Amicus Brief[1] to USCIS' AAO on "Final Merits Determination"
Submitted To Assist in the Adjudication/Review of I-140: SRC1003254992

I. The AAO Request

"At this time, the AAO seeks amicus briefing on the following topic, relating to the appeal of a denied Form I-140, Immigrant Petition For Alien Worker:

> In 2010, the U.S. Court of Appeals for the Ninth Circuit reviewed an AAO decision that dismissed the appeal of an extraordinary ability petition. *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010). The court concluded that while the AAO raised legitimate reservations about the significance of the submitted evidence, the AAO should have analyzed the concerns in a subsequent "final merits determination." *Id.* at 1121-22. The AAO seeks amicus curiae briefs on the nature of the "final merits determination" and how the AAO should apply this analysis to extraordinary ability visa petitions filed pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(A)."[2]

II. The Point of View of this Brief

USCIS has recognized that the Ninth Circuit Court of Appeals in *Kazarian*, clearly pointed out that the adjudication of a petition for the E1-1 (or EB-1A) *extraordinary ability* visa classification is best determined through a two-part analysis. USCIS has accepted this decision and has chosen to apply it nationwide. The first part is a simple but time-consuming *quantitative step* consists of identifying and counting the evidence submitted. The second part is a much more complex *qualitative analysis and evaluation* or as labeled by the Ninth Circuit: a "Final Merits Determination". The Ninth Circuit chastised the AAO for conflating the two steps of the analysis and in doing so improperly heightening the bar for the first threshold. By over thinking whether something fit into a basic evidentiary category, AAO erred by excluding items that actually met the lower quality standard required for the *underlying threshold showing for a particular category of evidence as stated in the actual criterion for which it had been offered.* AAO proceeded to the in-depth *qualitative analysis and evaluation* prematurely and unnecessarily. In *Kazarian*, the Court found that the items offered did not meet the *quantitative* evidentiary showing required. That case could have been denied without proceeding to the more time consuming in-depth *qualitative* analysis.

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[1] I titled this as an *Amicus Brief* as I am a friend to USCIS and AAO but dropped *Curiae* because it is to an Administrative Agency, not a court. Although, court is not the exact translation it has come to be synonymous, i.e. "friend of the court". Curiae derives from curia which means tribe or clan, especially tribal or clan leader(s) and also their meeting place or council, again, it is broadly used as a synonym for court.

[2] http://www.uscis.gov/USCIS/Outreach/Feedback%20Opportunities/Amicus%20Briefs/Amicus_Brief_Request_081611%20v2.pdf

III. Part One of the Suggested Approach to this Type of Adjudication

A. ***Quantitative Step:*** Did the petition include the minimum required number of items of evidence as enumerated in the regulations to meet this first threshold evidentiary showing? This *initial threshold* may be met in one of **three** ways.

1. The **first** way to meet the first criterion is by submitting "evidence of a one-time achievement (that is, a major, international recognized award)." 8 C.F.R. § 204.5(h)(3). The single example discussed by Congress was the Nobel Prize. This visa is not really restricted only to Nobel Prize Winners. This one example from Congress is an oversimplification. A *very significant* one-time achievement is not truly defined and is likely to change over time. The Oscar is another example frequently thrown about. Officially known as the Academy Awards, "Oscars" were first handed out on May 16, 1929, to 15 recipients. The variety and number of categories change and usually grow over time. Few people have probably ever thought about it or the "How" or "Why" of such changes. The Academy Award® for Special Effects was added in 1939 and was first won by Fred Sersen and E. H. Hansen of 20th Century-Fox for "The Rains Came." In 1963, the Special Effects award was split into two: Sound Effects and Special Visual Effects, in recognition of the fact that the best sound effects and best visual effects did not necessarily come from the same film. The genre of special effects as an example has grown from the stop-motion of King Kong (1933) which was not recognized as the innovation that is was, to the superb make-up of the Planet of the Apes (1968) to Star Wars (1977) and beyond. Achievements in any given area of endeavor, and how we as a society view and value such achievements changes in unpredictable ways so, the **evidence is fluid**. By "fluid" I mean that the evidence categories are dynamic and subject to substantial change over time. If the evidence of great achievement were static and unchanging then it could be more easily spelled out and codified in a list. The best one can hope to list are broad categories which may themselves change over time and are subject to reinterpretations.

2. The **second** way to meet the first criterion is to present the **minimum** *three of the ten possibilities* enumerated in the regulations at 8 C.F.R. § 204.5(h)(3)(i)-(x). While there may be a certain amount of *evaluation* involved in specific categories *in order to* ***include or exclude*** a piece of *prima facie evidence* in a particular category, such evaluation is necessarily *superficial, unsophisticated, expedient, rudimentary,* and *minimal*. In performing this *quantitative* step, you must glance away from the **extraneous** qualifiers used within the individual criterion and reserve the deeper analysis for the *qualitative* component, i.e. the *final merits determination.*

8 CFR § 204.5 Petitions for employment-based immigrants.

(h) *Aliens with extraordinary ability.*

(3) ***Initial evidence.*** A petition for an alien of extraordinary ability must be accompanied by evidence that the *alien has sustained national or international acclaim* and that his or her *achievements have been recognized* in the field of expertise. Such evidence shall include evidence of a **one-time achievement** (that is, a major, international recognized award), ***or*** at **least three** of the following:

(i) Documentation of the alien's receipt of **lesser** nationally or internationally recognized **prizes or awards** *for excellence* in the field of endeavor;

(ii) 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;

(iii) **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 the title, date, and author of the material, and any necessary translation;

(iv) 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;

(v) Evidence of the alien's **original** scientific, scholarly, artistic, athletic, or business-related **contributions** *of major significance* in the field;

(vi) Evidence of the alien's **authorship** *of scholarly articles* in the field, in *professional or major trade publications or other major media*;

(vii) Evidence of the **display of the alien's work** *in the field at artistic exhibitions or showcases*;

(viii) Evidence that the alien has **performed in a leading or critical role** *for organizations or establishments that have a distinguished reputation*;

(ix) Evidence that the alien has commanded a **high salary** or other *significantly* **high remuneration for services,** *in relation to others in the field*; or
(x) Evidence of **commercial successes** ***in the performing arts***, as shown by box office **receipts** or record, cassette, compact disk, or video **sales.**

3. The **third** way to meet the first criterion is to submit ***comparable evidence*** per 8 C.F.R. § 204.5(h)(4) but *only if none* of the enumerated possibilities *readily apply* to the beneficiary's occupation. Unfortunately, the "concept of *comparable evidence*" is not clearly defined. Rather it is highly subjective and very fluid. This is the least desirable path for everyone. Use of this third approach to submitting evidence is rare. This is so because **if** an alien's field of endeavor is ***so unique*** that it cannot be supported by any of the ten broad categories and it is being put forth as something to be classified as an *extraordinary ability*, **then** it should be something that could be covered by a one-time achievement award or prize, or international recognition and acclaim even if no prize were awarded. Some historical and contemporary figures would easily qualify in the absence of an award or prize.

B. It is useful to compare and contrast the extraordinary ability (EB-1) and exceptional ability (EB-2) categories. The implementing regulations for these two visa categories contain lists of evidentiary possibilities along the lines of the *petitioner may/must submit at least X number of the following ....* However, 8 CFR § 204.5(h)(4) and (k)(3)(iii), pertaining to *extraordinary* and *exceptional* abilities, BOTH state:

> "If the above standards do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence to establish the beneficiary's eligibility."

AAO has taken a strict interpretation of the above regulatory language in some of its *non-precedential* decisions posted online:

> "On appeal, counsel argues that "the standards of 8 CFR Section 204(h) do not readily apply to [the petitioner's] occupation as a Gospel Recording Artist based in Belize." We are not persuaded by counsel's argument. The regulation at 8 C.F.R. § 204.5(h)(l) provides that an alien may file "for classification under section 203(b)(l)(A) of the Act as an alien of extraordinary ability in the sciences, arts, education, business, or athletics" (emphasis added). *See* also section 203(b)(l)(A)(i) of the Act and 8 U.S.C. § 1153 (b) (l)(A)(i). In this case,

the petitioner is a gospel recording artist. **The regulation at 8 C.F.R. § 204.5(h)(4) allows for the submission of "comparable evidence" only if the ten criteria "do not readily apply to the beneficiary's occupation."** The regulatory language precludes the consideration of comparable evidence in this case, as there is no indication that eligibility for visa preference in the petitioner's occupation cannot be established by the ten criteria specified by the regulation at 8 C.F.R. § 204.5(h)(3). In fact, counsel has submitted evidence addressing four of the ten criteria at 8 C.F.R. § 204.5(h)(3). Where an alien is simply unable to meet three of these criteria, the plain language of the regulation at 8 C.F.R. § 204.5(h)(4) does not allow for the submission of comparable evidence."[3] **[Emphasis added.]**

C. I find that further interpretive guidance needs to be presented in a more user-friendly manner. A clear and proper interpretation needs to be emphasized to the petitioners seeking the EB-1 extraordinary ability visa classification. I suggest staring with the more generally applicable evidentiary possibilities stated in the following regulation and clarifying it a bit further as shown below this excerpt.

8 CFR § 204.5 Petitions for employment-based immigrants.

(g) *Initial evidence* —(1) *General.* Specific requirements for initial supporting documents for the various employment-based immigrant classifications are set forth in this section. In general, ordinary legible photocopies of such documents (except for labor certifications from the Department of Labor) will be acceptable for initial filing and approval. However, at the discretion of the director, original documents may be required in individual cases. Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. *If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered. [Emphases added.]*

D. Here is my specific suggested guidance on this issue:

Comparable evidence relating to qualifying experience, training, or any other claim or qualification may, ***as applicable***, be in the form of letter(s) or sworn

[3] http://www.uscis.gov/err/B3%20-%20Outstanding%20Professors%20and%20Researchers/Decisions_Issued_in_2010/Jan062010_01B3203.pdf

affidavits from current or former employer(s), trainer(s), editor(s), publisher(s), ~~any official(s) of organizations in a position to know, *whether by first-hand knowledge or records verification*~~, and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. It would be preferable that letters be on the official letterhead of the organization but need not be if from an independent or unaffiliated renowned and acclaimed expert in the relevant field of endeavor. If such evidence is unavailable, ***other documentation relating to the alien's*** experience, training; publications, recordings, artistic works; artistic or athletic performance(s) of note; credentials, certificates, diplomas; professional recognition, acclaim, or awards, will be considered. It is the position of USCIS to grant national interest waivers on a **case by case basis as demonstrated by the evidence in the individual record,** rather than to establish blanket waivers for entire fields of specialization. The same rationale shall be applied to the determination of eligibility for visa classification as an alien of extraordinary ability.

IV. Some Of The Administrative Decisions Of Note And Of Use In This Adjudication Process Are:

Matter of Price, 20 I. & N. Dec. 953 (Acting Assoc. Comm'r 1994) held:

> An alien seeking immigrant classification under section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(A) (Supp. V 1993), has **clearly established** that he is an alien with extraordinary ability in athletics **when** he **has won** such **internationally recognized competitions** as the 1983 World Series of Golf and the 1991 Canadian Open, **ranked [high]** 10th on the Professional Golfers' Association Tour in 1989, **collected [high]earnings** in 1991 totalling $714,389, provided **numerous affidavits and letters of support from well-known and celebrated** golfers and other **experts in the field**, and **received widespread major media coverage** for his ability on the golf course.

Matter of Brantigan, 11 I. & N. Dec. (BIA 1966) held:

> **In visa petition proceedings the burden of proof to establish eligibility for the benefit sought rests with the petitioner**, and *in the absence of proof* of the legal termination of a U.S. citizen petitioner's prior marriage, reliance on the *presumption* of validity *accorded by* California *law* to his subsequent ceremonial marriage in that State to beneficiary *is not satisfactory evidence* of the termination of his prior marriage and is insufficient ***by itself to sustain***

petitioner's burden of proof of a valid marriage on which to accord beneficiary nonquota status.

Matter of Chawathe, 25 I. & N. Dec. 369 (AAO 2010) held, in pertinent part:

> (3) **In most administrative immigration proceedings**, the applicant must prove by a **preponderance of evidence** that he or she is eligible for the benefit sought.
>
> (4) Even if the director has some doubt 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 has satisfied the standard of proof**. *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989), followed.
>
> (5) If the director can **articulate a material doubt**, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is **probably not true**, deny the application or petition.

Matter of E-M-, 20 I. & N. Dec. 77, 79-80 (Comm'r 1989) held:

> (1) **An applicant** seeking temporary resident status under section 245A of the Immigration and Nationality Act, 8 U.S.C. § 1255a (Supp. IV 1986), **has the burden to prove his eligibility by a preponderance of the evidence.**
>
> (2) **There is no catch-all definition of the term "preponderance of the evidence."** Whether an applicant has submitted **sufficient evidence** to meet his burden of proof under section 245A of the Act **will depend upon the factual circumstances of each case**. Generally, however, when something is to be established by a preponderance of evidence it **is sufficient that the proof only establish that it is probably true.**
>
> (3) An applicant who submitted an Arrival-Departure Record (Form I-94) and his passport to prove he entered the United States prior to 1982, affidavits from acquaintances and employers to prove his continuous residence in the United States since such a date, and an affidavit explaining why he was unable to submit other documentation has established by a preponderance of the evidence that he has resided continuously in the United States in an unlawful status since prior to January 1, 1982.

V. This brings us back to where we started.

Kazarian v. USCIS, 596 F.3d 1115 (9th Cir. 2010)

> ".... **If a petitioner has submitted the requisite evidence** [required by 8 C.F.R. § 204.5(h)(3)], USCIS determines whether 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)." At p. 3437 **[Emphasis added.]**

VI. To Stop or Proceed? That is the Question, *for now.*

If the petitioner cannot meet the initial hurdle as to the preliminary evidentiary showing, then the analysis may not proceed. The failure to meet the initial burden of proof as to the minimum basic requirement shall end the inquiry with denial of the petition. If on the other hand, the minimum showing is made, it is but the first step in the adjudication. The adjudicator may then proceed to the second part of the two-part *Kazarian* analysis.

VII. Part Two of the Suggested Approach to this Type of Adjudication

A. Basics and Background of the Visa Category

INA § 203 [8 USC § 1153] ALLOCATION OF IMMIGRANT VISAS

(b) *Preference Allocation for Employment-Based Immigrants.* - Aliens subject to the worldwide level specified in section 201(d) for employment-based immigrants in a fiscal year shall be allotted visas as follows:

> (1) *Priority workers.* - Visas shall first be made available in a number not to exceed 28.6 percent of such worldwide level, plus any visas not required for the classes specified in paragraphs (4) and (5), to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> > (A) *Aliens with extraordinary ability.* - An alien is described in this subparagraph if -

(i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been **demonstrated by sustained national or international acclaim** and whose **achievements have been recognized** in the field ***through extensive documentation***,

(ii) the alien **seeks to enter** the United States **to continue work** in the area of extraordinary ability, and

(iii) the **alien's entry** into the United States ***will substantially benefit prospectively*** the United States.

B. The less coveted preference visa category described at INA § 203(b)(2)(A), i.e. EB-2 alien of ***exceptional ability***, which is similar to but distinct from the EB-1alien of ***extraordinary ability*** category is informative to this discussion. INA § 203(b)(2) includes specific instruction as to determining eligibility for an EB-2 visa classification. EB-2 already has a high hurdle. The hurdle is even higher for EB-1.

(C) *Determination of **exceptional** ability.* - In determining under subparagraph (A) whether an immigrant has exceptional ability, the **possession of** a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning or a license to practice or certification for a particular profession or occupation **shall not by itself be considered sufficient** evidence of such exceptional ability.

C. *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010)

".... If a petitioner has submitted the requisite evidence [required by 8 C.F.R. § 204.5(h)(3)], ***USCIS determines whether 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)." At p. 3437 ***[Emphasis added.]***

D. ***Qualitative Analysis and Evaluation*****:** Does the totality of the evidence demonstrate the required level of expertise; and national or international acclaim or recognition within the field of endeavor; and is that acclaim or recognition sustained? The foregoing will help to answer the final question in the *qualitative analysis and evaluation*. Is this alien beneficiary or self-petitioner one of that small percentage who have risen to the top of their particular heap?

1. ***Proper Context Is Crucial***

8 CFR § 204.5

(h) *Aliens with extraordinary ability.*

(1) An alien, or any person on behalf of the alien, may file an I–140 visa petition for classification under section 203(b)(1)(A) of the Act as an alien of extraordinary ability in the sciences, arts, education, business, or athletics.

(2) *Definition.* As used in this section:

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.

2. The extraordinary ability must be in the sciences, arts, education, business, or athletics. There are as a starting point, FIVE[4] different broad "fields of endeavor" under consideration per the statute.

SCIENCES: There are a variety of branches of science and further sub-disciplines within the broader categories. Listed here as but a few of the plethora that exists and shall continue to grow along with human knowledge.

- 1 Natural science
  - 1.1 Physical science
    - 1.1.1 Physics
    - 1.1.2 Chemistry
    - 1.1.3 Earth science
  - 1.2 Biology and the life sciences
- 2 Social sciences

[4] These simple definition are mainly drawn from http://en.wikipedia.org/wiki/Main_Page

- 3 Formal sciences
  - 3.1 Decision theory
  - 3.2 Logic
  - 3.3 Mathematics
  - 3.4 Statistics
  - 3.5 Systems theory
  - 3.6 Theoretical computer science

- 4 Applied science

ARTS: The *arts* are a vast subdivision of culture, composed of many creative endeavors and disciplines. It is a broader term than "*art*," which as a description of a field usually means only the visual arts. *The arts* encompasses visual arts, literary arts and the performing arts – music, theatre, dance and film, **among others.** This list is by no means comprehensive, but only meant to introduce the concept of the arts.

EDUCATION: Education in the general sense is any act or experience that has a formative effect on the mind, character, or physical ability of an individual. In its technical sense, education is the process by which society deliberately transmits its accumulated knowledge, skills, and values from one generation to another.

- 1 Systems of formal education
  - 1.1 Preschool education
  - 1.2 Primary education
  - 1.3 Secondary education
  - 1.4 Higher education
  - 1.5 Adult education
  - 1.6 Alternative education
  - 1.7 Indigenous education

- 2 Process
  - 2.1 Curriculum
  - 2.2 Learning modalities
  - 2.3 Teaching
  - 2.4 Technology

- 3 Educational theory

- 4 Economics

- 5 History
- 6 Philosophy
- 7 Psychology
- 8 Sociology
- 9 Education in the Developing World
  - 9.1 Internationalization

BUSINESS: There are many divisions and subdivisions of businesses. The authoritative list of business types for North America is generally considered to be the North American Industry Classification System, or NAICS. The equivalent European Union list is the Statistical Classification of Economic Activities in the European Community (NACE). There is also the Occupational Outlook Handbook (OOH) at: http://www.bls.gov/oco/ among other resources.

ATHLETICS: Athletics is used here as an umbrella for any and all sports, but mainly for professional athletes based on human physical competition. As this is in the context of an employment-based visa category, if the alien is not an athlete, then a coach, trainer, or manager (*or something highly specialized and related with a strong **nexus** shown in the evidence*) could be considered in connection to an amateur competitor such as at a school or in preparation for competition (such as NCAA, or college bowl-game bound teams, the little league world series, or the Olympics as just a few examples).

E. *Weighing The Evidence; Judgment Calls; Training Issues*

A person is the sum of their existence to any given moment and to this this very point in their life. It is that sum total of your life experiences which guides your judgment on an issue. People can be educated but if they have been forced by their particular educational system to favor rote memorization rather than to "think outside the box", they will have a more difficult time weighing evidence.

Adjudicators can be trained but training has its limits. Far too often adjudicators are overwhelmed with large amounts of information de-coupled from discussion. Agencies have been forced to take the approach of trying to "cover themselves" from a legal perspective and this has been to the detriment of the quality of adjudications

produced. More time is needed in order to fully immerse an adjudicator in a new subject matter. Open discourse should be encouraged rather than discouraged. Spend the money up front in proper training rather than wasting so much in defending bad decisions in court.

Anyone can be exposed to information, provided with examples, and additional experience will be continually gained on-the-job and throughout life. A lifetime of inadequate thought processes however usually cannot be *unlearned*. A person may be guided in developing the needed skills to perform a task if there is something there to begin with. Let us hope that USCIS has folks on board already that can properly weigh evidence as required in order to make these judgment calls that are the heart and soul of the "final merits determination" required as the last step in the *Kazarian* analysis. Merely completing the two-step analysis does not conclude the adjudication. On initial review, the adjudicator may have to complete the two-step analysis more than once. The adjudication may start, be put on-hold, and resumes later.

F. *Interim Processing Steps and Building the Record of Proceeding (ROP)*

It is easy enough to sum up the final conclusion but it is usually demands a lengthy trek through reams of documentary evidence to reach that conclusion. Mere conclusory statements by an adjudicator are no more acceptable *as proper analysis* than statements by counsel, going on record and, being offered up *as evidence*. USCIS adjudicators must be able to spell out point-by-point what documentation has been submitted and state blandly and bluntly if it meets the *underlying threshold for a particular category of evidence as stated in the actual regulatory criterion for which it has been offered*. The use of an RFE or NOID as an adjudicative tool and as a training aid is under-rated and often overlooked. Having a clear list with written comments and observations right there in front of you helps in the evaluation of the evidence in the *qualitative analysis* process. Listing the evidence along with a citation to its regulatory criterion and documenting your thoughts as you go along *saves time later* in the follow-up portions of the overall process. Building a proper record of proceeding (ROP) is valuable to support the initial decision and facilitate any further review whether by a supervisor, AAO, or a federal Judge later on.

- **IF** the evidence *fails to meet the minimum quantity*, **THEN** the adjudicator must make one of three choices. (S)he may prepare an RFE, a NOID, or a Denial Notice. Supervisory Review could be and, should be considered, *if deemed appropriate to the particular case or to the particular adjudicator*.

- Request For Evidence (RFE): The issuance of an RFE is not mandatory but it is a valid option. This decision may be a judgment call or set as a matter of Policy.

- Notice of Intent to Deny (NOID): The issuance of a NOID is not mandatory but it is a valid option. This decision may be a judgment call or set as a matter of Policy.

- Denial Notice (I-292): The issuance of a Denial Notice at this stage is not mandatory but it is a valid option. This decision may be a judgment call or set as a matter of Policy.

➢ **IF** the evidence ***meets the minimum requirements***, **THEN** *and only then*, the adjudicator may proceed to the next stage of in-depth *qualitative analysis*.

G. *Burden* of Proof v. *Standard* of Proof

The various precedents noted above talk to the concepts of the "standard of proof" and "burden of proof". Those considerations relating to the "burden" are actually quite simple mechanical operations and are the easier parts of the analysis. They largely address the *quantitative* portion of the *Kazarian* analysis. You only need to be able to count to three *but you do have to know **what** to count*. The in-depth *qualitative analysis and evaluation* portion comprise the essence of the *Kazarian* "final merits determination". This is where things get more difficult. This second step is the step at which evidence is weighed. The "standard of proof" is ***relativistic*** in part because the *preponderance of evidence standard* **is** ultimately a judgment call. That judgment call must be in keeping with the *spirit* of the statute, guided by the regulations, tempered with wisdom, and made within the proper context.

These determinations involve judgment rather than discretion. Sound judgment can be nurtured but at least a kernel or spark must already exist. By comparison, in various decisions involving an exercise of discretion, the BIA, AAO, the various courts, and agency policy-makers have created a variety of "laundry lists" of "factors" to be "balanced" in order to determine if the good or positive factors outweigh the negative or bad factors. The proper exercise of this type of discretion is more akin to the *quantitative step* in the *Kazarian* analysis than to the *qualitative* component.

In stark contrast, the *qualitative analysis and evaluation* required for a *judgment on the merits* is not a simple task. This is because they serve as the foundation to support an **affirmative declaration** that *USCIS has found* an alien to possess the requisite "extraordinary ability" for this highly coveted visa classification.

- Obtain an employment-based visa without an actual job offer, and
- Circumvent the labor certification process, which was created to protect the American workforce from unfair competition that could negatively impact working conditions and wages.

H. Standard of Review

The "standard of review" is a question raised in the courts all the time. Clear cut and straightforward standards of review of evidence at both the initial and appellate stages are lacking in 8 CFR Chapter I. The standards of review are, *at the very least* addressed in the following notable Administrative Decisions.

Matter of Burbano, 20 I&N Dec. 872 (BIA 1994) held in pertinent part:

> (1) When the Board of Immigration Appeals reviews a **discretionary determination** of an immigration judge, it relies upon its own **independent judgment** in deciding the ultimate disposition of the case. ...

Matter of A-E-M-, 21 I&N Dec.1157 (BIA 1998) held in pertinent part:

> (2) **Where evidence** from the United States Department of State **indicates** that country **conditions have changed after** an alien's departure from his native country and that the Peruvian Government has reduced the Shining Path's ability to carry out persecutory acts**, the alien failed to establish** a well-founded fear of persecution in Peru.
>
> (3) An alien who **failed to rebut evidence** from the United States Department of State indicating that the Shining Path operates in only a few areas of Peru **did not establish a well-founded** fear of country-wide persecution in that country.

Matter of Matter of S-H-, 23 I&N Dec. 462 (BIA 2002) held:

> Under **new regulations** that become **effective** on **September 25, 2002**, the Board of Immigration Appeals has **limited fact-finding ability on appeal**, which heightens the need for Immigration Judges to include in their decisions clear and complete findings of fact that are supported by the record and are in compliance with controlling law. *Matter of Vilanova-Gonzalez*, 13 I&N Dec.

399 (BIA 1969), and *Matter of Becerra-Miranda*, 12 I&N Dec. 358 (BIA 1967), **superseded.**

The above BIA restriction on reviews is inapplicable to AAO and reaffirms the need for AAO rulemaking because in 2002, the BIA within EOIR and AAO within INS were both still parts of DOJ and largely shared the same regulations at 8 CFR § 103.

Matter of Gadda, 23 I&N Dec. 645 (BIA 2003) held:

> (1) An attorney who practices immigration law in proceedings before the Board of Immigration Appeals, the Immigration Courts, and the Department of Homeland Security must be a member in good standing of a State bar and is therefore subject to discipline by State bar authorities.
>
> (2) The Board of Immigration Appeals has authority to increase the level of disciplinary sanction initially imposed by an adjudicating official against an attorney.
>
> (3) Where the respondent was disbarred by the Supreme Court of California based on his *egregious and repeated acts of professional misconduct over a number of years*, expulsion from practice before the Board of Immigration Appeals, the Immigration Courts, and the Department of Homeland Security is an appropriate sanction.

In reaching that holding in *Gadda*, the Board stated the following on page 647:

> "The adjudicating official entered the transcript of the hearing before Judge Brott into the record, as agreed by the parties. **The parties were given an opportunity to identify any material fact that would necessitate an evidentiary hearing.** On August 22, 2002, the adjudicating official issued an order suspending the respondent indefinitely from practice before the Board, the Immigration Courts, and the DHS. Having reviewed the record, which was over 1,000 pages, the adjudicating official found that the **"*Respondent had ample opportunities* to question or call witnesses. The judge's conclusions are well supported by the facts in the record. There is no suggestion that Respondent was treated unfairly or that his due process rights have been violated in any way."** The adjudicating official further stated that the **"Respondent has not denied any of the factual findings** made in Judge Brott's order and **there is simply no issue as to any material fact which would require an evidentiary hearing.""" [Emphasis added.]**

Matter of V-F-D-, 23 I&N Dec. 859 (BIA 2006) included this notable footnote 1:

> "The respondent filed his Notice of Appeal from a Decision of an Immigration Judge (Form EOIR-26) after September 25, 2002. Accordingly, the **"clearly erroneous" standard of review** provided by 8 C.F.R. § 1003.1 (d)(3)(i) (2005) will be **applied to** the Immigration Judge's **findings of fact** pursuant to 8 C.F.R. § 1003.3(f) (2005). *See also Matter of S-H-*, 23 I&N Dec. 462, 464 n.2 (BIA 2002)."

Matter of Rowe, 23 I&N Dec. 962 (BIA 2006) involved a reexamination of prior reasoning in earlier decisions where an intervening change in the law took place after a former British territory gained independence and intervening court analysis took place in the U.S. on the subject matter. This particular case involved a citizenship claim under INA § 321(a)(3) in regard to legitimation in Guyana.

Matter of Briones, 24 I&N Dec. 355 (BIA 2007) includes this notable footnote 1:

> "The Immigration Judge's original oral decision contains transcription **errors** that he **corrected**, both by **handwritten** interlineation and by issuance of the March 31, 2005, written decision from which the present appeal was taken. We conclude, and the parties do not argue otherwise, that the Immigration Judge's **decision, as corrected, provides a meaningful basis for appellate review**."

Matter of A-S-B-, 24 I&N Dec. 493 (BIA 2008) held:

> (1) Under 8 C.F.R. § 1003.1(d)(3) (2008), the Board of Immigration Appeals **should defer to the factual findings** of an Immigration Judge, **unless they are clearly erroneous, but** it **retains** independent **judgment** and **discretion,** subject to applicable governing standards, regarding pure questions of law and the application of a particular standard of law to those facts.
>
> (2) **In determining whether established facts are sufficient to meet a legal standard,** such as "well-founded fear," the Board has the **authority to weigh the evidence in a manner different from** that accorded by the Immigration Judge, or to conclude that the foundation for the Immigration Judge's legal conclusions was insufficient or otherwise not supported by the evidence of record.

Matter of V-K-, 24 I&N Dec. 500 (BIA 2008) held:

> The Board of Immigration Appeals **reviews de novo** an Immigration Judge's prediction or **finding** regarding the likelihood that an alien will be tortured,

because it **relates to whether the ultimate statutory requirement for establishing eligibility for relief from removal has been met and is therefore a *mixed question of law and fact, or a question of judgment*.**

VIII. Drawing The Final Conclusion

A. Based on a showing of *either* one past major international accomplishment, *or* **sufficient** *lesser national or international* but *cumulative* **successes**; with continuing acclaim, recognition and/or contributions, USCIS should feel confident of *prospective benefits* to the United States from this individual and grant the classification. Having reached this stage of the analysis without denying the petition, there is one single issue yet to be resolved.

B. While this last tidbit is seemingly trivial, it has a higher standard and burden of proof with specifically described possible forms of evidence. Although the regulation states that the evidence "may include" such items, *it is unclear what, if anything*, could be substituted and satisfy the *clear evidence standard*. *See 8 CFR § 204.5(h)(5)*.

No offer of employment is required. Neither an offer of employment in the United States nor a labor certification is required for this classification. H*owever*, the petition must be accompanied by **clear evidence** *that the alien is coming to the United States to continue work in the area of expertise*.

Such evidence may include:

- Letter(s) from *prospective employer*(s),
- Evidence of *prearranged commitments* such as contracts, or
- A *statement* from the beneficiary ***detailing plans*** on how he or she intends to continue his or her work in the United States.

I thank USCIS and AAO for the opportunity to express my opinions on this topic. These thoughts, interpretations, and suggestions are offered in the hopes of ensuring an equitable outcome for alien beneficiaries seeking classification for visas that would allow them to enter the U.S. for the prospective benefit to this country.

##END###

Pg. 19 - Author Bio
Pg. 20 - Author PII [to be redacted, if released]

This *Amicus Brief* discusses a suggested approach to the application of the two-part analysis of eligibility for the extraordinary ability visa classification proscribed by the U.S. Court of Appeals for the Ninth Circuit in *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010). This is an *informal* brief written by a non-attorney. The author attended San Francisco State University (SFSU) in San Francisco, CA between 1992-1996, attained an M.A. in Anthropology and Graduated Cum Laude. Prior to that the author attended the State University of New York (SUNY) in Buffalo, NY between 1989-1992, attained a B.A. in Anthropology and Graduated Cum Laude. Prior to that the author attended Erie Community College (ECC) in Buffalo, NY between 1983-1985, attained an Associate of Applied Science in Hotel [and Restaurant Management] Technology and Graduated with Distinction. Foreign exchange student at Ealing College for Higher Education, Ealing, London, S.W., England, Spring Semester 1985.

The author has held various positions in federal service. The earlier career path explored was as an Archaeologist with the USDA Forest Service. The type of archaeology performed by federal archaeologists is often described as either compliance archaeology (in reference to compliance with § 106 of the National Historic Preservation Act (NHPA)) or cultural resource management (CRM) as required by the National Environmental Policy Act (NEPA) and the California Environmental Quality Act (CEQA). This work was performed as a part of an interdisciplinary team of other professional (wildlife biologists, silviculturists (tree specialists), hydrologists, fuels management specialists, rangers, firefighters, and geologists among others). This work entailed on-the-ground surveys, excavations, and mitigation efforts; including as a member of a Burned Area Emergency Rehabilitation (BAER) Team after two of the largest forest fires in California in the last 150 years. The other aspect of that position entailed a great deal of research and writing. Such research was not limited to anthropology textbooks. Instead, historical legal documents were often poured over for clues and in addition to the referenced statutes, research included Title 36 CFR, "Parks, Forests, and Public Property", Chapter VIII pertaining to the Advisory Council on Historic Preservation, *esp.* Parts 800 and 805.

The next federal career was District Adjudications Officer with Legacy INS and continued in a variety of adjudications positions and/or capacities within USCIS ranging from Supervisory Adjudications Officer, Quality Assurance Analyst, Community Liaison Officer, Trainer, HQ Subject Matter Expert (SME), and Immigration Adjudications Analyst. This author has successfully adjudicated Immigration, Naturalization, and Citizenship related cases of a wide variety for over 12 years bringing federal service to just over 15 years. This author has published over half a dozen scholarly immigration related articles in the past approximately ten months. I am still passionate on this subject matter and am an advocate for better adjudication quality and improved immigration officer training. I am not a party to the instant proceedings involving denied I-140: #SRC1003254992.