporting Evidence



- Example: Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor.
  - (1) the award is national or international in scope
  - (2) that it is highly prestigious; and
  - (3) that the beneficiary received the award as a result of his or her previous (*i.e.*, already accomplished) excellence in the field of endeavor.
- If possible, obtain a letter from the organization that explains the selection process, the size of the pool of applicants, the award's level of prestige, the qualifications of those on the selection committee, etc..

# Supporting Evidence



- Example: Evidence that the alien is a judge of the work of others in the field.
  - Submit:
    - Evidence of invitations by journals to review the work of others
    - Evidence about the journal or venue (level of prestige, influence, selectivity, etc.)
  - If, for example, the alien is a reviewer for a peer-reviewed scientific journal, submit:
    - The impact factor
    - Distribution figures
    - A letter from the editor discussing the items above plus information on how it selects reviewers and, generally, how they rank in the field.

# Supporting Evidence



- Example: Evidence of original contributions of major significance.
  - Often appears in RFEs.
  - Submitting an alien's publications is not enough.
    - As many RFEs point out, in the context of a researcher, all researchers are expected to publish original research, but not all original research contributes to the field.
  - Should submit:
    - Expert letters are critical
    - Citation index
    - If the alien's peers have asked about the research, submit such correspondences

# Supporting Evidence



- Example: Evidence of the alien's performance of a leading or critical role in distinguished organizations.
  - Two components
    - ✖ (1) Establishing the alien's leading or critical role
      - A letter from the director of the organization
      - Organizational chart
      - Acclaim achieved by the organization due to alien's work
    - ✖ (2) Establishing that the organization is distinguished
      - Submit information on the organization (awards, significant achievements, rankings, information on its members, etc.)

# Supporting Evidence



- Example: Published material about the alien in a professional or major trade publications or other major media
  - Two components
    - ✖ (1) the material is about the alien
    - ✖ (2) the publication qualifies as professional or major
      - Should submit circulation figures, ranking, and information on the intended audience.

# Supporting Evidence



- **Never discount flash and sizzle!**
  - Popular press is important; may state importance of alien in easily accessible way.
  - Cover stories, featured articles: gold!
  - Never forego color! Pizzazz!
  - Remember we live in a *USA Today* and *People* magazine culture.
  - Adjudicators are just like everyone else and respond to visuals.
  - Make sure a 10 year old child can understand your explanation of the field and evidence.

# The All Important Cover Letter



- Succinctly set out legal arguments why alien meets each criterion, including references to supporting materials, and then summarize, using *Kazarian* standard.
- Are these read by USCIS? They claim not, but my guess is with ten minutes or so to review a petition, they are essential for speed.
- The cynic: Proves to the alien/employer that you have done your job!
- Grammar, spelling, people! Your law firm's reputation with adjudicators matters!
- Proper structure for legal argument!

# Regulations, AFM, and Other Sources



- **It is critical that you understand the regulations**
  - To understand the regulations, you have to be familiar with *AAO* case law
    - Thus, you can shape the evidence appropriately from the start
    - For instance, *AAO* case law allows a coach to use the success of his/her individual athletes or teams to meet the first extraordinary ability criteria: “documentation of the alien’s receipt of lesser nationally or internationally recognized prizes or awards,” but not generally success as an athlete him/herself.
- **Review the December 22, 2010 USCIS memo on *Kazarian*.**
- **By understanding the rationale of USCIS and its adjudicators you can stack the deck in your favor.**

# Dealing with Marginal Cases and Managing Expectations



- Be candid and realistic throughout the process, but especially at the beginning
  - Conduct a thorough review of the client's materials at the start. Then, provide a summary of strengths and weaknesses.
    - Discover the weak cases early!
  - If a weak case, do not give false hope.
    - Discuss the likelihood of an RFE. This serves to benefit both the attorney and client because EB-1 RFEs require significant input from both parties. The attorney needs to be as prepared for an RFE as the beneficiary.
- Only premium process those petitions that (1) are home runs and (2) where immediate approval is critical.
  - Experience has revealed that premium processing results in higher chance of a boilerplate RFE being issued, doubling your work.  
Charge extra for RFE if alien insists on PP!
- If beneficiary is in H-1B, be aware of 5<sup>th</sup> year issues and time in H-1B remaining.

# RFEs, NOIDs, and Other Obstacles



- **First, build the strongest case up front to decrease the likelihood of an RFE.**
- **If an RFE is issued, review it and get started immediately**
  - Only have 84/87 days from date of RFE!
  - When new expert letters need to be obtained or old ones revised, it may take several weeks to obtain the letter.
  - Take into account that professors/experts travel often during breaks or may be located abroad.
- **Develop a strategy and don't be afraid to go over the top.**  
Remember that the standard for EB 1's is just "preponderance of the evidence," so present overwhelming evidence that tips the balance in your favor.

# RFEs, NOIDs, and Other Obstacles



- Post-Kazarian RFEs and NOIDs are several pages long and filled with boilerplate, with slight attempts to tailor to the individual case.
- USCIS, in its December 22, 2010 memo, states:
  - "...the USCIS officer should not merely make general assertions... Rather, the USCIS officer must articulate the specific reasons as to why the USCIS officer concludes that the petitioner, by a preponderance of the evidence, has not demonstrated that the alien is an alien of extraordinary ability."
  - But, many of the specific reasons are just boilerplate with a scattered references to the evidence and conclusory statements.

# RFEs, NOIDs, and Other Obstacles



- USCIS released the EB-1-1 RFE template on January 21, 2012
  - [http://www.uscis.gov/USCIS/Outreach/Draft%20Request%20for%20Evidence%20\(RFE\)%20Template%20for%20Comment/E11\\_RFE\\_Template\\_1-10-11.pdf](http://www.uscis.gov/USCIS/Outreach/Draft%20Request%20for%20Evidence%20(RFE)%20Template%20for%20Comment/E11_RFE_Template_1-10-11.pdf)
- No such template was released covering Outstanding Professor/Research category, but they generally follow the same pattern.

# RFEs, NOIDs, and Other Obstacles



- NOIDs: theoretically only issue in cases where you have failed to provide “required initial evidence”. If you have done this, or if not, a NOID is really not very different from an RFE.
- RFEs: Basically, you haven’t proved your case by a preponderance of the evidence. Keep in mind that USCIS frequently interprets this standard as “beyond a shadow of a doubt.”
- Don’t be afraid to tactfully remind them of correct legal standard. But don’t get angry, vituperous!

# RFEs, NOIDs, and Other Obstacles



- **Nebraska Service Center v. Texas Service Center**
  - While USCIS states it strives for consistency in adjudication, the outcome of a petition may depend on where it is filed.
  - Adjudication rates between NSC and TSC indicate there is a lack of consistency in the evaluation process.
  - The journey of an EB-1 petition at NSC is much bumpier and uncertain than at TSC.
  - Petitions electronically filed at TSC now go to Service Center having jurisdiction over place of employment.
  - I have weeks when I think TSC is more liberal and vice versa. However, TSC seems to win the day overall.

# Know the Proper Evidentiary Standard and (Politely) Correct USCIS



- In all correspondences with USCIS, whether in an initial filing or a response to an RFE or NOI, always discuss that the appropriate standard of review is **preponderance of the evidence**.
- Carefully review all RFEs and NOIDs to make sure that USCIS is not relying on contorted interpretations of the regulations, improper evidentiary standard.
- Remember, you are a lawyer, adjudicator is not. Think and write like one!
- Always be extremely polite, not rude or condescending.
-

# Strategies in Multiple Filings, Refilings, Appeal



- If you receive a difficult RFE, determine whether it is better to respond to the RFE or simply withdraw and refile the case.
  - If withdrawn and refiled, you may use the RFE to bolster your arguments in the new initial filing.
- If the case is denied, you may refile, but the denial will be apparent to USCIS through the information on the I-140 (Part 4, Question 6).
- However, our experience has often been that refilings often work, despite a prior denial.
- Appeal when there is an important legal issue that needs the AAO's attention or where the beneficiary cannot afford to let go of the I-140, such as, where beneficiary's children have age out issues, or there are H fifth year issues.

# QUESTIONS?

¿Preguntas?

Domande?

Câu hỏi?

Fragen?

Preguntas?

Savāla?

Pytannya?

Sorular?

Yǒu wèntí ma?

Maswali?

Vragen?

Perguntas?

Shitsumon wa  
arimasu ka?

Kum tum?

Voprosy?

Tanong?

Kesyon?

Jilmun?

Kit'Khvebi?