ABIL
Alliance of Business Immigration Lawyers

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Amicus Brief Submitted by Alliance of Business Immigration Lawyers

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DUPLICATE

U.S. Department of Homeland Security
USCIS Administrative Appeals Office
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Avenue, N.W., MS 2090
Washington, DC 20529-2090

Re: Amicus Brief, Alliance of Business Immigration Lawyers
File Number: SRC1003254992

Dear Commissioner:

The Alliance of Business Immigration Lawyers ("ABIL") respectfully submits this Amicus Curiae brief to the USCIS Office of Administrative Appeals. ABIL is a global collaboration of the world's top business immigration lawyers. Its members include over 40 global law firms and more than 1,000 immigration professionals. ABIL assists intending immigrants of extraordinary ability throughout the immigration process and has a strong interest in maintaining the integrity, clarity and consistency of such process.

AMICUS CURIAE BRIEF, ALLIANCE OF BUSINESS IMMIGRATIN LAWYERS

A. USCIS HAS MISINTERPRETED THE *KAZARIAN* DECISION

In its December 22, 2010 Policy Memorandum,[1] ("Policy Memorandum") USCIS implemented a "two-part adjudicative approach" for extraordinary ability, outstanding researcher and professor, and exceptional ability immigrant visa petitions. The Service cites *Kazarian v.*

[1] USCIS Memorandum, "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" (Dec. 22, 2010), *published on* AILA InfoNet at Doc. No. 11020231 (*posted* Feb. 2, 2011).

USCIS, 596 F.3d 1121 (9th Cir. 2010) as the basis for modifying the Adjudicator's Field Manual to include a second step in the adjudication process, the "final merits determination."

The following excerpts from the *Kazarian* decision constitute the sole references by the Court to a "final merits determination" analysis:

(1) While other authors' citations (or lack thereof) might be relevant to the *final merits determination* of whether a petitioner is at the very top of his or her field of endeavor, they are not relevant to the antecedent procedural question of whether the petitioner has provided at least three types of evidence (emphasis added);[2] and

(2) . . . [W]hile the AAO's analysis might be relevant to a *final merits determination*, the AAO may not unilaterally impose a novel evidentiary requirement (emphasis added).[3]

As confirmed by these two quotes, the Court did not directly address the issue of a "final merits determination" other than in passing. Instead, the *Kazarian* Court focused on the scope of the evidentiary requirements, as opposed to creating a new approach for analyzing evidence submitted in support of an extraordinary ability, outstanding professor or researcher, or exceptional ability immigrant visa petition. Nothing in or about the *Kazarian* decision purports to touch, change, impact, set aside, or add to the analysis in the adjudication process. Rather, the decision merely acknowledges an adjudication process that already existed and confirms that USCIS is prohibited from placing extra regulatory requirements on petitioners seeking to classify a beneficiary as an alien of extraordinary ability.

The correct approach to the adjudication of extraordinary ability immigrant visa petitions was clearly articulated in the District Court case *Buletini v. INS*, 860 F.Supp. 1222 (E.D. Mich 1994). *Buletini* held, "[o]nce it is established that the alien's evidence is sufficient to meet three of the criteria listed in 8 C.F.R. § 204.5(h)(3), the *alien must be deemed to have extraordinary ability unless the INS sets forth specific and substantiated reasons* for its finding that the alien,

[2] *Kazarian v. USCIS*, 596 F.3d 1115, 1121 (9th Cir. 2010).
[3] *Id.*

despite having satisfied the criteria, does not meet the extraordinary ability standard" (emphasis added).[4] There are legitimate "specific and substantiated" reasons USCIS might reference in accordance with *Buletini*, which do not impermissibly supplement the requirements in the regulations, and which articulate why "the alien, despite having satisfied the criteria" has not established that it is more likely than not that he or she is eligible for classification as an alien of extraordinary ability. There may be something indicating that a piece of the evidence submitted, though it meets one of the regulatory criterion, has been falsified or otherwise lacks credibility. Alternatively, the petition may be filed in 2011 but consists of evidence of extraordinary ability dating from 1998, with little or no documentation of continued work. In such a case, USCIS may justifiably question whether the individual intends to continue working in the field of extraordinary ability and/or whether the individual's work would prospectively benefit the U.S.

The *Buletini* holding has been followed for years. It was echoed in *Racine v. INS*, 1995 U.S. Dist. LEXIS 4336, in which the District Court held that the INS could not insert a "new qualification" into the regulation or alter "its own definition of extraordinary ability in order to support its" decision.[5] In *Muni v. INS*, 891 F.Supp. 440 (N.D. Ill. 1995), the District Court confirmed that a USCIS decision could not rest on "an impermissible basis" which is "against the weight of the evidence and deviate[s] from its own policies and precedents."[6] Further, in *Gülen v. Chertoff*, 2008 U.S. Dist. LEXIS 54607 (E.D. Pa. July 16, 2008), the District Court stated, in noting that the AAO had already concluded the petitioner met two regulatory criteria, ". . . if we are able to identify one other of the regulatory criteria that his application meets, we *must* conclude that the AAO's denial of [the petitioner's] petition was contrary to law" (emphasis added).[7]

The *Kazarian* Court did not directly or impliedly reverse *Buletini* or any of the subsequent decisions which echoed that case. To the contrary, it supported the *Buletini* finding

[4] *Buletini v. INS*, 860 F.Supp. 1222, 1234 (E.D. Mich 1994).
[5] *Racine v. INS*, 1995 U.S. Dist. LEXIS 4336 (N.D.Ill. Feb. 16, 1995) *17.
[6] *Muni v. INS*, 891 F.Supp. 440, 444 (N.D. Ill. 1995).
[7] *Gülen v. Chertoff*, 2008 U.S. Dist. LEXIS 54607 (E.D. Pa. July 16, 2008).

by insisting USCIS not modify the regulatory criteria for adjudicating extraordinary ability immigrant visa petitions. USCIS's Policy Memorandum ignored the clear instructions of the *Buletini*, *Racine*, *Muni*, and *Gülen* Courts, which plainly articulate the appropriate method of analysis for adjudicating extraordinary ability immigrant visa petitions. Read together, these decisions confirm that a petitioner who has submitted evidence meeting at least three criteria, in which the evidence demonstrates that it is more likely than not that the beneficiary is "one of that small percentage who ha[s] risen to the very top of" his or her field, has satisfied the burden of proof.[8] USCIS must then conclude that the beneficiary is an alien of extraordinary ability as defined at 8 C.F.R. § 204.5(h)(2) unless USCIS articulates case- and fact-specific reasons why the beneficiary does not meet the extraordinary ability standard.

B. LEGISLATIVE HISTORY

The starting point for examining the legislative history of the Immigration Act of 1990 is the House Report. [9] With respect to aliens of extraordinary ability, the House Report states:

> In order to qualify for admission in this category an alien must (1) demonstrate sustained national or international acclaim in the sciences, arts, education, business or athletics (as shown through extensive documentation); (2) be coming to the United States to continue work in that area of expertise; and (3) by virtue of such work benefit the United States. Documentation may include publications in respected journals, media accounts of the alien's contributions to his profession, and statements of recognition of exceptional expertise by qualified organizations. Recognition can be through a one-time achievement such as receipt of the Nobel Prize. An alien can also qualify on the basis of a career of acclaimed work in the field. In the case of the arts, the distinguished nature of the alien's career may be shown by critical reviews, prizes or awards received, box office standing or record sales. In short, admission under this category is to be reserved for that small percentage of individuals who have risen to the

[8] *See Matter of CHAWATHE*, 25 I&N Dec. 369 (AAO 2010), which stated "[e]ven if the director has some doubts as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is 'more likely than not' or 'probably' true, the applicant or petitioner has satisfied the standard of proof." *See also INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987), which affirms the proposition that something can be "more likely than not" or "probably true" despite there being a "less than 50% chance of the occurrence taking place."

[9] H.R. Rep. No. 723, Pt. 1, 101st Cong., 2d Sess. 4 (Sept. 19, 1990).

very top of their field of endeavor.[10]

There is nothing in this passage that suggests that the USCIS needed to conduct a two-step analysis to determine extraordinary ability. On the contrary, the House Report broadly suggests a number of possibilities under which an alien can establish extraordinary ability, such as through publications in respected journals, media accounts or statements of recognition of exceptional expertise by qualified organizations. Moreover, the House Report also indicates that "[a]n alien can also qualify on the basis of a career of acclaimed work in the field."

The implementing regulations appropriately relied on the House Report in defining "extraordinary ability" to mean "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." [11] The proposed regulations would have used one of the "few (emphasis added) who has risen to the very top of the field," but after listening to the objection of commentators, the Service substituted the word "few" with "small percentage" in deference to the same, albeit broader, verbiage that was used in the House Report. By developing the ten evidentiary criteria at 8 C.F.R. §204.5(h)(3)(1)-(x), and recognizing that if an alien met three out of the 10 criteria, the Service appropriately followed Congressional intent by allowing this alien to demonstrate extraordinary ability, which is "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." There is nothing more that is required within the regulatory criteria to demonstrate whether an alien was within that "small percentage," and this appears to be consistent with the House Report too. Given the broad examples in the House Report for demonstrating extraordinary ability, the Service also promulgated an additional regulation, 8 C.F.R. § 204.5(h)(4), that permits submission of comparable evidence when the given criteria do not apply to the candidate's occupation or achievements.

The extraordinary ability provision, as crafted by Congress in 1990, should be viewed in the context of other introductory passages in the House Report preceding the section on extraordinary ability. Congress was clearly concerned about the US labor market facing two

[10] H.R. Rep. No. 723 at 69.
[11] *See* commentary on implementing regulations at 56 Fed. Reg. 60897 (Nov. 29, 1991).

problems, which immigration policy could help correct.[12] "The first is the need of American business for highly skilled, specially trained personnel to fill increasingly sophisticated jobs for which domestic personnel cannot be found and the need for other workers to meet specific labor shortages."[13] The following passage from the House Report is worth extracting, and while written in 1990, is relevant even in 2011:

> The competitive influences of the Asian Pacific Rim, Caribbean Basin, and the European Community are forcing re-evaluation of the U.S. role in the world. Immigration law is not now in synchronization with these global developments. Its current structure inhibits timely admittance of needed highly skilled immigrants. The highest preference in the employment category, relating to people of exceptional ability, currently involves an 18-month wait for a visa. The other employment category, for skilled and unskilled workers, is subject to a 2 ½ year wait. This lack of responsiveness may impede the ability of businesses to plan and operate efficiently and effectively in the global economy.[14]

Indeed, it is very clear that IMMACT90, as reflected by the intent of Congress in the House Report, has failed to address the problem of timely admittance of highly skilled immigrants. The waits under the employment-based second preferences (EB-2) for India and China and in the employment-based third preferences (EB-3) for all countries, and worse for India, are far greater in 2011. In the case of the India EB-3, the wait could be more than a decade. If immigration law was not in synchronization with global developments in 1990, it is much less so in 2011 especially since the world has become far more globalized and interdependent. Indeed, one way to correct the imbalance is for the Service to faithfully interpret the pivotal extraordinary ability provision in light of Congressional concern in 1990, which continues to be even more of concern today, and that is to expeditiously allow an alien of extraordinary ability who meets 3 out of the 10 evidentiary criteria to be able to obtain permanent residence in the employment-based first preference (EB-1), which unlike the EB-2 for India and China, and the EB-3, remains current. A second-step subjective merits analysis, as

[12] H.R. Rep. No. 723 at 52.
[13] *Id.*
[14] *Id.* at 53.

proposed by the USCIS, would continue to thwart Congressional intent as it would lead to arbitrary denials of aliens who otherwise can demonstrate extraordinary ability, and who would clearly be able to benefit the U.S.

C. THE WORDING AND STRUCTURE OF THE REGULATION SUPPORT THE *BULETINI* ANALYTICAL APPROACH RATHER THAN THE USCIS-DERIVED INTERPRETATION OF *KAZARIAN;* IN SHORT THE USCIS-DERIVED APPROACH IS AN ATTEMPT TO CIRCUMVENT THE FEDERAL RULEMAKING PROCESS

a. THE REGULATION SETS FORTH CRITERIA FOR DETERMINING WHICH INDIVIDUALS MEET THE STATUTORY PROVISION AND THE USCIS-DERIVED INTERPRETATION OF KAZARIAN WOULD IMPERMISSIBLY ADD TO THE REGULATION WITHOUT COMPLYING WITH FEDERAL RULE MAKING PROCESS

Following America's long tradition of attracting the best and the brightest, Congress provided that visas should be made available to immigrants of extraordinary ability in the sciences, arts, education, business, or athletics.[15] The Secretary of Homeland Security, in turn, promulgated a regulation setting forth the criteria by which an immigrant meets the statutory requirement of extraordinary ability. [16] The regulation sets forth a detailed list of ten types of documentation, each of which is designed to show extraordinary ability. Specifically, the regulation requires receipt of a major, international recognized award (such as a Nobel Prize) or at least three of the following:

1) Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor;
2) Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields;
3) Published material about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought. Such evidence shall include

[15] INA § 203(b)(1)(A).
[16] 8 C.F.R. § 204.5(h).

the title, date, and author of the material, and any necessary translation;

4) Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought;
5) Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field;
6) Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media;
7) Evidence of the display of the alien's work in the field at artistic exhibitions or showcases;
8) Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation;
9) Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field; or
10) Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.

The burden of proof is on the intending immigrant to meet at least three of the above requirements to show *prima facie* eligibility as an alien of extraordinary ability.[17] Apart from the documentation required in this detailed list and proof that the immigrant will continue to work in his or her area of extraordinary ability, the regulation does not require any other showing of evidence for an immigrant to be *prima facie* eligible as an alien of extraordinary ability.[18] In short, the regulation as written does not contain the type of "final merit" determination being promulgated by USCIS in the Policy Memorandum.

Notably, this is not the first time USCIS or its administrative appeals body has attempted to change the law to require the type of "final merit" determination they promulgate in their Policy Memorandum. In 1994, the Administrative Appeals Unit, the predecessor to the Administrative Appeals Office, asserted: the submission of documents to satisfy three or

[17] *See* 8 C.F.R. § 204.5(h); Buletini v. INS, 860 F. Supp. 1222, 1234 (E.D. Mich 1994); *Muni v. INS*, 891 F. Supp. 440, 445-46 (N.D. Ill. 1995). It should be noted that also an immigrant may also show receipt of a major, international recognized award (such as receipt of a Noble prize) or *if* the listed standards do not apply to the immigrant's occupation other comparable evidence. 8 C.F.R. § 204(h)(3), (4).
[18] *Id.*

more of the criteria contained in 8 C.R.F. § 204.5 (h)(3) does not necessarily establish eligibility as an alien of extraordinary ability.[19] Upon review, this assertion was immediately rejected by a federal court as an "abuse of discretion."[20] The court noted that the agency was deviating from its own regulation and that this was not acceptable. INS then attempted to change the regulation. On June 6, 1995, INS submitted a proposed regulation containing just such a "final merit" determination.[21] *However, this attempt to change the regulation failed and such language was never added to the regulation.* Thus, having failed to advance their interpretation through the rulemaking process, USCIS is now once again attempting to use impermissible methods to change a regulation, this time via the Policy Memorandum.

As the court in *Buletini* implied, if USCIS wants to change the meaning of the regulation, they must actually change the regulation (to do otherwise is an abuse of discretion). The regulation clearly states what type, amount and level of documentation is required. It comprehensively sets forth the statutory criteria for determining *prima facie* eligibility. USCIS has tried, and failed, to change the regulation to include their derived "final merits" determination.[22] *Having failed to amend the regulation by following the proscribed rulemaking process, USCIS is now trying to circumvent that process by amending the regulation using a Policy Memorandum.* This is not the way our law works. Agencies are not allowed to circumvent the rulemaking process by issuing policy memorandums.

b. THE WORDS OF THE REGULATION MEAN WHAT THEY SAY AND HAVE BEEN UPHELD BY PRIOR CASE LAW

The regulation and case law implementing the same is clear. Ten criteria are specified. Meeting at least three of these makes an immigrant *prima facie* eligible for classification as an

[19] *See Buletini*, 860 F. Supp. at 1233.
[20] *Id.* at 1234.
[21] *See* 60 Fed. Reg 29771, 29775 and 29780 (June 6, 1995) (proposing that language be added to the regulation effectuating a highly-subjective "final merit" determination identical to the approach set forth in the Policy Memorandum).
[22] *See* 60 Fed. Reg at 29775 and 29780.

alien of extraordinary ability.[23] In fact, USCIS recognizes as much in their Policy Memorandum. The Policy Memorandum requires that USCIS officers evaluate the evidence to determine if the parameters of the regulations are met. Tellingly, this requirement is referred to as the "regulatory criteria."[24]

Once the "regulatory criteria" have been met, however, the USCIS-derived interpretation of *Kazarian* promulgates a new, extra-regulatory rule: a "final merits" review different from the *Buletini* analysis, in which previously evaluated and accepted documentation may be disregarded. Under this USCIS-derived extra-regulatory rule, officers are free to disregard documents submitted and accepted under the regulation, rendering the words of the regulation meaningless.

The USCIS's derived interpretation also contrasts with well-established federal decisions. Before the Policy Memorandum, federal courts and USCIS recognized and applied a two-step or a *Buletini* final merits approach in adjudicating extraordinary ability petitions. Under the *Buletini* final merits approach, first an immigrant had to establish *prima facie* eligibility by submitting the documentation required by the regulation, then the burden shifted to USCIS to set forth specific and substantial reasons why the immigrant, despite having satisfied the regulation, did not meet the extraordinary ability standard. The USCIS-derived interpretation of *Kazarian* overthrows this established two-part final merits approach by creating an approach whereby the immigrant carries the burden of proof under both the initial case and the final merits review. This is a strained and incorrect interpretation of *Kazarian*. The *Kazarian* decision contains no language to suggest that the established final merits approach was being overthrown. When a case does not specifically overturn established interpretations, there is a presumption the case will be read in conjunction with precedent decisions to maintain stability and predictability in the

[23] *See* 8 C.F.R § 204.5(h)(3); *Buletini*, 860 F. Supp. at 1234 ("once it is established that the alien's evidence is sufficient to meet three of the criteria listed in 8 C.F.R § 204.5(h)(3), the alien *must be deemed* to have extraordinary ability *unless* INS sets for specific and substantiated reasons") (emphasis added); *See also* 60 Fed. Reg at 29775 and 29780 (INS's failed attempt to change the regulation to eliminate *prima facie* eligibility upon an immigrant meeting three of the listed criteria).

[24] *See* Policy Memorandum at 5.

law.[25] By reading *Kazarian* to change the law regarding the adjudication of extraordinary ability petitions, the USCIS-derived approach willfully fails to read *Kazarian* in light of past precedent. This is impermissible.

c. THE STRUCTURE OF THE REGULATION IS VERY FORMULAIC AND INSERTING AN UNWRITTEN "FINAL MERITS" DETERMINATION CAPABLE OF RENDERING ALL ITS DETAILS IRRELEVANT COMPLETELY UNDERMINES ITS STRUCTURE.

The structure of the regulation is very formulaic. The regulation states the exact evidentiary categories that must be met, the exact number of evidentiary categories that must be met, and exactly what must be provided for each evidentiary category. By way of example, if an alien chooses to submit his or her published works, these works must have been published in a professional or trade journal. Furthermore, these works must relate to the alien's work in the field for which he or she is seeking classification. Finally, such submission shall include the title, date, and author of the material as well as any necessary translation.[26] Likewise, if an alien has performed for an organization, the evidence submitted must show that the alien played a leading or critical role in that organization and that the organization has a distinguished reputation.[27]

It is inconceivable that a regulatory scheme so specific in precisely defining the evidentiary categories would then entertain the type of "final merits" determination promulgated by the USCIS , which is capable of setting them all aside. Furthermore, it is inconceivable that a regulatory scheme so specific would provide for such a subjective final merits determination *without stating as much*. The regulations are devoid of reference to the type of "final merits" determination being pushed by USCIS. This is because the notion of a "final merits" determination does not make sense in the context of this very specific and formulaic regulatory

[25] *C.f. Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197 (1991) (stating that adherence to precedent promotes stability, predictability, and respect for judicial authority); *Midlantic Nat'l Bank v. New Jersey Dep't of Envt'l Protection*, 474 U.S. 494, 501 (1986) (when a judicially created concept is to be changed that intent should be clear).
[26] 8 C.F.R. § 204.5(h)(3)(iii).
[27] 8 C.F.R § 204.5(h)(3)(viii).

scheme unless the final merits determination is to be interpreted in the *Buletini* sense rather than the USCIS-derived *Kazarian* sense.

D. THERE ARE PRECEDENTS IN MANY OTHER AREAS OF IMMIGRATION LAW FOR THE BURDEN-SHIFTING APPROACH OF *BULETINI*

The burden-shifting approach consistent with *Buletini* that is discussed above would not be especially novel in the immigration-law context. A similar approach is already taken in a variety of other areas of immigration law. In some instances, this burden-shifting approach has been specifically prescribed by regulation, but in some cases it has been put into place by case law even though the governing regulations do not explicitly require it.

In the asylum context, an applicant who demonstrates that he or she has suffered past persecution on account of a protected ground is rebuttably presumed to have a reasonable fear of future persecution on that same ground.[28] In such cases, by regulation, "the Service shall bear the burden of establishing by a preponderance of the evidence" that a change in circumstances, or the reasonable possibility of relocating within the country of persecution, should lead to a denial of asylum.[29] The same is true when an applicant seeks withholding of removal to a particular country under INA § 241(b)(3), on the basis that his or her life or freedom would be threatened in that country on a protected ground. In that context, "if the applicant is determined to have suffered past persecution in the proposed country of removal on [a protected ground], it shall be presumed that the applicant's life or freedom would be threatened in the future in the country of removal on the basis of the original claim."[30] Neither presumption is set out in so many words in the governing statutes – there is no mention of a presumption in INA § 208, which governs asylum, or INA § 241(b)(3), which governs withholding of removal – but USCIS and the Executive Office for Immigration Review (which adjudicates removal proceedings) have determined that this presumption best accords with common sense and the logic of the statute.

[28] 8 C.F.R. §§ 208.13(b)(1), 1208.13(b)(1).
[29] 8 C.F.R. §§ 208.13(b)(1)(ii), 1208.13(b)(1).
[30] 8 C.F.R. §§ 208.16(b)(1)(i), 1208.16(b)(1)(i).

The existence of such presumptions in the asylum context is not limited to those explicitly set out in the regulations. Even after an applicant has established eligibility for asylum, the statute and regulations make clear that whether or not to grant asylum is within the discretion of the Secretary of Homeland Security or the Attorney General.[31] The Board of Immigration Appeals has held, however, that in the asylum context, "the danger of persecution will outweigh all but the most egregious adverse factors."[32] That is, once an applicant has established a well-founded fear of persecution, there is a presumption that discretion will be exercised favorably to grant asylum, rebuttable only by a particularly compelling reason why discretion should not be exercised favorably. This presumption has been held to exist despite the fact that it is nowhere explicitly set out in the regulations.

Another presumption that is set out explicitly in the regulations exists in the context of suspension of deportation and special rule cancellation of removal under the Nicaraguan Adjustment and Central American Relief Act, popularly known as NACARA. By statute, an ordinary applicant for special rule cancellation of removal under NACARA (that is, one without a relevant criminal record) must demonstrate "that removal would result in extreme hardship to the alien or to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence," NACARA § 203(b)(f)(1)(A)(iv), just as an applicant for suspension of deportation had to demonstrate such extreme hardship under the law predating the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (popularly known as IIRIRA). The regulations implementing NACARA, however, provide that in certain classes of cases involving Guatemalan and Salvadoran nationals, an applicant for suspension of deportation or special rule cancellation of removal "shall be presumed to have established" that the requisite hardship would result from the applicant's deportation or removal.[33] Only if the evidence in the record affirmatively rebuts this presumption would the requisite hardship be found not to exist.[34]

[31] *See* INA § 208(b)(1)(A); 8 C.F.R. §§ 208.14(a)-(b), 1208.14(a)-(b).
[32] *Matter of Kasinga*, 21 I&N Dec. 357, 367 (BIA 1996) (citing *Matter of Pula*, 19 I&N Dec. 467, 474 (BIA 1987)).
[33] 8 C.F.R. § 240.64(d)(1).
[34] 8 C.F.R. § 240.64(d)(2).

Presumptions similar to the one set forth in *Buletini* and advocated here are not even unprecedented in the specific context of petitions to confer immigrant status pursuant to INA § 204. When a petition for the spouse of a U.S. citizen is filed pursuant to INA § 204(a)(1)(A)(i) within the jurisdiction of the USCIS New York District Office, it is subject to procedures established by the consent decree in *Stokes v. I.N.S.*, No. 74 Civ. 1022 (S.D.N.Y. Nov. 10, 1976), as explained in Section 15.5 of the USCIS Adjudicator's Field Manual. The *Stokes* consent decree, a copy of which is available at page 80 of Vol. 54, No. 9 of *Interpreter Releases* (Feb. 28, 1977), provides as follows at paragraphs 10 to 11:

> 10. The overall burden of proving eligibility under the law for immediate relative status rests with the I-130 petitioner.
>
> 11. **The I-130 petitioner has the burden to prove that the marriage is valid in accordance with the applicable law of the jurisdiction where it was entered into. Thereupon, the burden shifts to the Service to prove that the marriage is nonetheless not one which legally merits approval of the petition.** In this connection, the I-130 petitioner shall have the opportunity to rebut evidence. The failure of the I-130 petitioner and beneficiary to answer material and relevant questions may make it difficult to determine eligibility under the law for immediate relative status and such failure may result in a failure to sustain the overall burden.[35]

In all of these cases, although the governing portion of the statute does not speak in terms of a presumption, it has been determined that the most logical approach is to presume a requirement to be satisfied upon production of what one might call *prima facie* evidence, unless the adjudicator can point to other evidence in the record which is out of the ordinary and which rebuts this presumption. The similar reading of *Kazarian* and the EB-1 statute and regulations for which we advocate here, in line with *Buletini*, would simply be one more in a long line of such presumptions already present in the fabric of the immigration laws.

[35] 54 *Interpreter Releases* No. 9 at 83 (emphasis added).

E. USCIS INTERPRETATION OF *KAZARIAN* AS PUT FORTH IN THE POLICY MEMORANDUM IMPERMISSIBLY ALLOWS USCIS TO ROUTINELY ENGAGE IN POLICY-MAKING, RATHER THAN POLICY IMPLEMENTATION.

The impact, and presumably the likely purpose, behind USCIS's interpretation of *Kazarian* as authorizing an additional, highly-subjective level of review (a "final merits determination" different from the *Buletini* analysis) is the introduction of unfettered discretion into the adjudications process. At this second level of analysis, everything that has gone before can be discarded, because the adjudicator is now free of the regulatory definitions and enumerated categories of evidence. In such a manner USCIS is able to control and change policy without the benefit of actual rulemaking. For example, the numbers of people in this country via this category can be limited when USCIS thinks they should be limited, despite the fact that Congress has already established annual statutory limitations for extraordinary ability applicants in 8 INA § 201. Under the new adjudication standard, USCIS allows itself discretion to deny, under the auspices of a "final merits" determination, more cases when they feel that more people should be kept out, and to approve more cases when they feel that more people should be kept in. Similarly, policy-making related to the economy and the perceived number of U.S. workers can now dictate adjudications under a category intentionally exempted from the labor certification process.[36] *This, however, is policy making, not policy implementing.* And if the Policy Memorandum is allowed to stand, it will open the door for these impermissible policy considerations to effectively dictate adjudications. This is improper. In a transparent democracy, the law does not allow for so great a degree of agency discretion and manipulation of legal standards.

The concerns regarding unfettered agency discretion and manipulation of legal standards, however, could be resolved by using the *Buletini* approach. This approach sets forth objective, transparent criteria for determining who meets the statutory requirements. Furthermore, the *Buletini* approach is capable of consistent application. The *Buletini* approach does not mean that *every single person* with a scholarly publication, a patent, and evidence of

[36] *See* 8 C.F.R. § 204.5(h)(5).

peer review will win classification as an alien of extraordinary ability. Rather, the *Buletini* interpretation and application means that adjudications of extraordinary ability can now be removed from the realm of the highly subjective and rightly returned to the more objective, transparent, and relatively predictable realm of the regulation at 8 C.F.R. 204.5(h). In short, *Buletini* (requiring adherence to the regulation as written) forces transparency and requires that USCIS articulate a rationale, while USCIS 's Policy Memorandum (effective rewriting the regulation without the benefit of federal rulemaking procedure) opens the door for inconsistent rational and non-regulatory based decisions.

F. USCIS'S INTERPRETATION OF THE *KAZARIAN* DECISION IS IMPRACTICAL TO APPLY

USCIS's interpretation of the *Kazarian* decision as set forth in the December 22, 2010 Policy Memorandum is difficult to apply and promotes inconsistent, subjective determinations rising to the level of abuse of discretion. The Policy Memorandum invites arbitrary and capricious decision-making because adjudicators are left without clear instructions explaining how to conduct a "final merits determination." Specifically, USCIS does not provide any guidance regarding what steps should be taken when considering "all of the evidence in totality in making the final merits determination regarding the required high level of expertise."[37] Instead, the Policy Memorandum simply parrots the following language already stated in the regulations:

> In Part two of the analysis in each case, USCIS officers should evaluate the evidence together when considering the petition in its entirety to make a final merits determination of whether or not the petitioner, by a preponderance of the evidence, has demonstrated that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of

[37] USCIS Memorandum, "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" (Dec. 22, 2010), *published on* AILA InfoNet at Doc. No. 11020231 (*posted* Feb. 2, 2011).

> expertise, indicating that the alien is one of that small percentage who has risen to the very top of the field of endeavor.[38]

This degree of vagueness virtually ensures that one adjudicator's determination of whether the evidence submitted demonstrates that the beneficiary meets the standard will differ from another's.

To further complicate matters, the Policy Memorandum is inherently contradictory. At page 3, USCIS states that the *Kazarian* decision eliminated "piecemeal evaluation of extraordinary ability"[39] by individually evaluating "each type of evidence . . . to determine whether the self-petitioner was extraordinary." At page 13, however, the Policy Memorandum instructs that:

> As part of the final merits determination, the quality of the evidence also should be considered, such as whether the judging responsibilities were internal and whether the scholarly articles (if inherent to the occupation) are cited by others in the field.[40]

USCIS, therefore, advocates for the same "piecemeal evaluation" during the final merits analysis that it claimed had been eliminated in an earlier section of the Policy Memorandum. This instruction, furthermore, invites the adjudicator to invent novel evidentiary requirements, such as a citation record for publications, thereby undermining the *Kazarian* decision entirely while simultaneously purporting to implement it.

USCIS does not encourage a holistic approach to assessing the overall evidence and determining eligibility on a case-by-case basis in the Policy Memorandum. Instead, it allows adjudicators to apply arbitrary requirements that may be completely irrelevant to the merits of a particular petition or piece of evidence. For example, a scholarly article published only four

[38] USCIS Memorandum, "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" (Dec. 22, 2010), *published on* AILA InfoNet at Doc. No. 11020231 (*posted* Feb. 2, 2011).
[39] USCIS Memorandum, "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" (Dec. 22, 2010), *published on* AILA InfoNet at Doc. No. 11020231 (*posted* Feb. 2, 2011).
[40] *Id.*

months before the petition is filed is unlikely to have a substantial citation record. The article nonetheless may be indicative of the beneficiary being at the very top of his or her field because, for example, it was published in the most influential and selective journal in that field.

In *Kazarian*, the Court held that "the AAO may not unilaterally impose a novel evidentiary requirement" when assessing a foreign national's eligibility under each of the regulatory criteria articulated at 8 C.F.R. § 204.5(h)(3).[41] USCIS however, has turned the Ninth Circuit Court of Appeal's final decision on its head by mandating implementation of a "final merits determination" analysis, which, as described in the Policy Memorandum, permits adjudicating officers to demand extra regulatory evidentiary requirements and apply an amorphous standard resulting in a significant lack of consistency and predictability in adjudication.

G. QUALITY OF ADJUDICATIONS SUFFERS DUE TO USCIS MISINTERPRETATION OF KAZARIAN

In addition to having misinterpreted the *Kazarian* decision, in an effort to assist USCIS adjudicators in the application of the government's erroneous interpretation, USCIS issued the Policy Memorandum, which implements USCIS's misinterpretation of *Kazarian*.

The Policy Memorandum has resulted in a diminution of quality in the adjudications process. The stated purpose of the memorandum is "to ensure that USCIS processes Form I-140 petitions filed under these employment-based immigrant classifications with a consistent standard." Although the three categories bear some similarities, the language setting forth the evidentiary requirements is different and creates actual differences in the legal requirements under 8 C.F.R. §204.5(h)(3), 8 C.F.R. §204.5(i)(3)(i), and 8 C.F.R. §204.5(k)(3)(ii). The provision of guidance in a single memorandum purporting to cover adjudications under three different categories has resulted in the confusion of regulatory criteria and standards applicable to each of those categories.

This confusion in the adjudications process is illustrated by post-12/22/2010, Requests for Evidence that misstate the law and confuse the regulatory requirements, particularly under

[41] *Kazarian* at 1121.

the EB-1B category. Requests for Further Evidence under the EB-1B category often apply 8 C.F.R. §204.5(h)(3) evidentiary criteria and EB-1A regulatory language to EB-1B petitions. The result is the de facto application of "extraordinary ability" requirements to beneficiaries of petitions filed under 8 C.F.R. §204.5(i). Examples are discussed below.

LEVEL OF EXPERTISE

The EB-1A category requires that the beneficiary (or self-petitioner) be "one of that small percentage who have risen to the very top of the field of endeavor."[42] No such restriction is placed on beneficiaries under the EB-1B category. Despite the lack of such restriction under the EB-1B category, USCIS Requests for Evidence misstate the EB-1B regulations, "Evidence must demonstrate that the beneficiary, through original contributions of major significance, is within that small percentage at the top of his field, to the extent that he has gained sustained international recognition." (RFE issued August 9, 2011, SRC-11-901-48495). Another RFE states that scholarly articles and presentations are not sufficient under 8 C.F.R. §204.5(i)(3)(i)(F) unless the beneficiary's authorship "sets him apart from others in his field through eminence." Momentarily setting aside the fact that the regulation itself makes no mention of an additional qualitative requirement, the term "eminence" suggests application of the EB-1A definition of "extraordinary ability" set forth at 8 C.F.R. §204.5(h)(2). Such erroneous statements in post-12/22/2010 Requests for Evidence indicate that the adjudicators do not fully appreciate the different definitions and evidentiary requirements of the various visa categories discussed in the Policy Memorandum. While administrative expedience may be served by offering adjudicators guidance on multiple case types in a single memorandum, the substantive content of post-Memorandum Requests for Evidence indicates that clarity, regulatory meaning, and adjudicative quality are lost.

PUBLISHED MATERIAL ABOUT ALIEN AND ABOUT ALIEN'S WORK

One of the evidentiary categories under the EB-1A regulations requires "published material about the alien" in professional or major trade publications or other major media,

[42] 8 C.F.R. §204.5(h)(2).

"relating to the alien's work in the field".[43] The corresponding EB-1B regulation requires "published material about the alien's work in the academic field."[44] Notably, EB-1B regulations do not require that the published material be about the alien, but rather only about the alien's work.

The distinction is important because many times researchers conduct research in their capacity as employees of an organization, but only the employing organization's name is referenced in articles about the research. Such scenarios are common and date back to British common law, applicable today in our body of labor and employment law, wherein a worker's product is the property of the employer. The employer has the right to the publicity and the profit from the worker's product and need not promote or even reference the particular employee's individual research efforts and contributions. Under the EB-1B regulations, articles in professional publications that do not refer to the foreign national employee by name but are clearly about the product or the employee's research behind the product should be accepted as published material in professional publications written by others about the alien's work in the academic field. This would not be true for EB-1A petitions, which would require that the published material be about the alien, relating to the alien's work.

This distinction logically fits the context of the overall regulatory scheme which permits EB-1A beneficiaries to self-petition, while EB-1B beneficiaries must have a petitioning employer. The regulations logically would not require of EB-1B employee-beneficiaries that which they are unlikely to be able to provide due to the nature of the required employer-employee relationship, and thus the requirement that the published material be about the alien is omitted from the EB-1B regulatory provision that otherwise roughly corresponds to the EB-1A regulatory provision requiring published material about the alien that also relates to the alien's work.

This distinction has been ignored in the Policy Memorandum and as a result has been lost in adjudications following implementation of the Memorandum. Unfortunately, practitioners

[43] 8 C.F.R. §204.5(h)(3)(iii).
[44] 8 C.F.R. §204.5(i)(3)(i)(C).

have received multiple USCIS Requests for Evidence that purport to require published material about the alien in connection with EB-1B petitions. (RFE issued August 30, 2011, LIN-11-906-95338; RFE issued August 9, 2011, SRC-11-901-48495; RFE issued March 18, 2011, SRC-11-901-15480). The result is the application of EB-1A legal and evidentiary requirements to EB-1B petitions.

ORIGINAL CONTRIBUTIONS TO THE FIELD

Another evidentiary category under the EB-1A regulations requires evidence of the alien's "original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field."[45] The corresponding EB-1B regulation requires evidence of the alien's "original scientific or scholarly research contributions to the academic field."[46] Notably, there is no requirement that the research contributions be of major significance in EB-1B cases. The Policy Memorandum initially appears to acknowledge this distinction, but then proceeds to discuss essentially the same qualitative indicators for each, such as numbers of citations and expert letters addressing the alien's contributions. Proof that such guidance has caused adjudicators to confuse and muddle the two evidentiary criteria can be found in multiple EB-1B Requests for Evidence that require evidence that a researcher's original scientific research contributions have "major significance," or that the petitioner demonstrate that other researchers have applied the beneficiary's work, or that the beneficiary have an established citation history. (RFE issued March 18, 2011, SRC-11-901-15480).

Several EB-1B RFEs have suggested or required that the petitioner submit evidence of contracts with companies using the beneficiary's products, licensed technology or patents that are shown to be significant in the field. In other words, before USCIS would acknowledge an original scientific or scholarly research contribution to the academic field, USCIS would require evidence of industrial application or significant contributions to industry. (RFE issued August 30, 2011, LIN-11-906-95338; RFE issued August 9, 2011, SRC-11-901-48495; RFE issued July 27, 2011, SRC-11-900-15131; RFE issued March 18, 2011, SRC-11-901-15480; RFE issued

[45] 8 C.F.R. §204.5(h)(3)(v).
[46] 8 C.F.R. §204.5(i)(3)(i)(E).

February 17, 2011, SRC-11-087-50975). In reality, the term "academic field" is significant because contributions to the academic field may never find industrial application. The imposition of such a requirement would yield absurd results. Under such an interpretation, eminent theoretical physicist and cosmologist Professor Stephen W. Hawking could be found to have made no original scientific contribution to the academic field because his research of black holes has not resulted in time-travel.

One very recent EB-1B RFE even acknowledged that the "beneficiary has made noteworthy contributions to the field" but concluded the evidence "fails to establish that the beneficiary has made a contribution of major significance in the field." (RFE issued August 9, 2011, SRC-11-901-48495.) The adjudicator completely missed the distinction between EB-1A and EB-1B evidentiary requirements and thus failed to acknowledge that EB-1B beneficiaries need not demonstrate the major significance of their contributions. The confusion of these two distinct evidentiary criteria has contributed to the diminished quality of Requests for Evidence and overall adjudications.

The origin of the confusion of these two different evidentiary requirements, and resulting legal standards, appears to be the Policy Memorandum, which traces its origin to the government's misunderstanding and misinterpretation of *Kazarian*. Because USCIS has interpreted *Kazarian* as applying a new and different, second level of qualitative analysis, as opposed to merely acknowledging the second analytical step as previously understood and articulated in *Buletini*, USCIS has attempted to explain how this new second level of qualitative analysis is to be applied in adjudications. This has led to the introduction of qualitative elements in evidentiary categories that do not include qualitative elements, particularly under the EB-1B category.

CIS MEMORANDUM EFFECTIVELY INTERPRETS "CONTRIBUTION" TO REQUIRE "MAJOR SIGNIFICANCE"

Under the EB-1A category, one's original scholarly or scientific contributions to the field must be of "major significance."[47] Appropriately, in the Policy Memorandum, USCIS discusses

[47] 8 C.F.R. §204.5(h)(3)(v).

"major significance" under the guidance for EB-1A adjudications. USCIS correctly identifies the qualitative language in the regulation to be the term "major significance." In the EB-1A section of the Memorandum, USCIS does not discuss the meaning of the word "contributions" or imply any qualitative or quantitative requirement derived from the term "contributions."

When the Policy Memorandum discusses the EB-1B requirements with respect to one's original contributions to the academic field, USCIS necessarily notes that there is no requirement that the contributions be of "major significance". Finding no such qualitative requirement articulated in the 8 C.F.R. §204.5(i)(3)(i)(E) itself, the Policy Memorandum attaches a new and particular significance to the word "contributions" that effectively creates a qualitative and quantitative requirement. If the word "contributions" carries such importance and meaning under the EB-1B regulations, the same must be said of the word "contributions" under the EB-1A regulations, yet this critical meaning was not discussed under the treatment of EB-1A adjudications. In discussing the EB-1A regulation, USCIS focused on the term "major significance," and the notion of some added significance of the term "contribution" arose only when USCIS implied it under the discussion of EB-1B regulations.

The Policy Memorandum discusses the same types of evidence that would satisfy the requirements of both 8 C.F.R. §204.5(h)(3)(v) and C.F.R. §204.5(i)(3)(i)(E). For both determinations the Policy Memorandum guides adjudicators to count citations, evaluate whether others have used the beneficiary's contribution, and determine whether the contribution has made any impact on future work in order to assess whether the "contribution" has even been made. This USCIS treatment of "contribution" under the EB-1B regulations has rendered the term the co-equal and substitute for "major significance" as found under the EB-1A regulations.

"CONTRIBUTION" MEANS "SOMETHING GIVEN"

The terms should be kept distinct and USCIS should not interpret the noun "contribution" to require a qualitative or quantitative evaluation of significance. The ordinary meaning of the noun "contribution" is "something given or provided." The term "contribution" as a noun does not specify how much, or of what value. The thing contributed may be big or small, major or minor, concrete or abstract. The key is that the item(s) cannot be held back or kept secret and

personal to the contributor. If the items are considered to be contributions, they must be given forth. Under the EB-1B regulations, they must be given forth to the academic field.

The most common means that researchers use to give forth their research findings and ideas is publication through some form of media, or presentation at a conference in which researchers share their findings and ideas. Ideas discussed in such a forum are contributed to the forum (i.e., the academic field) whether anyone uses them or not. A contribution to the academic field is not dependent on acknowledgement by the recipient(s), or the number of citations one's research has received. A contribution can be a contribution even if no one values it. For instance, Nicolas Copernicus put forth the radical notion that the earth revolves around the sun long before any listener ever accepted or carried forth his idea. Copernicus nevertheless made a contribution to the academic field the moment he shared his theory.

Without an additional adjective, the term "contribution" means any item given forth. With the adjectives "original" and "scientific or scholarly," it is clear that the contribution must be original and either scientific or scholarly. These adjectives impose the only qualitative requirements on contributions under the EB-1B category. The Policy Memorandum and USCIS adjudicators should not read in a "major significance" requirement with respect to the contribution. Doing so results in a collapse and confusion of two distinct regulatory requirements for two distinct immigrant categories.

USCIS misinterpretation of *Kazarian*, and USCIS use of a single Policy Memorandum to provide guidance for adjudications of multiple different case types, has resulted in the confusion of the legal and evidentiary requirements for multiple immigrant categories. This confusion has resulted in unnecessary Requests for Evidence, erroneous denials, and the overall diminution in the quality of the EB-1 adjudications process. A return to the more transparent, straight-forward, clear, and easily-applied analytical approach set forth in the regulations and acknowledged in *Buletini* would remedy the adjudications errors described above. Rather than a 24-page guidance memorandum, adjudicators should be instructed to read a few paragraphs of 8 C.F.R. §204.5.

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