ADMINISTRATIVE APPEALS OFFICE
UNITED STATES DEPARTMENT OF HOMELAND SECURITY
UNITED STATES CITIZENSHIP & IMMIGRATION SERVICES

FILE: SRC-10-032-54992

PETITION: Immigrant Petition for Alien Worker of Extraordinary Ability Pursuant to Section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. Section 1153(b)(1)(A)

AMICUS CURIAE BRIEF OF THE STATE OF OHIO

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INTRODUCTION

The guidelines in the Code of Federal Regulations are the anchor for every case considering a visa for an alien of extraordinary ability. An administrative procedure that untethers the analysis from the codified regulations is unfaithful to those regulations and invites arbitrariness that disserves both applicants and this federal agency.

The current two-step process at work in USCIS evaluations strays too far from the text of 8 C.F.R. § 204.5. The "final merits determination" described in *Kazarian v. USCIS,* 596 F.3d 1115 (9th Cir. 2010) is not a clean-slate evaluation of the alien's status as extraordinary. Instead, it is a limited opportunity for the agency to rebut a presumption created for that status if the applicant has produced the requisite evidence listed in 8 C.F.R. § 204.5. If USCIS officers conduct a "final merits determination" without assigning any weight to the evidentiary criteria in the regulations, those regulations will not serve their intended purpose to define and delimit applicants who qualify as aliens of extraordinary ability. A "final merits determination" freed from the textual constraints of the regulation results in an inevitable zigzag pattern of decisions applying the extraordinary classification that disserves immigration policy and the applicants hoping to comply with it.

Accordingly, this body should find that the final merits determination is not mandatory, but rather a limited opportunity for the USCIS to rebut the presumption of extraordinariness created when a petitioner presents evidence from at least three of the ten categories listed in 8 C.F.R. § 204.5(h)(3).

The State of Ohio has an additional pressing concern related to these considerations. Whatever this body concludes about the meaning of a final merits determination for evaluations of aliens of extraordinary ability, that conclusion is not necessarily appropriate for evaluating applications by potential outstanding professors/researchers. The text and context of the

regulations governing that category differs from the regulations for extraordinary aliens. Both text and context show that, for outstanding professors/researchers, the presumption in favor of the beneficiary who satisfies the listed criteria is stronger than the presumption for extraordinary aliens.

STATEMENT OF AMICUS INTEREST

On August 18, 2011, the AAO requested input from interested parties on the meaning of the phrase "final merits determination," in the *Kazarian* decision. The State of Ohio respectfully submits that current USCIS and AAO interpretations of this term are incongruous with *Kazarian*, overly restrictive, and harmful to the efforts of Ohio and the nation to attract top talent that plays an important role in maintaining leadership and excellence in the academic and scientific arenas.

The State of Ohio is home to 37 public universities and colleges, with more than 522,000 students and 107,000 employees, including more than 51,000 faculty, instructional, and research staff.[1] International faculty and researchers are a vital component of the institutions' instructional, scientific, and research missions and provide valuable opportunities for faculty, staff, and students to benefit from the knowledge and expertise of the world's top talent. Through collaborations with private industry and various research centers, these individuals are also an important catalyst for innovation and economic growth in Ohio.

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[1] Ohio's public universities and colleges include the University of Akron, Bowling Green State University, Central State University, University of Cincinnati, Cleveland State University, Kent State University, Miami University, Northeast Ohio Medical University, The Ohio State University, Ohio University, Shawnee State University, University of Toledo, Wright State University, Youngstown State University, Belmont Technical College, Central Ohio Technical College, Cincinnati State Technical & Community College, Clark State Community College, Columbus State Community College, Cuyahoga Community College, Eastern Gateway Community College, Edison Community College, Hocking College, James A. Rhodes State College, Lakeland Community College, Lorain Community College, Marion Technical College, North Central State College, Northwest State Community College, Owens Community College, Rio Grande Community College, Sinclair Community College, Southern State Community College, Stark State College, Terra Community College, Washington State Community College, and Zane State College.

According to the National Science Foundation, foreign students account for 31% of all Ph.Ds awarded in the United States, and more than 55% of Ph.Ds awarded in engineering fields.[2] Ohio has an interest in hiring and retaining this important talent pool. Ohio also has a direct interest in hiring and retaining foreign graduates of its own institutions because Ohio's taxpayers regularly fund the graduate studies of these foreign students. Retaining Ph.Ds minted in Ohio both repays Ohioans for their investment in these students and helps Ohio attract talented foreign graduate students to its programs because they know future employment in Ohio is an option.

These dynamics mean that Ohio's public universities and colleges often file immigrant worker petitions for aliens of extraordinary ability pursuant to Immigration & Nationality Act Section 203(b)(1)(A) and for outstanding professors and researchers pursuant to INA Section 203(b)(1)(B). Accordingly, the State of Ohio has a strong interest in this matter.

Ohio's interest in attracting and retaining extraordinary aliens and outstanding professors is a goal shared by current and past executives and their advisors. In his January 2011 State of the Union Address, President Obama implored that it "makes no sense" to attract talented students from abroad and then "send them back home to compete against us" as soon as they secure their advanced degrees.[3] The current Secretary of the Department of Homeland Security, Janet Napolitano, has echoed the President's economic concerns: "Today, we have a system where America educates many of the brightest individuals from around the world, and then tells them to leave the country . . . This hurts the economy for all of us, and it has to change."[4] Tom Ridge, former Secretary of the Department of Homeland Security, also shared these concerns: "[W]e know that nearly half the scientific and medical professionals at the National Institutes of Health

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2 NSF/NIH/USED/USDA/NEH/NASA, 2009 Survey of Earned Doctorates, publicly available at: http://www.nsf.gov/statistics/nsf11306/appendix/pdf/tab16.pdf.

3 President Barack Obama, State of the Union Address (January 25, 2011).

4 Janet Napolitano, "Prepared Remarks by Secretary Napolitano on Immigration Reform at the Center for American Progress." (November 13, 2009).

are foreign nationals. And as we secure America from terrorists, we do not want to risk losing the next Enrico Fermi or Albert Einstein. We would be a far poorer nation in many, many ways."[5]

Congressional intent embodies this same idea. In 1991, Congress classified aliens of extraordinary ability and outstanding researchers and professors as first preference "Priority Workers." *See* INA Section 203(b)(1). This decision reflects a national priority—shared by the State of Ohio—to bring these individuals to the United States and keep them here.

ARGUMENT

The Ninth Circuit's *Kazarian* decision is instructive in evaluating immigrant worker petitions for aliens of extraordinary ability. Drawing on the regulations governing these petitions, *Kazarian* suggests that a USCIS "final merits determination" is a limited opportunity for the agency to rebut the presumption of extraordinariness created when a petition contains evidence from at least three of the ten categories listed in 8 C.F.R. § 204.5.(h)(3).

Kazarian rebuked the USCIS and the AAO for improperly requiring a petitioner to submit evidence beyond that specified in the regulations governing the extraordinary ability classification. USCIS subsequently offered its own interpretation of *Kazarian* in guidance to examiners for use in adjudicating both extraordinary ability petitions and outstanding professor\researcher petitions.[6] The AAO has used an interpretation of *Kazarian* identical to that of the USCIS in non-precedent decisions involving these classifications.[7] As reflected in the policy memorandum and the decisions, current USCIS and AAO methodology involves a two-step process. First, an officer determines whether a petition establishes the required number of

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5 Tom Ridge, Remarks to the Association of American Universities (April 14, 2003).

6 Policy Memorandum of December 22, 2010 (PM-602-0005.1).

7 *See, e.g.,* LIN-08-221-52544 (AAO, August 19, 2010), and LIN-09-192-51229 (AAO, August 4, 2010).

evidentiary criteria from the regulatory list. Second, without regard to the criteria, the officer separately makes a "final merits determination" as to whether the alien is, in fact, extraordinary or outstanding.

Ohio submits that both *Kazarian* and the text of the regulations it interpreted suggest that an alien meeting three of the ten evidentiary criteria is presumptively an alien of extraordinary ability. In rare cases where, in spite of having met the criteria, a beneficiary cannot legitimately claim to have risen to the top of her field, USCIS may rebut this presumption in a "final merits determination" by providing specific, evidentiary reasons for reaching that conclusion.

Moreover, whatever this body concludes about "final merits determinations" for extraordinary-alien petitions, the same conclusion may not be appropriate for the outstanding professor/researcher petitions. The text and context of those regulations distinguish outstanding professor/researcher applications from extraordinary-alien petitions. Accordingly, if the AAO issues a precedent decision applicable to extraordinary-ability petitions, it should distinguish the procedure for outstanding professor/researcher petitions.

A. *Kazarian* instructs that the USCIS cannot impose evidentiary requirements unsupported by the regulations.

The key insight of *Kazarian* is that that the AAO and USCIS cannot require a petitioner to submit evidence beyond that required by the regulations. 596 F.3d 1115, 1121-22. Thus, an alien can "prove extraordinary ability" by providing "evidence of at least three" of the listed criteria in the regulations. 596 F.3d 1115, 1119. The appellate court found "clear legal error" when the USCIS subjected the applicant to "novel substantive or evidentiary requirements beyond those" in the regulations. *Id.* at 1121. A concurring judge went further, chastising current immigration procedures as unjust and "haywire." 596 F.3d at 1123.

Federal district court decisions on extraordinary-alien visas accord with *Kazarian* that the regulations create—at minimum—a rebuttable presumption. One court reached this conclusion "because it is an abuse of discretion for an agency to deviate from the criteria of its own regulation[s]." *Buletini v. INS,* 860 F. Supp. 1222, 1234 (E.D. Mich. 1994). Therefore, "once an "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, despite having satisfied the criteria, does not meet the extraordinary ability standard." *Id.* (emphasis added). Another federal court explained that an agency cannot disregard its regulations with unsupported assertions. "While the satisfaction of the three-category production requirement does not mandate a finding that the petitioner has sustained national or international acclaim and recognition in his field, it is certainly a start, and the INS made no attempt to explain why [the alien's] evidence did not meet the acclaim and recognition standard. . . . We deem such arbitrary decisionmaking an abuse of discretion." *Muni v. INS*, 891 F. Supp. 440, 446 (N.D. Ill. 1995). Yet another federal court has attached significance to the regulatory criteria far beyond current USCIS and AAO policy. "Because [the beneficiary] has met the requirements of three of the subcategories of 8 C.F.R. § 204.5(h)(3), the AAO's determination that he has not demonstrated extraordinary ability is contrary to applicable law and must be reversed." *Gulen v. Chertoff*, No. 07-2148, 2008 U.S. Dist. LEXIS 54607, at * (E.D. Pa., July 16, 2008).

Other parts of the regulatory framework support these conclusions. For instance, a related category of first preference visas covers multinational managers and executives. 8 C.F.R. § 204.5(j). The regulations governing these visas explicitly authorize the director to "request additional evidence" in "appropriate cases." 8 C.F.R. § 204.5(j)(4). But there is no parallel authority for the director when evaluating extraordinary-alien or outstanding-

professor/researcher petitions. This regulatory silence for extraordinary alien or outstanding professor/researcher petitions underscores *Kazarian's* key point: the USCIS is limited to the kind of evidence spelled out in the regulations. Any evidence request broader than the regulations or any "final merits determination" unhinged from the regulations is not faithful to the text of 8 C.F.R. § 204.5.

Reading *Kazarian* against the backdrop of other federal decisions and regulatory sources shows that the term "final merits decision" is an opportunity for the USCIS to rebut a presumption of extraordinary ability in those rare instances where, despite having met three criteria, a beneficiary cannot legitimately claim extraordinary ability. This interpretation gives meaning to the term "final merits determination" and assures petitioners that the regulations enacted to flesh out the extraordinary-alien language have real force.

The agency's current practice runs contrary to that guidance. The USCIS's current guidelines do not presume an alien is extraordinary, even if she meets three of the ten evidentiary criteria that define extraordinary aliens.[8] This process stymies both petitioners and examiners from relying on the enacted criteria and thereby undermines the whole purpose of having regulations in the first place. In fact, in a contemporaneous statement about the meaning of the criteria, the federal immigration agency made this very point. Lawrence Weinig, Acting Assistant Commissioner for Examinations of the INS, explained in 1992 that "the evidence lists were designed to provide for easier compliance by the petitioner and easier adjudication by the examiner." *Buletini*, 860 F. Supp. 1233-34.[9] Current USCIS and AAO policy sabotages these goals with an open-ended "final merits determination" untethered from the regulations that were enacted to anchor these determinations.

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[8] Policy Memorandum of December 22, 2010 (PM-602-0005.1).

[9] *Quoting* Letter from Lawrence Weinig, INS Acting Assistant Commissioner for Examinations, to NSC Director James Bailey, July 30, 1992.

By way of an example of the agency's deviations, there is the frequent claim in USCIS Requests for Evidence ("RFEs") or AAO non-precedent decisions that publication, peer review, citation, institutional travel awards, and grant funding are somehow "routine" or "ordinary." These activities occur among professionals that have risen to the very top of their fields by virtue of their education and employment. The regulations in 8 C.F.R. § 204.5 define extraordinary aliens, and USCIS is not free to tack on ""novel substantive or evidentiary requirements." *Kazarian*, at 1121. It is inappropriate to evaluate Ph.D professors or researchers only against other Ph.D professors or researchers. Ph.D holders have distinguished themselves from their peers, and Ohio contends that the USCIS may not require petitioners to prove that beneficiaries are extraordinary among an already extraordinary group.

Ohio notes that, even among those few who obtain university faculty positions, publication and citation rates are not nearly as high as USCIS sometimes assumes in its RFEs. The National Research Council, in conjunction with the National Academies of Sciences, Engineering, and the Institute of Medicine, published an assessment in 2010 of over 5,000 doctoral programs at 212 universities in the United States.[10] As an example, based on Ohio's calculations, faculty at the 124 mechanical engineering programs covered by the study had an average of 3.9 publications in the 2000-2006 period covered by the study, with an average citation rate of 1.41 citations per article. With regard to Materials Science, among 75 programs, the publication rate was 4.42 per faculty in the six-year period, with an average of 1.81 citations per article.

Current USCIS practice is unduly stringent in light of these statistics, the regulations governing extraordinary-alien petitions, and federal case law interpreting the regulations.

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10 This study is publicly available at http://www.nap.edu.rdp.

B. *Kazarian* does not suggest a two-part analysis for the distinct category of outstanding professor or researcher; meeting two criteria is sufficient to establish that a beneficiary is internationally recognized as outstanding.

There is one final, vital point that Ohio wishes to emphasize here, and it relates to the outstanding professor/researcher category of visas. The USCIS and AAO have evaluated outstanding professor/researcher petitions under INA Section 203(b)(1)(B) in the same manner as extraordinary-ability petitions. USCIS evaluates whether a beneficiary meets two out of the six applicable regulatory criteria and then, setting that analysis aside, conducts an independent "final merits determination" to determine whether a beneficiary is recognized internationally as outstanding.[11] But a two-step analysis is even less appropriate for the outstanding-professor/researcher classification than it is for the extraordinary-ability classification. The outstanding-professor/researcher regulations directly state that meeting two of the evidentiary criteria is sufficient. Accordingly, whatever this body concludes about the "final merits determination" for extraordinary alien petitions, the same conclusion may not be appropriate for outstanding professor/researcher petitions.

USCIS (then INS) promulgated regulations implementing INA Section 203(b)(1)(B) in 1991. (*See* 56 Fed. Reg. 60905, November 29, 1991). With regard to the international recognition requirement, these regulations state that the petitioner must submit "evidence that the professor or researcher is recognized internationally as outstanding in the academic field specified in the petition." 8 C.F.R. § 204.5(i)(3)(i). The regulations continue:

> Such evidence shall consist of at least two of the following:
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> (A) Documentation of the alien's receipt of major prizes or awards for outstanding achievement in the academic field;
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> (B) Documentation of the alien's membership in associations in the academic field which require outstanding achievements of their members;

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[11] Policy Memorandum of December 22, 2010 (PM-602-0005.1).

> (C) Published material in professional publications written by others about the alien's work in the academic field. Such material shall include the title, date, and author of the material, and any necessary translation;
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> (D) Evidence of the alien's participation, either individually or on a panel, as the judge of the work of others in the same or an allied academic field;
>
> (E) Evidence of the alien's original scientific or scholarly research contributions to the academic field; or
>
> (F) Evidence of the alien's authorship of scholarly books or articles (in scholarly journals with international circulation) in the academic field.

Id. (emphasis added). The phrase "shall consist of" plainly limits USCIS adjudications, and that mandatory language leaves no room for interpretation: A petitioner supplying evidence in two of the relevant categories establishes that an alien is "internationally recognized as outstanding." A second "final merits determination" is not appropriate for this category of visas.[12]

Context further supports the conclusion that a lower threshold applies to outstanding-professor/researcher petitions. These petitions may only be filed by institutions of higher education or certain narrowly defined private entities; they may not be self-petitions. 8 C.F.R. § 204.5(i)(3)(iii). A beneficiary must also have three years of experience. 8 C.F.R. § 204.5(i)(3)(ii). These limitations, combined with the requirement that two out of six regulatory criteria must be met, substantially narrow the field of potential beneficiaries. Given current USCIS practice of evaluating extraordinary-ability and outstanding-professor/researcher cases with the same procedure, Ohio respectfully requests that—if the AAO issues a precedent decision in this case—that it explain either that a "final merits determination" is not appropriate

[12] Another significant difference in the regulations: the extraordinary ability criterion regarding contributions to the field at 8 C.F.R. Section 204.5(h)(3)(v) require that such contributions be of "major significance," while the outstanding professor\researcher regulations require only that contributions be "original." 8 C.F.R. § 204.5(i)(3)(i)(E).

for an outstanding-professor/researcher petition or reserve the question until amici can weigh in on a future case that directly raises that question.

CONCLUSION

For all of the foregoing reasons, the State of Ohio urges this body to recognize that the current two-step process used to evaluate extraordinary-alien petitions strays too far from the applicable regulations. This body should determine that the "final merits determination" described in *Kazarian* is a limited opportunity for the agency to rebut a presumption of qualification once the petitioner has produced the evidentiary criteria called for in 8 C.F.R. § 204.5. That is, the "final merits determination" is not mandatory, but an opportunity for the USCIS officer to affirmatively demonstrate why an applicant who presents the evidence listed in 8 C.F.R. 204.5 is *not*, in fact, extraordinary.

Finally, whatever the agency concludes about the "final merits determination" for extraordinary-ability visa petitions, Ohio urges the agency to recognize that *Kazarian* does not suggest a two-part analysis for the separate category of outstanding professors/researchers.

Respectfully submitted,

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