

**BEFORE THE ADMINISTRATIVE APPEALS OFFICE
UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES
UNITED STATES DEPARTMENT OF HOMELAND SECURITY**

In The Matter Of:

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WHO KNOW WHO, ONLY YOU

File #:SRC 1003254992

Petitioner-Appellant

CORRECTED Brief of *Amicus Curiae*

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I. IDENTITY AND INTEREST OF *AMICUS*

Amicus, Frederic W. Schwartz, Jr., is an attorney who has in the past and continues to represent EB-1 petitioners before the USCIS. He spent approximately 12 years as a regulatory and legislative counsel at the U.S. Department of Transportation beginning shortly after its inception in the 1960s. (The VIN in your motor vehicle is but one example of his handiwork.) His private legal practice of more than 25 years since leaving DOT has primarily involved administrative law. For the past 12 years or so, part of his practice has involved immigration law, almost exclusively EB-1 and EB-2 national interest petitioners. He is a great fan of Chief Rhew, and regrets having to recently sue him, among others.

II. RELEVANT FACTS

The petitioner self petitioned under § 203(b)(1)(A) to be designated as an extraordinary associate professor, thereby avoiding the need to go through the labor certification process.¹ The Texas Service Center, as is its wont, rejected almost all the evidence submitted to meet the regulatory criteria by grafting on to the criteria additional disqualifying restrictions which departed from a plain reading of the regulation. Consequently, it rejected the petition. So did the AAO.

¹Presumably the petitioner did not qualify for the somewhat easier § 203(b)(1)(B) criteria.

III. LEGAL CONTEXT

The USCIS is perhaps unique among Federal agencies in the “discretion” afforded to the Attorney General in determining eligibility for a benefit.² Indeed, the statute only has to come

²Title 8 is replete with decisions which are “specified...to be in the discretion of the Attorney General.” The Attorney General “shall, in his discretion, appoint...employees.... 8 U.S.C. 1103(a)(5). The “Attorney General may, in the Attorney General’s discretion...admit any refugee who is not firmly resettled in any foreign country.... 8 U.S.C. 1157(c)(1) The Attorney General can determine, “in the Attorney General’s discretion, that there are not reasonable grounds for regarding the alien as a danger to the security of the United States....” 8 U.S.C. 1158(b)(2)(A)(v) Ten thousand refugees visas “may be made available by the Attorney General, “in the Attorney General’s discretion....” 8 U.S.C.1159(b) The Attorney General may readmit returning resident immigrants, “in his discretion, without being required to obtain a passport...or other documentation.” 8 U.S.C. 1181(b) “The Attorney General may, in the Attorney General’s discretion”, waive the immigration bar for certain members of a totalitarian party. 8 U.S.C.1182(a)(3)(D)(iv) “The Attorney General has sole discretion to waive” under certain conditions the requirement that aliens who have been unlawfully in the United States be removed. 8 U.S.C. 1182(a)(9)(B)(v) In addition, “[t]he Attorney General, in the Attorney General’s discretion, may waive...[certain visa and admission bars for criminal informants] if the Attorney General considers it to be in the national interest to do so.” 8 U.S.C. 1182(d)(1) Similarly, certain otherwise ineligible aliens may be admitted temporarily to the United States on the recommendation of the Secretary of State “in the discretion of the Attorney General...if the Attorney General considers it to be in the national interest to do so.” 8 U.S.C. 1182(d)(3). Certain other ineligible aliens may obtain temporary admission as well “in the discretion of the Attorney General.” 8 U.S.C. 1182(d)(3) “The Attorney General may...in his discretion parole into the United States temporarily...on a case-by-case basis” certain aliens on humanitarian grounds. 8 U.S.C. 1182(d)(5)(A) “The Attorney General may, in his discretion for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest,” waive certain requirements for persons who voluntarily went abroad. 8 U.S.C. 1182(d)(11) In a similar manner, other ineligibility provisions may be waived by the Attorney General, “in the discretion of the Attorney General,” for humanitarian and other purposes. 8 U.S.C.1182(d)(12) In terms of aliens barred for health-related reasons, “the Attorney General, in the discretion of the Attorney General after consultation with the Secretary of Health and Human Services, may by regulation prescribe” alternatives to vaccination. 8 U.S.C. 1182(g) Other health provisions can also be waived upon the giving of bond or other provisions “in the discretion of the Attorney General after consultation with the Secretary of Health and Human Services...” 8 U.S.C. 1182(g)(3) If the alien has been involved with petty drug related offenses, “[t]he Attorney General may, in his discretion, waive” the application of certain provisions of the Act which would otherwise bar the alien. 8 U. S.,C. 1182(h) Alternatively, if the drug-involved alien is able to prove extreme hardship, “[t]he Attorney General, in his discretion,” may consent to the alien applying or reapplying for a visa. 8 U.S.C. §1182 (h)(1)(B)(2) A similar statutory waiver plan is available to aliens excludable for fraud or willful misrepresentation, and “[t]he Attorney General may, in the discretion of the Attorney General,” waive the exclusionary provisions. 8 U.S.C.1182(I)(1). Other

inadmissible aliens who are properly credentialed and unaware of their inadmissibility may “be admitted in the discretion of the Attorney General...” 8 U.S.C. 1182(k) An alien may also be temporarily admitted despite being inadmissible if the alien gives a suitable bond “in the discretion of the Attorney General...” 8 U.S.C. 1183 In the case of itinerant artists and performers, consultation with United States peer groups can be waived “as the Attorney General determines, in his sole discretion....” 8 U.S.C. 1184(c)(6)(F). If, on the other hand, the alien is an itinerant fiancée or fiancé of a citizen, the pre-admission requirement that he or she have actually met their spouse-to-be can be waived by “the Attorney General in his discretion...” 8 U.S.C. 1184(d) Marriage-based green cards are conditioned on two years of spousal bliss (or at least survival), but this requirement may be waived by the “Attorney General, in the Attorney General’s discretion...” 8 U.S.C. 1186a(c)(4) In this regard, “[t]he determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Attorney General.” 8 U.S.C. 1186a(c)(4)(c). For pending immigrants whose “proposed departure...would not be contrary to the interests of the United States, the Attorney General may, in his sole discretion, issue the permit...” 8 U.S.C. 1203(b) On the other side of the coin, “[a]n alien applying for admission may, in the discretion of the Attorney General and at any time, be permitted to withdraw the application for admission and depart immediately...” 8 U.S.C. 1225(a)(4) Certain other aliens who apply with iffy credentials and the inability to show two years of United States residence may be subject to summary proceedings at inspection stations “in the sole and unreviewable discretion of the Attorney General...” 8 U.S.C. 1225(b)(1)(A)(iii) Smugglers of aliens are deportable, but “[t]he Attorney General may, in his discretion for humanitarian purposes, waive this requirements if the smuggled alien is a close relative.” 8 U.S.C. 1227(a)(1)(E)(iii). Misrepresentations which would otherwise result in deportation can also be waived, “in the discretion of the Attorney General ...” under certain circumstances. 8 U.S.C. 1227(a)(1)(H) Battered spouses and children are eligible for adjustment of status despite procedural infirmities, but only with sufficient evidence, the weight and sufficiency of same to be “within the sole discretion of the Attorney General.” 8 U.S.C. 1229b(b)(2) An alien’s adjustment to that of a green card holder is carried out by “[t]he Attorney General, in his discretion...” 8 U.S.C. 1255(a) Criminal informants may adjust if, “in the sole discretion of the Attorney General,” certain conditions are met. 8 U.S.C. 1255(j)(2) Long-term illegal aliens may also adjust if certain conditions are met, but “[t]he Attorney General may, in his discretion, waive these conditions for the elderly and developmentally disabled. 8 U.S.C. 1255a(b)(1)(D)(ii) Specially designated private entities may aid in this legalization program with the information provided to them to be confidential, except that “[t]he Attorney General may provide, in the Attorney General’s discretion,” for the furnishing of this information to others. 8 U.S.C. 1255a(c)(5)(c) Even though there is a legalization requirement for continued U.S. residence, “[t]he Attorney General may provide for a waiver, in the discretion of the Attorney General,..” of certain absences. 8 U.S.C. 1255a(g)(2)(c) “A record of lawful admission for permanent residence may, “in the discretion of the Attorney General,” be made. 8 U.S.C. 1259 Owners of sea-going vessels are required to prepare a complete list of alien crewmen unless this requirement is modified “in the discretion of the Attorney General...” 8 U.S.C. 1281(a) A parallel list of departing crewman is also required, unless this requirement is modified “in the discretion of the Attorney General...” 8 U.S.C. 1282(a) “It shall be unlawful...to pay off or discharge any alien crewman...”, and the fine for doing

close to saying discretionary for the discretionary standard to apply. *Zhouqin Zhu v. Gonzales*, 411 F.3d 292, 294-295 (D.C. Cir. 2005) By contrast, for example, decisions concerning eligibility for Social Security disability benefits are governed solely by the HHS regulatory framework, albeit with resolution aids such as a “grid” matrix, without reference to the discretion of the Commissioner of Social Security or the HHS Secretary. *Bruton v. Massanari*, 268 F.3d 824 (9th Cir. 2001)(Alejandro N. Mayorkas on the brief for the Government); 42 U.S.C. 1395hh (SS benefits were chosen as a paradigm because of AAO Chief Rhew’s superior if not supreme knowledge of the field.)

so shall be \$3,000 except that “[s]uch fine may, **in the discretion of the Attorney General**, be mitigated...” 8 U.S.C. 1282(6) All aliens must be fingerprinted, but “[t]he Attorney General may, **in his discretion**,...” waive the requirement. 8 U.S.C. 1302 (c) Similarly, “[t]he Attorney General may **in his discretion**...” require further information. 8 U.S.C. 1305(b) Carriers are required to keep aliens from jumping ship and are subject to a \$3,000 fine if they do not, this penalty, **in the discretion of the Attorney General**,” may be waived. 8 U.S.C. 1321(a) Other penalties may be recovered by civil suit “**in the discretion of the Attorney General**.” 8 U.S.C. 1330(a) INS officers outside the United States may receive travel expenses which may be allowed “**within the discretion...of the Attorney General**...” 8 U.S.C. 1353 Immigration depositions may be taken in front of postmasters if authorized by “**the Attorney General...in his discretion**.” 8 U.S.C. 1443(d) “**The Attorney General may, in his discretion**, waive“ pre-naturalization inspections. 8 U.S.C. 1446(a) The record of the inspection, if given, “**may, in the discretion of the Attorney General**” be transmitted to the Attorney General. 8 U.S.C. 1446 (c) An alien terrorist in Government custody may be released “**solely at the discretion of the Attorney General**...” 8 U.S.C. 1537(b)(2) (c) When determining whether an alien is receiving a public benefit, soup kitchens and the like can be excluded “**in the Attorney General’s sole and unreviewable discretion**.” 8 U.S.C. 1613(c)(2)(G) A parallel provision, also at “**the Attorney General’s sole and unreviewable discretion**,” relates to certain specified types of aliens. 8 U.S.C. 1621(b)(4) Finally, after appropriate consultation, “the Attorney General shall issue guidance “**in the Attorney General’s sole and unreviewable discretion**” ...concerning the meaning of the terms “battery” and “extreme cruelty.” 8 U.S.C. 1641(c)(3) Title 8 offers the Secretary of State as well the opportunity to make decisions which are discretionary, although these decisions are not protected from judicial review as they are not made by the Attorney General. *See* 8 U.S.C. 1182(a)(10)((C)(iii); 1201(b), 1201(I), 1202 (c), 1202(f), and 1502.

Nowhere in the statute, and likely nowhere in the Congress's contemplation, was the discretionary nature of the eligibility decision to be delegated and re-delegated to the level of a USCIS officer with, perhaps, a college degree and without, in many instances, any knowledge of the arcane area in which extraordinary ability was claimed. Thus, the Attorney General's discretion is exercised through a readily-understandable regulatory structure which the Attorney General technically established, and which articulates in an understandable and quantifiable form the metrics of eligibility. The unadorned regulation, therefore, is paramount, and the examiner can require no more. *Kazarian v. USCIS*, 596 F.3d 1115, 1121-1122 (9th Cir. 2010).

IV. ARGUMENT

A. There is a clear meaning to the phrase "final merits determination"

The enquiry which give rise to the requested *amici* is to discern the panel's meaning when it used the phrase "final merits determination" in *Kazarian, supra* at 1122

Kazarian makes clear that the satisfaction *vel non* of each criterion is based on a plain reading of the regulation. The Texas Service Center, as is its wont, rejected almost all the evidence submitted by SRC 1003254992 to meet the regulatory criteria by grafting onto the criteria additional disqualifying restrictions which departed from a plain reading of the regulation. *Kazarian* categorically rejected this approach.

Kazarian also points out, however, that the regulation provides that extraordinary ability is found only in individuals when:

the evidence demonstrates both a "level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the[ir] field of endeavor," 8 C.F.R. § 204.5(h)(2), and "that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise." 8 C.F.R. § 204.5(h)(3). Only aliens whose achievements have garnered "sustained national or international acclaim" are eligible for an "extraordinary ability" visa. 8 U.S.C. § 1153(b)(1)(A)(i). *Kazarian, supra* at 11-19-1120

This is not a *de novo* determination, however, nor may it discount or ignore the satisfaction of some or all of the criteria as specifically set out in the regulation. Instead, the second step of the process is to assess the totality of the evidence to determine if the evidence submitted which successfully satisfies each criterion is outweighed by evidence which demonstrates that the alien is not among that small percentage at the top of his or her field and has not been the subject of sustained acclaim. In this regard, a preponderance of the evidence standard is utilized as explained in *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010), Interim Decision #3700 (October 20, 2010).

For example, to crib an example from one of counsel's recent submissions to the AAO, a choreographer/dancer who once demonstrated extraordinary ability but has not performed or choreographed for ten years may or may not currently demonstrate extraordinary ability. The lack of a recent performance history is the countervailing evidence which the adjudicator considers and balances in the second step of the review. Similarly, a molecular biologist who had demonstrably become one of that small percentage at the top of his or her field of endeavor and then because of a mental defect changes his profession to that of a lawyer or second trombone in an amateur orchestra would not be eligible for an EB-1 in almost every circumstance.

In short, the EB-1 adjudicator considers whether the evidence submitted in support of each criterion—as written—satisfied that criterion. If three or more criteria are satisfied, the reviewer then considers whether there is **separate evidence** to suggest that the petitioner is not among that small percentage at the top of his field, has not been the subject of sustained acclaim, and has not met the other general criteria. What the reviewer does not and cannot do is to reject out of hand the petitioner's satisfactory criteria because his or her proof is not good enough.

Among other reasons, including *Kazarian*, this is because the original regulatory criteria as written were meant to demonstrate compliance with the overall requirements discussed above.

B. The AAO's revisionist view of *Kazarian* is incorrect

While I am here, I believe will be useful to correct the AAO's view of the ultimate holding of *Kazarian* so that view this view will not influence its reading of this and other *amici*. Chief Rhew, an experienced and extraordinarily clever lawyer, has stated on a number of occasions to counsel and others that the ultimate holding of *Kazarian* was that the AAO came to the right conclusion albeit for the wrong reason. *Kazarian* said no such thing. First, two members of the three-member panel concluded that the AAO was categorically wrong. Translating the AAO's decision into a mathematical formula, as the *Kazarian* panel almost did, the AAO concluded:

$$1 + 1 + 1 = 0$$

Kazarian held that:

$$1 + 1 = 2 \neq 3$$

The AAO was absolutely and unquestionably wrong in its methodology. and the affirming of its decision since its erroneous methodology was harmless does not avoid the panel's total rejection of how the AAO arrived at its decision. Indeed, the third member of the panel wrote to point out that but for the errors of an errant attorney Dr. Kazarian would have been approved for the requested benefit by another route.

IV. CONCLUSION

The panel utilized the phrase "final merits determination" to refer to the weighing of the evidence as described above, not a *de novo* determination. The focus on the regulation is necessitated because it embodies the Attorney General's discretion.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Frederic W. Schwartz, Jr.", with a large, sweeping flourish extending to the right.

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