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

20 Massachusetts Avenue, N.W., MS 2090
Washington, D.C. 20529-2090

In the Matter of:

File Number: SRC1003254992

Corrected Brief of Amicus Curiae of the American Immigration Lawyers Association

Deborah S. Smith
American Immigration Lawyers Association
1331 G Street, NW, Suite 300
Washington, D.C. 20005

Attorney for Amicus

Introduction

The American Immigration Lawyers Association ("AILA") submits this *amicus curiae* brief to the Administrative Appeals Office ("AAO") on the nature of the "final merits determination" discussed in *Kazarian v. USCIS,* 596 F.3d 1115 (9th Cir. 2010) ("*Kazarian*") 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 ("INA"), 8 U.S.C. §1152(b)(1)(A). While the AAO's request for *amicus curiae* briefs is confined to aliens with extraordinary ability, resolution of this issue is also relevant to petitions for outstanding professors or researchers under Section 203(b)(1)(B) of the INA.

The AAO's request for *amicus curiae* briefs seems to indicate that the AAO interprets the "final merits determination" as a requirement established by *Kazarian*. This brief sets out why AILA believes the AAO and USCIS have misunderstood the meaning of *Kazarian* and what the decision does and does not require. Furthermore, AILA believes that any attempted substantive change to the existing regulatory framework can properly be accomplished only through formal rulemaking and not through an *ad hoc* appellate adjudication. Likewise, it is improper for USCIS to affect substantive regulatory change through the issuance of policy memoranda.

The first part of this brief analyzes the statutory and regulatory framework, case law, and agency guidance to explain the nature and application of the "final merits determination." The substantive analysis of evidence to evaluate its quality and credibility goes beyond merely counting evidence and is not new or unique to *Kazarian*. As discussed in detail herein, weighing the quality and credibility of evidence to determine whether the burden of proof has shifted to USCIS is the approach that lies at the core of federal court decisions since the employment-based first preference ("EB-1") classifications were first introduced. *See, e.g*., *Buletini v. INS*, 860 F. Supp. 1222, 1231 (E.D. Mich. 1994); *Muni v. INS*, 891 F. Supp. 440 (N.D. Ill. 1995); *Racine v. INS*, 1995 U.S. Dist. LEXIS 4336, 1995 WL 153319 (N.D. Ill. Feb. 16, 1995); *Gulen v. Chertoff*, 2008 U.S. Dist. LEXIS 54607 (E.D. Pa. July 16, 2008); *Grimson v. INS*, 934 F. Supp. 965 (N.D. Ill. 1996); *Russell v. INS*, 2001 U.S. Dist. LEXIS 52 (E.D. Ill. Jan 4. 2001) (N.D. Ill. 2001). Therefore, no meaningful conclusions can be drawn about the contours of the "final merits determination" without regard to other federal court decisions on point. Incorporating the analysis from cases that preceded *Kazarian* will provide an analytical framework that USCIS may apply in order to determine whether a petitioner has met the "preponderance of the evidence" standard to establish eligibility for extraordinary ability or outstanding professor or researcher classification.

The second part of this brief addresses the evidentiary and regulatory framework that should guide the merits determination of each piece of evidence submitted in support of petitions for extraordinary ability and outstanding researcher or professor. This merits determination focuses on the plain meaning of the statute and regulations, and is informed by case law, including *Kazarian*. Like earlier cases, the *Kazarian* court pointed out that USCIS cannot impose a higher burden beyond the plain meaning of the statute and regulations: "neither USCIS nor the AAO may unilaterally impose novel substantive or evidentiary requirements beyond those set forth at 8 C.F.R. § 204.5." *Love Korean Church v. Chertoff*, 549 F.3d 749, 758 (9th Cir. 2008). *Kazarian* at 3440-41.

Statement of Interest of Amicus

AILA has a direct interest in the question presented by the AAO because AILA is a voluntary bar association of more than 11,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent U.S. citizens, immigrant and nonimmigrant aliens, their family members, and businesses that receive their services, in proceedings with DHS.

I. The Legal Framework for a Final Merits Determination

USCIS has characterized the "final merits determination" referenced in *Kazarian* as one where all of the evidence is considered in totality to determine whether the alien has achieved the requisite level of recognition. The problem with this approach is that *Kazarian* mentions the concept of a "final merits determination" merely in passing and does not explain or provide a structural framework for such a determination. Assuming that the EB-1 category even authorizes or requires a "final merits determination," we submit that the nature and scheme of the analysis articulated by *Buletini* most closely adheres to the plain meaning of the statute and regulations, and provides the best approach to achieve USCIS's goals of consistent and transparent adjudication.

A. The Plain Meaning of the Statute and Regulations Provide an Adjudicatory Framework

Section 203(b)(1)(A) of the INA defines an alien of extraordinary ability as one who 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. The implementing regulation at 8 C.F.R. §204.5(h), published in 56 *Fed. Reg.* 60897 (Nov. 29, 1991), further defines extraordinary ability as a level of expertise indicating that the individual is one of that small percentage who has risen to the very top of the field of endeavor, as demonstrated 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. The regulation further provides that such evidence shall consist of either a one-time major, international award or by evidence satisfying at least three of the ten enumerated types.

Section 203(b)(1)(B) of the INA defines an outstanding professor or researcher as an alien who is recognized internationally as outstanding in a specific academic area. The regulation at 8 C.F.R. §204.5(i) does not further define outstanding professor or researcher, but does provide a list of initial evidence that must accompany the petition for such classification.

Significantly, neither the regulations nor the preamble in the final rule or the proposed rule, published at 56 *Fed. Reg.* 30703 (Jul. 5, 1991), mention a two-part analysis. Rather, under the

plain meaning of the regulation, eligibility for extraordinary ability and outstanding professor or researcher classification is established simply upon submission of the specified evidence.

1. The 1995 Proposed Regulations Confirm that Earlier Regulations Did Not Require a Two-Part Analysis

Earlier proposed regulatory changes, closely resembling USCIS's most recent policy guidance, were never implemented and cannot now be mandated to the field without notice and comment. Moreover, proposed regulations cannot form the basis for a "final merits determination." In the 1995 Proposed Rule on Employment-Based Immigrants, legacy INS attempted to clarify alleged confusion concerning the evidentiary lists set forth in the regulations and to make the adjudicative process easier. 60 *Fed. Reg.* 29771 (Jun. 6, 1995). The preamble to the Proposed Rule stated:

> The evidence listed is intended to be a guideline for the petitioner and the Service to determine extraordinary ability in order to make the adjudicative process easier for both the petitioner and the Service. The fact that an alien may meet three of the listed criteria does not necessarily mean that he or she meets the standard of extraordinary ability. The Service adjudicator must still determine whether the alien is one of that small percentage who have risen to the very top of his or her field of endeavor. Accordingly, the Service proposes to amend the regulations to state that meeting three of the evidentiary standards is not dispositive of whether the beneficiary is an alien of extraordinary ability. *Id.* at 29775.

Likewise, in the context of outstanding professor or researcher, the preamble noted:

> [T]he evidence listed is intended to be a guideline for the petitioner and the Service to determine whether the beneficiary stands apart in the academic community through eminence and distinction based on international recognition…. The fact that the beneficiary may meet two of the listed criteria does not necessarily mean that he or she has the international recognition to be considered an outstanding researcher or professor. The Service, therefore, proposed to amend this regulation to specifically state that having two types of the listed evidence does not compel a finding that the beneficiary is recognized internationally as outstanding. *Id.*

This proposed rule appears to be the first time legacy INS attempted to promulgate a preferred adjudicative process that implicitly involved a two-part evaluation of evidence. This commentary indicates clearly that legacy INS recognized that, under IMMACT 1990 and the implementing regulations, demonstrating at least three types of the specified evidence for extraordinary ability petitions and two types for outstanding professor or researcher would be legally sufficient to establish eligibility for the requested classification. In other words, legacy INS viewed the proposed rule as a necessary measure to bring the regulations into conformance with its view that the evidentiary standard should be more restrictive and that adjudicators should be given wider discretion to subjectively interpret the evidence.

As a result of widespread opposition, including AILA's response to this and other provisions,[1] legacy INS ultimately withdrew the proposed rule. In the ensuing 16 years, legacy INS and USCIS has never again tried to promulgate a similar rule. Although USCIS would not and could not achieve its objective through proper rulemaking, it recently purported to affect its desired substantive change to this evidentiary standard via a December 22, 2010 internal policy memorandum (PM-602-0005.1).

Proposed regulations do not represent an agency's considered interpretation of its statute. *McNamee v. Dep't of the Treasury*, 488 F.3d 100, 109 (2d Cir. 2007). It follows that proposed regulations have no legal effect. *United States v. Springer*, 354 F.3d 772, 776 (8th Cir. 2004) *citing Sweet v. Sheahan*, 235 F.3d 80, 87 (2d Cir. 2000). *See also LeCroy Research Sys. Corp. v. Commissioner*, 751 F.2d 123, 127 (2d Cir. 1984) ("Proposed regulations are suggestions made for comment; they modify nothing."); *Barton Mines Corp. v. Commissioner*, 446 F.2d 981, 990 n.4, 993 n.7 (2d Cir. 1971) (refusing to consider import of proposed regulations in rendering decision); *Wuillamey v. Werblin*, 364 F. Supp. 237, 243 (D.N.J. 1973) (a proposed rule does not have "the force of law."). As such, USCIS cannot now circumvent the notice and comment process required under the APA in order to provide so-called interpretive guidance to the field on a "final merits determination."

2. Substantive Changes to Regulatory Standards Must Be Accomplished Through Rulemaking Under the Administrative Procedures Act

AILA considers the issuance of the December 22, 2010 policy memorandum to be in violation of the Administrative Procedures Act ("APA") because the memorandum is a substantive rule even though it is characterized as guidance to USCIS officers on how to analyze evidence submitted in support of a petition for extraordinary ability, or outstanding professor or researcher. AILA believes strongly that substantive changes to the current regulatory framework and evidentiary standard for demonstrating eligibility for the extraordinary ability and outstanding professor or researcher classification can only be accomplished through formal rulemaking and not through *ad hoc* case adjudication and agency guidance.

Federal case law interpreting the APA has long distinguished between rulemaking and adjudication, and has established rules for reviewing the legality of each type of action. In adjudication, an agency applies an existing standard to the facts of a specific case. *Londoner v. Denver*, 210 U.S. 373, 385 (1908). In contrast, rulemaking sets a prospective standard to be applied to a broad group of regulated persons. *See, Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441, 446 (1915).

The Supreme Court has held that an agency may not bypass the rulemaking process and use standards announced in adjudications to prospectively bind other parties. *NLRB v. Wyman-Gordon*, 394 U.S. 759, 765-66 (1969). *See also, Morton v. Ruiz*, 415 U.S. 199 (1974). The clear lesson of these two cases is that an agency may not avoid rulemaking by making policy through adjudication. *See, Yesler Terrace Community Council v. Cisneros*, 37 F.3d 442 (9th Cir. 1994).

[1] AILA Comments on Proposed Rule on Employment-Based Immigrant Petitions, AILA InfoNet Doc. No. 95080760, Aug. 7, 1995.

The December 22, 2010 policy memorandum revises Chapter 22.2 of the Adjudicator's Field Manual ("AFM"), which is binding on adjudicators pursuant to AFM Section 3.4.

In *Appalachian Power Company, et al. v. Environmental Protection Agency*, 208 F.3d 1015, 1024 (D.C. Cir. 2000), the Supreme Court stated:

> It is well-established that an agency may not escape the notice and comment requirements by labeling a major substantive legal addition to a rule a mere interpretation. *See Paralyzed Veterans v. D.C. Arena L.P.*, 117 F.3d 579, 588 (D.C. Cir. 1997); *American Mining Congress v. MSHA*, 995 F.2d 1106, 1109-10 (D.C. Cir. 1993) ("We must still look to whether the interpretation itself carries the force and effect of law… or rather whether it spells out a duty fairly encompassed within the regulation that the interpretation purports to construe.") (Internal citations and quotations omitted.) *See Paralyzed Veterans* at 588.

In addition, the Supreme Court notes that an agency's guidance can have a binding effect for APA purposes regardless of language to the contrary:

> But we have also recognized that an agency's other pronouncements can, as a practical matter, have a binding effect. *See, e.g.*, *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1321 (D.C. Cir. 1988). If an agency acts as if a document issued at headquarters is controlling in the field, if it treats the document in the same manner as it treats a legislative rule, if it bases enforcement actions on the policies or interpretations formulated in the document, if it leads private parties or State permitting authorities to believe that it will declare permits invalid unless they comply with the terms of the document, then the agency's document is for all practical purposes "binding." *See* Robert A. Anthony, Interpretive Rules, Policy Statements, Guidances, Manuals and the Like—Should Federal Agencies Use Them to Bind the Public?, 41 Duke L.J. 1311, 1328-29 (1992), and cases there cited.

208 F.3d at 1021.

The principles of proper rulemaking under the APA should apply with even greater force where, as here, legacy INS once attempted to implement the desired substantive change to the evidentiary standard through proposed rulemaking, but later abandoned that effort by withdrawing the proposed regulation. The passage of more than 16 years since then does not make the current effort by way of a USCIS policy memorandum any more appropriate to accomplish such a substantive change by case adjudication.

B. Federal Case Law Informs the Merits Determination by Establishing the Contours for Evaluating and Analyzing Evidence

In seeking *amicus curiae* briefs on the nature of the "final merits determination" and how to apply such an analysis to EB-1 petitions, the AAO has correctly determined that *Kazarian* does not provide a structure for making a "final merits determination." Although *Kazarian* mentions

the "final merits determination," AILA submits that this analysis is not new and is not being raised for the first time in *Kazarian*. A merits determination has always been a part of the law for extraordinary ability and outstanding professor or researcher petitions. However, the *Kazarian* court, and USCIS in its subsequent policy memorandum and Request for Evidence (RFE) template, failed to recognize that the analysis articulated in *Buletini* provides a roadmap for applying the "final merits determination."

Federal cases explain the nature and application of a merits determination when analyzing evidence to determine whether the preponderance of evidence standard has been met. The most significant case on point is *Buletini* where the court first analyzed whether the plaintiff met three of the ten criteria enumerated in 8 C.F.R. §204.5(h)(3). Having determined that the plaintiff did provide sufficient evidence of three of the ten enumerated criteria, the court stated:

> 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 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.

Buletini, *supra* at 1234.

The court in *Buletini* recognized that USCIS's intention in creating specific enumerated evidentiary criteria for immigrant petitions for extraordinary ability was to "make compliance easier by apprising aliens of the evidence they need to present." *Id.* Accordingly, the court concluded that once the petitioner provides documentation required under the regulation, the petitioner has demonstrated *prima facie* eligibility for approval, and the burden of proof then shifts to USCIS to demonstrate by "specific and substantiated reasons" why the alien is nonetheless not qualified for the benefit. *Id*. However, a merits determination does not simply require counting the types of evidence submitted. Instead, there is a substantive evaluation of the credibility and value of each piece of evidence to determine whether it should be taken into account, along with the remaining evidence, to shift the burden from the petitioner to USCIS. In contrast to the approach suggested by *Kazarian* and recent USCIS guidance, the merits determination is not separate from an evidentiary analysis, but, rather, the merits determination is an inherent component of the review of evidence.

Simply put, once a petitioner presents credible evidence to satisfy three (extraordinary ability), or two (outstanding professor or researcher) of the regulatory criteria, the petitioner has demonstrated, by a preponderance of the evidence, eligibility for the classification sought. Thereafter, it is the burden of USCIS to show, by competent and substantial evidence, that the petitioner is nevertheless not qualified for the benefit sought.

The *Buletini* approach also reconciles what could otherwise be interpreted as inconsistencies in various federal court decisions cited *supra*, including *Muni, Racine,* and *Gulen*. All of these extraordinary ability cases evaluated whether the plaintiffs met at least three of the ten criteria and held that the plaintiffs were aliens of extraordinary ability if they did so, unless there was evidence indicating otherwise. The courts in *Muni* and *Racine* emphasized that legacy INS

offered no specific explanation or evidence as to why the plaintiff was ineligible despite meeting the evidentiary requirements, suggesting that the courts would have been open to consider such countervailing evidence. This approach is consistent with *Kazarian*. The court in *Kazarian* found that the plaintiff failed to provide evidence to meet three of the ten criteria and upheld USCIS's denial solely on that basis. *Kazarian, supra* at 1122.

C. Pre-*Kazarian* Agency Guidance Clarifies IMMACT 1990 Regulations

Legacy INS's interpretation of the IMMACT 1990 regulations was explained in a letter from legacy INS Acting Assistant Commissioner for Examinations, Lawrence Weinig, to the Northern Service Center Director. In his July 30, 1993 letter, Mr. Weinig advised that the evidentiary lists [in 8 C.F.R. §§204.(h) and (i)] were designed to provide for easier compliance by the petitioner and easier adjudication by legacy INS. The documentation presented must establish the alien is either an alien of extraordinary ability or an outstanding professor or researcher. Specifically, Mr. Weinig stated: "If this is established by … meeting three of the criteria for extraordinary aliens or two of the criteria for outstanding professors or researchers, this is sufficient to establish the caliber of the alien." There is no need for further documentation on the question of the caliber of the alien. However, according to Mr. Weinig's instructions, the examiner must evaluate the evidence presented as "[t]his is not simply a case of counting pieces of paper." 69 No. 32 *Interpreter Releases* 1037.

Legacy INS's interpretation of the IMMACT 1990 regulations clearly contemplated that the demonstration of at least three of the criteria for extraordinary ability or two of the criteria for outstanding professor or researcher would be sufficient, otherwise it would not have proposed the 1995 changes. The 1995 proposed rules would not have been necessary had legacy INS not had the desire to make the regulations more restrictive by introducing substantive changes through the notice and comment process.

D. The December 2010 Policy Memorandum Confuses the Proper Standards

In contrast to this interpretation, USCIS's December 2010 guidance, which was incorporated into the AFM, does not present the proper standards on which to base the "final merits determination" and in fact, does much to obfuscate those standards. For example, the guidance contains contradictory language. On page 4, the last full paragraph from the bottom states: "USCIS officers should then evaluate the evidence together when considering the petition in its entirety to determine if the petitioner has established … the required high level of expertise." In contrast, on page 13, the second full paragraph states: "for the analysis in part two, the alien's participation should be evaluated to determine whether it was indicative of the alien being one of the small percentage who have risen to the very top of the field of endeavor." These two sections appear to contradict one another as the first paragraph states that the "totality of the evidence" should be analyzed to determine if the whole of the parts establishes the "high level of expertise," while the second section suggests that, as with the previous AFM, each criterion must independently demonstrate the "high level of expertise." Thus, the memorandum appears to instruct officers to make two separate evaluations in the final merits analysis, for each criterion individually, and again, for the evidence as a whole.

Furthermore, page 14 of the guidance states, "(i)f the USCIS officer determines that the petitioner has failed to demonstrate these requirements, the USCIS officer should not merely make general assertions regarding this failure. Rather, the USCIS officer must articulate the specific reasons as to why the USCIS officer concludes that the petitioner … has not demonstrated … extraordinary ability." This is also problematic because while officers are advised to "articulate specific reasons" it appears that there is no further instruction offered in the guidance on what constitutes valid and *bona fide* reasons to deny a petition once the applicant has met the sufficient number of regulatory criteria. Rather, it invites officers to substitute their own judgment for that of the experts and in place of supporting documentation. Moreover, it thwarts efforts to achieve transparency, consistency, and predictability, and ultimately, due process, and fundamental fairness as it eliminates any clear standard from the adjudicatory process.

As noted above, *Kazarian* never reached the issue of how the second step in the analysis should be conducted. Rather, it cites favorably to several federal court decisions that USCIS appears bent on ignoring; beginning with *Buletini* and cases that follow the formula and methodology established by *Buletini*. AILA urges the AAO to look to *Buletini*, *Muni*, *Racine* and *Gulen* and apply the burden shifting test set forth most precisely in *Buletini* in the context of the preponderance of the evidence standard. This approach would have a number of benefits: (1) It would make USCIS adjudicatory practice consistent with applicable regulation; (2) It would provide petitioners with a clear evidentiary requirement articulated in the regulation; (3) It would provide examiners with a clearer standard of adjudication; and (4) It would retain USCIS's flexibility to question and deny petitions that involve those anomalous circumstances where an alien may meet the evidentiary requirements of the regulation, but where concrete and articulated reasons exist to believe that the alien is nevertheless not an alien of extraordinary ability.

II. Applying a Merits Determination to the Evidence

The *Kazarian* court and subsequent USCIS guidance mistakenly identify a "final merits determination" as an inherent part of adjudicating extraordinary ability and outstanding professor and researcher petitions, rather than offering a practical pathway for weighing and judging each piece of evidence to assess its value, credibility, and whether it satisfies the plain meaning of the statute and regulations. Instead, a merits determination is implicit in the adjudicative process when each piece of evidence is analyzed to determine whether a beneficiary satisfies the requisite evidentiary requirements. Using the preponderance of evidence standard, adjudicators should remain within the plain meaning of regulations and avoid imposing extra-regulatory and stricter requirements not located in or required by the regulations or pre-*Kazarian* guidance.

A. The Evidentiary Standard Is Preponderance of the Evidence

Decisions respecting the approval of immigration petitions are governed by the "preponderance of the evidence" standard. *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). To sustain approval, it "demands only 51% certainty." *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir. 1976), *see also National Lime Ass'n v. EPA*, 627 F.2d 416 (D.C. Cir. 1980). If there is insufficient evidence to meet the 51% standard, examiners should resolve their doubts by requesting clarifying evidence to afford the petitioner the opportunity to explain and document its eligibility. 8 C.F.R.

§103.2(b)(8). The preponderance standard is *not* a high standard: "preponderance of the evidence is rock bottom at the fact finding level of civil litigation." *Matter of E-M*, 20 I. & N. Dec. 77, at 83 (BIA 1989) citing *Charlton v. FTC*, 543 F.2d 903, 907 (D.C.Cir.1976). The BIA notes the preponderance standard is not actually explained in the law or regulations, but ultimately concludes that "when something is to be established by a preponderance of the evidence, it is sufficient that the proof only establish that it is probably true." *Matter of E-M* at 79 -80. (BIA 1989) (citations omitted).

BIA Member Lory Rosenberg, in *Matter of M-B-A-*, 23 I&N Dec. 474 at 484 (BIA 2002) notes that preponderance "requires evidence of a greater than 50% chance that an event will occur," citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987). She adds that preponderance "simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence," citing *In re Winship*, 397 U.S. 358, 371-72 (1970) (Harlan, J., concurring). She concludes that "[u]nlike other standards of proof such as reasonable doubt or clear and convincing evidence, the preponderance standard 'allows both parties to share the risk of error in roughly equal fashion'… citing *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 137 (1997). Thus, even the use of a "final merits determination" does not alter the fact that if the 50% threshold is crossed the case should be approved.

B. The Evidentiary Criteria Prong of *Kazarian* Is More than a Mere Counting Exercise

Contrary to the approach presently taken by USCIS, *Kazarian* does not limit the first part of the analysis to a simple counting exercise. Rather, in reviewing the evidence presented, the *Kazarian* court performed a substantive evaluation of each criterion to determine if the evidence supported a finding that a specific criterion was met. Finding that only two criteria were met, the court held that "the applicant has failed to satisfy the regulatory requirement of three types of evidence." *Kazarian, supra* at 3443. Therefore, *Kazarian* recognized the conclusion reached in *Buletini* that there is a qualitative aspect of this review, as "the examiner must evaluate the evidence presented." *Buletini*, supra at 1233 (citing letter from Lawrence Weinig, INS Acting Assistant Commissioner for Examinations to James Bailey, Director of the INS Nebraska Service Center (July 30, 1992) [hereinafter "Weinig letter"])

As discussed in this section, the final merits determination in *Kazarian* was not presented as an opportunity to second-guess the three criteria. The *Kazarian* decision did not contradict the standard enunciated in *Buletini*: "[o]nce it is established that the alien's evidence is sufficient to meet three of the criteria…, 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." *Buletini*, supra at 1234 (emphasis added). *See also Muni, supra* at 445–46 (recognizing that the burden is on the INS to explain why, despite having met three criteria, the evidence did not establish the acclaim and recognition standard). Any other interpretation belittles the significance of having met at least three criteria, rendering the whole purpose of meeting three criteria meaningless. Another federal district court recently concurred in this view, finding that the AAO had "already concluded that [the petitioner] met "two of the criteria and that "if we are able to identify one other … we must

conclude that the AAO's denial … was contrary to law." *Gulen v. Chertoff*, 2008 U.S. Dist. LEXIS 54607 (E.D. Pa. July 16, 2008). In this light, we believe it is helpful to take a quick look at the evidentiary categories themselves and how they should be interpreted before proceeding to the "final merits determination."

1. **Receipt of Lesser Nationally or Internationally Recognized Prizes or Awards, 8 C.F.R. §204.5(h)(3)(i); Receipt of Major Prizes or Awards for Outstanding Achievement, 8 C.F.R. §204.5(i)(3)(i)(A)**

This first criterion is one in which there are differences between the regulatory standards for an alien of extraordinary ability and outstanding professor or researcher. While the case at bar deals only with extraordinary ability aliens, the analysis is instructive for both categories. Looking first at the alien of extraordinary ability standards, in reviewing evidence submitted in support of this criterion, the following are not presently taken into consideration by USCIS adjudicators who appear to believe – incorrectly[2] - that the prize must not only be major but must be open to the entire field of endeavor in order to qualify:

- The regulations specifically allow "lesser" prizes or awards, indicating that the prizes or awards do not have to be "major";
- The lesser prizes or awards may be nationally *or* internationally recognized;
- The lesser prizes or awards must be received or directly attributable to the alien, keeping in mind that collaborative team work is inherent in many fields of endeavor, and group or collective prizes or awards should be given equal merit;
- The prizes or awards must be nationally or internationally *recognized*, though not necessarily nationally or internationally distributed; and
- It is the prize or award that should have national or international recognition through this distinct criterion, and not the alien. To hold otherwise would be imposing requirements beyond those set forth in the regulations which the Kazarian court disapproved. *Kazarian, supra* at 1034.

In its RFE template, USCIS urges an approach that is not consonant with these conditions and will lead to inappropriate adjudications. The template suggests strongly that the suggested evidence is required in order for the evidence to qualify in a particular category. In the awards category there are three specific examples of this concern:

- The template suggests examiners should request "evidence that the award was reported internationally in the top media." While it is certainly true that some major, internationally recognized awards are reported in the media, this is not true for all internationally recognized awards or for all fields. Depending on the field, the award may be the most important recognition in the field but it simply does not constitute

[2] For instance, the Pulitzer Prize, a major, internationally recognized award for excellence in journalism and the arts, is limited to work conducted in the United States. *See* http://www.pulitzer.org/files/entryforms/2011planofaward.pdf.

international news, since not all fields of endeavor are of sufficient interest to the general public.

- The template also suggests examiners ask for "evidence that the award is a familiar name to the public at large." Not only is this not required under the statute or the regulations, it is unclear what type of evidence would demonstrate the public's familiarity with a particular award. More importantly, a major, internationally recognized award in a particular field may simply be of little interest, and therefore, unfamiliar to the general public. For instance, the Abel Prize[3] which is considered the equivalent of the Nobel Prize in the field of mathematics may not be known to the general public. However, it is one of the highest honors a mathematician can receive for extraordinary contributions to the field.
- The template suggests it is relevant "that the award includes a large cash prize. AILA is concerned that this will lead to the conclusion – not supported by the regulation or by *Kazarian* - that unless an award includes a large cash prize, it would not qualify under the regulation. However, the Academy Awards of Merit given by the Academy of Motion Picture Arts and Sciences (commonly known as "the Oscars"), which is the top honor in motion pictures, has no cash prize.[4] Additionally, the Pulitzer Prize is $10,000, an amount unlikely to meet the definition of "large cash prize."[5]

Rather than following this potentially rigid checklist approach in scenarios where one size does not fit all, more appropriate lines of inquiry include, for example, the number of awardees, the criteria by which awardees are selected, the selection process itself, the entity that granted the award, and evidence that addresses the reputation of the award within the field.

Using the above analysis would change the way in which USCIS currently treats a number of honors, awards, and prizes that seem to consistently raise doubts in adjudicating petitions for extraordinary ability aliens and outstanding professors and researchers. At the top of this list would be research funding, which USCIS routinely rejects as not satisfying this criterion. For example, on recent AAO decision states, "…research grants simply fund a scientist's work. A substantial amount of scientific research is funded by research grants from a variety of public and private sources. Every successful scientist engaged in research, of which there are hundreds of thousands, receives funding from somewhere." *Matter of [name not provided]*, LIN 07 050 50034 (AAO July 16, 2009). Leaving aside the validity of the conclusion that hundreds of thousands of scientists in the United States are independently receiving grant funding, the AAO simply dismissed the receipt of funding, without any consideration of evidence of the competitive nature of the grant, on what basis grant recipients were selected, the amount of the grant, whether the alien petitioner was named in the grant, *et cetera*. In another decision, the AAO refused to consider funding as an award by stating: "[W]e cannot ignore the fact that research funding through competitive grants is inherent to many fields within the basic and applied sciences. Although prestigious grants may indicate the recognized value of the recipient's research, they are not prizes or awards for documented achievements." *Matter of [name not provided]*, LIN 08 158 52452 (AAO May 29, 2009). While acknowledging that some

[3] http://www.abelprisen.no/en/.
[4] http://www.oscars.org/awards/academyawards/rules/83aa_rules.pdf.
[5] http://www.pulitzer.org/files/entryforms/2011planofaward.pdf.

grants do indicate recognition of the alien's excellence, the AAO, without explanation, nevertheless finds that grants may not be treated as awards.

Certain sources of funding are more competitive and prestigious than others and are recognized as such throughout academia, and USCIS should not reject what is a well-established industry standard, without considering the specific nature of the research grant. As just one example, the National Institutes of Health (NIH) reports historically low grant success rates. In 2008 for example, the NIH grant approval rate was only 21.8%, meaning that barely more than one in five applications for NIH funding was successful. *See* http://report.nih.gov/success_rates/index.aspx. The peer-review process specifically calls for proof of scientific significance and innovation, and the NIH funds only those projects that are deemed to meet its very high threshold. NIH funds are awarded only after an expert review of an applicant's record of scientific achievement, significance and innovation. *See* http://grants.nih.gov/grants/peer_review_process.htm

USCIS also routinely rejects evidence of a beneficiary's receipt of fellowship awards and grants as meeting this criterion, AFM 22.2(i)(1)(E), based on the faulty assumption that they are "student-level scholarships" that do not rise to the level of "lesser nationally or internationally recognized prizes" (for extraordinary ability) or "major prizes for outstanding achievement" (for outstanding researchers). There are many types of fellowships, some of which do meet these standards, and should be considered on their own merits. Examples include the Woodrow Wilson International Center for Scholars fellowship, a highly competitive and prestigious fellowship requiring "outstanding capabilities and experience" as judged by "external interdisciplinary panels of distinguished scholars and practitioners." www.wilsoncenter.org/index.cfm?fuseaction=Fellowships.welcome Another example would be the Fulbright Scholar Program, which includes several different programs both for students and more established scholars. The Fulbright New Century Scholars global program is designed to bring together a group of "outstanding" research scholars and professionals, from the U.S. and participating countries around the world, who are selected through an open international competition to conduct multi-disciplinary research on a global theme of significance to mankind. www.cies.org/ncs/ AILA urges USCIS to recognize that competitive research grants and competitive fellowships awarded based on prior accomplishments can satisfy the criteria in 8 C.F.R. §204.5(h)(3)(i) and 8 C.F.R. §204.5(i)(3)(i)(A).

2. Membership in Associations That Require Outstanding Achievements, 8 C.F.R. § 204.5(h)(3)(ii); 8 C.F.R. § 204.5(i)(3)(i)(B)

With respect to 8 C.F.R. §204.5(h)(3)(ii) and 8 C.F.R. §204.5(i)(3)(i)(B), AILA agrees with USCIS that where membership in professional associations may require *only* a certain level of education, a payment of a membership fee, or where membership is an entry requirement for certain professions, such membership would not rise to the level required in the regulations. However, there is nothing in the statute or the regulations that requires that membership must be exclusive or small. There are several highly selective professional organizations with large memberships that require aspiring members to go through rigorous nomination and review processes that satisfy the dictates of 8 C.F.R. § 204.5(h)(3)(ii). Examples include the International Astronomical Union, Royal Societies for various professions in the United Kingdom, and the American Society for Clinical Pharmacology and Therapeutics. There is

nothing in the regulations to support the suggestion that the exclusivity of an organization satisfies this evidentiary criterion. The focus of inquiry should be on the organization's membership requirements and processes, and the factors an organization takes into consideration in determining whether an individual has the requisite level of achievement, rather than the number of members.

Moreover, in both the extraordinary ability and outstanding professor or researcher contexts, USCIS should recognize that there are professional associations with different levels of membership and higher levels of membership may satisfy this evidentiary criterion. For example, the American College of Clinical Pharmacology (ACCP) has four levels of membership. Although all membership levels have annual fees, the full Member and Fellow levels of membership require certain substantial accomplishments in the field. Arguably, an applicant who is a Fellow of the ACCP could rely on this status as evidence of membership in associations that require outstanding achievements. The Institute of Electrical and Electronics Engineers (IEEE) is another similarly structured organization, with senior membership reserved for those with significant professional technical accomplishments. AILA asks that USCIS consider the degree of achievement required to qualify for membership in multi-level professional organizations to determine whether the membership is, at a level that satisfies the evidentiary criterion.

3. Published Material About the Alien, 8 C.F.R. § 204.5(h)(3)(iii); 8 C.F.R. §204.5(i)(3)(i)(C)

The regulatory definition for this criterion is rather straightforward, leaving little room for misinterpretation or misunderstanding. While there are slight differences in the regulatory language in 8 C.F.R. § 204.5(3)(i)(C) and 8 C.F.R. § 204.5(h)(3)(ii), both state that the documentation must demonstrate that material is published:

1) about the alien;
2) relating to the alien's work in the field;
3) in "professional" publications (for outstanding researchers) or "professional, major trade, or other major media" (for extraordinary ability); and,
4) shall include the title, date, and author of the material.

In *Russell v. INS*, 2001 U.S. Dist. LEXIS 52 (E.D. Ill. Jan 4, 2001), the District Court rejected INS's position that articles from Chicago newspapers did not demonstrate that Russell had "major media" attention because the newspapers were not *national* media. The court noted: "Nowhere in the relevant language of the INS regulation is there a requirement that the submitted media publications be from news outlets throughout the country." *Id* at 15, n.5. Thus, USCIS should focus on the circulation of the publication, its intended audience if it is a professional or trade publication, or the editorial influence of the media source, rather than solely whether the publication is *national* in scope.

USCIS guidance and templates subsequent to *Kazarian* are an indication that despite the clear regulations and case law, the Service Centers are operating under the presumption that the "published material be primarily about the beneficiary and the beneficiary's work." There is no basis in the regulations for this requirement. Moreover, such a requirement has been repeatedly

rejected by the federal courts. In *Muni*, the court held that "published material about [Muni] in professional or major trade publications or other major media, relating to [his] work in the field for which classification is sought" was sufficient to satisfy this criterion. *Muni, supra* at 445. The court noted that the "articles do not establish that Muni is one of the stars … but that is not the applicable standard." *Id*. Instead, the court found that "the articles Muni submitted, which appeared in various newspapers and hockey magazines, clearly fit this requirement" *Id*. A similar holding was set forth in *Racine, v. INS*, 1995 U.S. Dist. LEXIS 4336, at 17, 1995 WL 153319, at 6 (N.D. Ill. 1995). There, the court found that "[The] INS was not following its own regulations when it held that there are no articles which state that Racine is 'one of the best in the field.'" Like the court in *Muni*, *Racine* held that "articles [that] … demonstrate his work within the field" were sufficient to meet this criterion. *Id*.

This extraregulatory requirement would appear to reject published material about collaborative work. Scientific research is a collaborative endeavor, which requires the efforts of several different people in order to be successful. If the beneficiary's name does not appear directly in the published material, it does not necessarily mean that the material is not about the beneficiary's work. Adjudicators should remember that all co-authors contribute significantly to a published article and, if that article receives media coverage, that coverage should be acceptable as evidence of meeting this criterion. Even the lead researcher or first author of an important and exciting project may not be interviewed if the research was conducted in a laboratory where someone else is the principal investigator.

4. Participation as a Judge of the Work of Others, 8 C.F.R. § 204.5(h)(3)(iv); 8 C.F.R. § 204.5(i)(3)(i)(D)

This criterion in particular has proved troublesome both in terms of content and how it is to be treated in the "final merits determination." One example of judging the work of others that perfectly illustrates the problem with this evidentiary category is the concept of peer review. Generally, USCIS dismisses peer review in scientific cases on the supposition that every scientist does peer review and requests for peer review must in and of themselves be both numerous and the requester must specifically state the request is made on account of the aliens extraordinary or outstanding ability. The regulations themselves impose no such requirements and, historically, neither has legacy INS or USCIS. For example, the 1992 Weinig letter, cited above, recognizes that "participation by the alien as a reviewer for a peer reviewed scholarly journal would more than likely be a solid piece of evidence." It merely requires participation and does not qualify that participation. Moreover, legacy INS has consistently recognized that peer-review satisfies this criterion. See, *e.g.*, AILA/TSC June 3, 2002 Liaison Meeting Approved by TSC for Publication August 14, 2002, published on AILA InfoNet at Doc. No. 02082742 (posted Aug. 27, 2002); Questions and Answers from October 7, 2002 AILA/TSC Liaison Meeting, published on AILA InfoNet at Doc. No. 0212641 (posted Dec. 16, 2002). The October 2002 liaison minutes further recognize that reviewing for a "notable journal is not the only manner in which to satisfy…[this] criteria….one may be deemed to be a judge of the work of others … by providing thesis direction in the academic setting or by serving as a reviewer for significant research grants...."

AILA also notes that there are a number of similar positions that should satisfy this criterion. For example, a position on a journal editorial board would certainly meet this standard, as it is the editorial board that, *inter alia*, selects the peer reviewers, thereby judging the judges, so to speak. Likewise, conference organizers are often involved in reviewing abstracts and selecting speakers, deciding whose work merits presentation, as well as selecting the appropriate experts to speak on a particular topic. Authorship of review articles and textbook chapters may also fall within this criterion, as these are frequently a comprehensive review and commentary on a specific area. Review articles and chapters tend to carry significant authority because they synthesize and analyze the results of many independent studies, making strong conclusions that are used in the field. Other examples include moderating and/or chairing conference presentations, seats on advisory boards, or positions on committees.

The common thread with all of these examples is that they involve evaluating and analyzing the work of others in the field, and making an assessment of the importance of the others' work. This would be the appropriate line of inquiry to determine whether someone has met this criterion; namely, to determine if they did in fact judge the work of others. As the court held in *Buletini*, "The fourth criterion … only requires evidence that the alien participated as a judge of others in his field; it does not include a requirement that an alien also demonstrate that such participation was the result of his having extraordinary ability. Such a requirement would be a circular exercise." *Buletini*, *supra* at 1231. The focus of the inquiry should be on the nature of the activity itself, and how it evidences that the alien has in fact judged the work of others.

5. Original Scientific, Scholarly, Artistic, Athletic, or Business Related Contributions of Major Significance, 8 C.F.R. § 204.5(h)(3)(v); Original Scientific or Scholarly Research Contributions, 8 C.F.R. § 204.5(i)(3)(i)(E)

There are a number of ways to establish the original character of, and where appropriate, the significance of, contributions. However, recent USCIS practice suggests that certain historically acceptable means of proving this criterion are generally being disregarded. Foremost among these are the opinions of experts, particularly if their letters were written specifically for the petition. This approach is both contrary to prior practice and nonsensical. Experts, in all fields, do not give their opinion unless asked to do so to prove a particular evidentiary point in a particular legal proceeding or application. To draft an expert opinion prior to the existence of a need for such an opinion certainly would not make such an opinion more reliable as the RFEs and denials being issued by USCIS seem to suggest. Some USCIS RFEs and denials also take the position, without any proof, that all scientific research is original. Although this position is not empirically sustainable, even if it were, expert opinions are one key tool in determining what is an original "contribution" and whether, if required, the contribution is "major."

As background on this issue, we note that while expert letters by themselves are not conclusive evidence of extraordinary ability, such letters often summarize and explain the documentary evidence submitted. Moreover, failure to consider expert testimony and/or affidavits is a violation of due process. *Tun v. Gonzales*, 485 F. 3d 1014 (8th Cir. 2007*); Rodriguez Galicia v. Gonzales*, 422 F. 3d 529, 538–40 (7th Cir. 2005); *Lopez-Umanzor v. Gonzales*, 405 F. 3d 1049, 1056–58 (9th Cir. 2005); *McDonald v. Gonzales*, 400 F. 3d 684,687–88 9th Cir. 2005). Finally, unchallenged expert testimony cannot be rejected outright. *Banks v. Gonzales*, 453 F. 3d 449,

453–54 (7th Cir. 2006). The determination of the credibility of documentary evidence should be the same as the determination of the credibility of testimony and therefore, an adverse decision must be based on "specific, cogent reasons that bear legitimate nexus to the finding." *Zahedi v. INS*, 222 F. 3d 1157, 1165 (9th Cir. 2000). In other words, an expert letter may not be dismissed without a specific, cogent reason for finding that it is not credible evidence in support of the petition.

USCIS has a long history of accepting expert letters as evidence. Expert letters were listed in the 1992 Weinig letter, cited *supra,* among the acceptable types of evidence to determine whether an alien could establish extraordinary or outstanding ability through the evidentiary criteria addressed in the opinion. A number of non-precedent AAO decisions reinforced this view. For example, one AAO decision noted that "[t]he significance of the Beneficiary's research work is evidenced by the numerous letters from doctors and researchers in Canada, China and the United States, attesting to the merits of the beneficiary's contributions to his field and to his international reputation." *See, e.g.*, *Matter of [name not provided]*, 1997 WL 33171069 (AAO 1997); *Matter of [name not provided]*, AAU LIN 95 08951447, 1997 WL 33171273 (AAO 1997). In addition, the court in *Buletini* held that expert statements respecting the petitioner's contributions must be fully considered, even if the expert opinions came from people who knew or had worked with the beneficiary. *Buletini, supra* at 1232. Similarly, the court in *Muni* found that dismissal of expert letters without full consideration was "clear evidence that [the INS] did not adequately evaluate the facts before it." *Muni, supra* at 445. See also *Racine v. INS*, 1995 U.S. Dist. LEXIS 4336, 1995 WL 153319 (N.D. Ill. Feb. 16, 1995).

Kazarian did not change this analysis. Rather, *Kazarian* noted that expert opinion letters cannot be vague and should specifically identify contributions and give examples of how they influenced the field. *Kazarian*, *supra* at 1122. A letter which satisfies these requirements is objective testimonial evidence which must be considered, and which may provide critical insight to understand the nature and significance of the contributions. Given that many of these petitions involve complex scientific and technical work and USCIS examiners are not experts in every field, such letters should be valued as a way to comprehend what the work is all about. An expert letter may not be dismissed without some specific, cogent reason for finding that it is not credible evidence in support of the petition.

AILA appreciates the language in the December 2010 USCIS guidance directing adjudicators to consider the probative value of expert testimonials. However, in practice, RFEs and NOIDs often fail to explain the deficiencies in the letters or ignore them altogether. The letters are also rejected on the grounds that they are too "boastful", were written for the petition and thus potentially not reflective of the true opinion of the writer, were written by someone with whom the alien had worked and thus inherently suspect, were written by someone who did not know the beneficiary well enough and thus incapable of making a cogent evaluation, etc. The irony is that the RFE or NOID usually requests "testimony and/or support letters from experts." No one expects adjudicators to be familiar with every field of endeavor. However, everyone should expect that adjudicators would give credence to expert testimony in the form of opinion letters if there is no actual evidence, beyond the adjudicators subjective belief or suspicion, that the letters are false.

Expert letters are not the only way to establish original contributions. There are myriad ways to show original contributions, based on the nature of the field of expertise and the nature of the claimed contribution. These include but are not limited to publication of the work in top journals, citation of the work, invitations to present the work, commercial exploitation of the work, patents, and the role of the work in a chain of discoveries that ultimately lead to final conclusions in a particular matter. USCIS appears to be following a path where it dismisses much of this evidence or simply asserts, in a conclusory manner, that it does not prove the requisite category. Given the preponderance of the evidence standard, if evidence of the above nature is presented as part of the petition, USCIS must, under *Buletini* and *Kazarian*, specifically explain *how* the evidence leads to the conclusion that the alien has not made an original contribution to the field. Simply concluding he or she has not done so and reiterating the statutory and regulatory requirements, without more, fails to meet this legal requirement incumbent upon the Service.

In this category too, the USCIS guidance and RFE templates do not solve the analytical problem and introduce novel requirements in violation of the holding in *Kazarian*. For example, 8 CFR § 204.5(h)(3)(v) requires evidence of the alien's original contributions of major significance *in* the field and not, as suggested by the language in the guidance, *to* the field**.** The guidance directs adjudicators to look for evidence that "peer reviewed articles…have provoked widespread commentary." While the guidance continues by offering the alternative of "received notice from others working in the field or entries (particularly a goodly number) in a citation index," the prominence of "provoking widespread commentary" in both the guidance and in the EB-1-1 RFE template suggests that such evidence is not only potentially probative, but legally required. The guidance seems to focus more on a quantitative analysis ("how many or how broad?"), rather than a qualitative analysis. A qualitative analysis would be more appropriate, as it could address the reputation of the journal or conference where the work appeared, and the prestige of the experts commenting on the significance.

Although the questioned presented by the AAO is confined only to the extraordinary ability category, given that USCIS guidance applies the same standards to the outstanding professor and researcher category, AILA also reiterates its concern that the regulatory criterion at 8 C.F.R. § 204.5(i)(3)(i)(E) is confused with the regulatory at 8 C.F.R. § 204.5(h)(3)(v). The former only requires that contributions be original, while the latter requires they be of "major significance." The language in current USCIS guidance imposes an extra-regulatory burden by requiring applicants for the outstanding professor and researcher classification to demonstrate not only the originality of their contributions, but also the "impact on subsequent work." This is not the appropriate line of inquiry, as it goes beyond demonstrating the originality of the alien's contributions.

6. Authorship of Scholarly Articles, 8 C.F.R. § 204.5(h)(3)(vi)

AILA is concerned that USCIS takes an unduly restrictive position on what constitutes a "scholarly article." The regulatory criterion requires "authorship of scholarly articles in the field, in professional or major trade publications, or major media." Instead of making up requirements for what constitutes such publications, including whether the article has footnotes, endnotes, or a bibliography, USCIS should instead look to applicable case law for the definition. *Gulen, supra* held "… a work becomes scholarly by virtue of its author and its subject matter, not its intended

audience." *Gulen* at 3. The definition in *Gulen* better lends itself to application particularly in cases where the material being proffered as a "scholarly article" is published in a major newspaper, periodical, or trade or professional publication.

USCIS should also adhere to the plain meaning of the regulatory definition in this category. RFEs and denials have often stated that researchers are expected to publish and that aliens seeking to qualify as extraordinary must show that their publications establish national or international acclaim or international recognition.[6] As held in *Buletini,* this would constitute an abuse of discretion because it would require a "plaintiff to prove he is a doctor of extraordinary ability in order to prove that he is a doctor of extraordinary ability." *Buletini, supra* at 1231. The regulations simply ask for "evidence of authorship of scholarly articles in the field, in professional journals." The regulations do not require that the journals be prominent or that the alien's publications be of particular caliber. As such, USCIS should accept evidence of authorship of scholarly articles without requiring additional information. While it is accurate to state that publishing alone does not necessarily equal sustained acclaim or international recognition, publishing alone *does* satisfy the "authorship of scholarly articles in the field" criterion.

Research and similar activities that are conducted for proprietary purposes, such as industrial research and product development pose special issues. Consideration should be given to petitioners who would normally publish their findings in professional publications, major trade publications or other major media, but due to national security, trade secret, or proprietary reasons, are unable to publish in the public domain. Under these circumstances, USCIS should consider comparable evidence *(e.g.,* invention reports, technical reports, internal presentations to senior management or a larger consortium, submissions to government agencies, etc.) for this regulatory criterion.

7. Display of Work in Artistic Exhibitions or Showcases, 8 C.F.R. § 204.5(h)(3)(vii)

The regulation at 8 C.F.R. § 204.5(h)(3)(vii) asks for evidence of the display of the alien's work in the field at artistic exhibitions or showcases. This criterion readily applies only to artistic fields and may exclude aliens practicing in other fields of endeavor from using it directly. However, 8 C.F.R. § 204.5(h)(4) allows submission of comparable evidence in a situation where a criterion does not readily apply to the beneficiary's occupation and, therefore, USCIS should consider such comparable evidence if it is submitted. To evaluate evidence submitted to satisfy this criterion, USCIS should consider whether the work displayed is the alien's work, including

[6] Prior to its revision, the AFM at chapter 22.2(i)(1)(E) referenced a 1998 report by the Association of American Universities' (AAU) Committee on Graduate Education, which states that post-doctoral appointees are expected to publish the results of their research. USCIS has taken that statement out of context. USCIS must analyze the report as a whole. For instance, the same report also notes that postdoctoral appointees perform a significant portion of the nation's research and augment the role of graduate faculty in providing research instruction to graduate students. This confirms that post-doctoral appointees are an important scholarly force. Committee on Graduate Education, Ass'n of American Universities, Report and Recommendations (1998), *at* www.aau.edu/WorkArea/showcontent.aspx?id=6720

the collaborative work product of a team. For instance, where an alien is part of a group (not a solo artist who is the star of his/her own show), the display of the alien's artistic work should satisfy this criterion. As an example, an alien actor's appearance as a character in a television show (which has other characters played by other actors) should meet the standard.

The most obvious examples of exhibitions and showcases are art galleries or museums, film, television or theatrical productions, etc. However, USCIS should also consider less conventional venues. In essence, this criterion calls for confirmation that the alien's work has been presented to an audience of viewers, which would suggest the public's interest in the alien's work. As such, other venues that display the alien's work to the public could include artistic exhibitions on public streets (e.g., Marc Chagall's Four Seasons mosaic sculpture at the Exelon Plaza / The First National Plaza in Chicago), exhibitions at public libraries (see http://www.loc.gov/exhibits/ for exhibitions at the Library of Congress), art displayed at places or worship (e.g., Tiffany stained glass windows displayed at numerous churches around the U.S.), etc. There are many ways in which artists display their work for public viewership and USCIS should consider submitted evidence with that in mind.

8. Leading and Critical Role for Distinguished Organization, 8 C.F.R. § 204.5(h)(3)(viii)

In evaluating this criterion, the regulation requests "evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation." AILA contends that this does not necessarily require a showing that the alien's role was leading or critical to the organization as a whole. This is particularly true in large organizations such as universities, nonprofits or corporations which may have many parts and in cases where an alien may play a leading or critical role for a key function or component of the organization. For example, an alien may have served as a Principal Investigator (PI) on a number of projects at a major medical research center pursuant to a prestigious series of grants. However, his projects may be only a small part of the overall research activities at this major medical research center. Nevertheless, if the work is part of what has allowed the research center to be considered as distinguished or if it sustains the continued distinguished reputation of the center, it should meet this evidentiary criterion since no one individual can be responsible for the standing of a large institution. Other examples could include a petroleum engineer leading a research group at a large oil company, the director of a regional program at an international aid organization, or the director of an athletics program at a university with a distinguished record in that field of sports.

Finally, AILA appreciates the common sense use of a dictionary definition of the term "distinguished." The second part of that definition – befitting an eminent person – provides an alternative method of analysis of this criterion. In addition to showing the reputation of the institution or its key component, the alien could also show that others who hold similar positions are in their own right "eminent." Common examples would be editors of journals where the other editors besides the alien have distinguished reputations, or research programs where the other researchers at the same level (or who have held the alien's position previously) can document that they are "distinguished."

9. High Salary in Relation to Others in the Field, 8 C.F.R. § 204.5(h)(3)(ix)

AILA's concern respecting this category and how it impacts the *Kazarian* analysis stems from language in the USCIS RFE template that is contrary to the guidance to the field which provided examiners with three specific websites that offer federal databases of wages in specific fields. These sites included the Department of Labor's Office of Foreign Labor Certification Online Wage Library. This site is a particularly strong and long-standing tool, as it forms the basis for wage determinations in H-1B and labor certification cases. Included in this database is an upper-most level, for those most experienced in the field. This would provide USCIS with a very clear parameter to determine if a salary is indeed considered "high." Disconcertingly, in a side note, the template dismisses DOL data as not establishing on its own that a salary is "significantly" higher than others. However, the regulatory language requires evidence that the alien has "commanded a high salary, or other significantly high remuneration …." The language referencing "other significantly high remuneration" was meant to encompass forms of compensation other than salary alone, such as a very high bonus or a high fee for services rendered. It does not require that the salary be *significantly* higher as compared with others, nor does it require that it be amongst the highest in the field. There is also no requirement that the petitioner provide an organizational justifications to pay above the compensation data, as suggested in the template, since this is not probative of whether the salary is "high" as compared to others.

10. Commercial Success in the Performing Arts, 8 C.F.R. § 204.5(h)(3)(x)

AILA has no comment respecting this criterion that is relevant to the instant *amicus* request.

11. Comparable Evidence, 8 C.F.R. § 204.5(h)(4)

Where specific evidentiary criteria do not readily apply, the regulation at 8 C.F.R. § 204.5(h)(4) provides much-needed relief. It is critical in that case to remember that 8 C.F.R. § 204.5(h)(4) allows for both the provision of evidence that is comparable to any of the ten listed criteria, and other evidence of equivalent persuasive value to demonstrate extraordinary ability.

In the past, the AAO has held that it would allow the submission of comparable evidence only if none of the ten criteria of 8 C.F.R. § 204.5(h)(3) apply to the beneficiary's occupation. *See, e.g.*, *Matter of [name not provided]*, EAC 04 033 50279 (AAO May 25, 2007). AILA would ask the AAO at this juncture to reconsider that position as it renders the "comparable evidence" criterion practically unusable. To conclude that the threshold for eligibility under the "comparable evidence" rule is a showing that none of the ten criteria apply to the beneficiary's occupation is to strip this regulation of any meaning. The ten regulatory criteria are sufficiently diverse such that they apply, at least partially, to most existing occupations. Thus, under this reasoning, the "comparable evidence" regulation would be used only for the most obscure fields in extremely rare circumstances. This interpretation of the regulations is too narrow, as nothing suggests that the "comparable evidence" regulation is reserved only for such extreme scenarios.

For example, an alien who has not won a major, internationally recognized award may select three (or more) criteria out of the ten available options in order to prove his or her extraordinary

ability. However, some of the listed criteria are field-specific and do not readily apply to every occupation. This disqualifies aliens who do not work in those specific fields or occupations from using these criteria and limits such aliens to a smaller list. Specifically, three of the ten criteria apply only to particular occupations:

- 8 CFR § 204.5(h)(3)(vi) (evidence of authorship of *scholarly* articles) applies only to scholars;
- 8 CFR § 204.5(h)(3(vii) (evidence of display of the alien's work at *artistic* exhibitions or showcases) applies only to artists; and
- 8 CFR § 204.5(h)(3)(x) (evidence of commercial successes in the *performing arts*) applies only to performing artists

Thus, an alien who is not a scholar, an artist, or a performing artist (e.g., a physician) would have a choice of only seven regulatory criteria in order to prove extraordinary ability. At the same time, a scholar, or an artist working in the non-performing arts, would have to choose among eight criteria.

AILA believes that the "comparable evidence" regulation addresses the above deficiencies by allowing the submission of evidence comparable to any one or more of the criteria, or any other evidence of equally persuasive value, for establishing E11 eligibility. As one example, the "display" criterion in 8 CFR §204.5(h)(3)(vii) applies to the arts, and no criterion specifically calls for evidence of lectures and presentations, which is how scholars and academics "display" their work. "Display of work" at scholarly exhibitions is comparable to the "display of work at artistic exhibitions" because in both cases, the alien presents his work to an audience; may participate by invitation only; and invitations to display one's work are granted based on merit of achievement and competitive selection. Consequently, a scholar's display of work at a prestigious international conference is comparable to an artist's display at a widely anticipated artistic exhibition, and should be admissible evidence to satisfy the "display" criterion under the "comparable evidence" regulation.

The "comparable evidence" regulation is ameliorative, as it permits the use of evidence that does not naturally fall into one or more of the ten criteria and expands the alien's options for proving extraordinary ability. The logical construction of the regulation, therefore, is that if the alien does not readily meet at least one of the enumerated criteria, he may provide comparable evidence that demonstrates extraordinary ability. Any other interpretation of the interplay between the regulatory criteria in 8 C.F.R. § 204.5(h)(3)(i)-(x) and the "comparable evidence" regulation would render the latter meaningless. Thus, if an alien can demonstrate that certain criteria do not readily apply to his occupation then comparable evidence should be considered to allow for a fair evaluation of eligibility.

Conclusion

In order to establish eligibility for extraordinary ability classification, a petitioner/beneficiary must submit the required initial evidence. Under *Buletini*, all initial evidence should be qualitatively evaluated – rather than merely counting - to determine its credibility and value, and in order to determine whether a *prima facie* case has been established. This is not a two-step

process that would require, first, the procedural counting of all the pieces of the evidence and, second, a substantive totality of circumstances analysis to determine whether an individual is one of that small percentage who has risen to the top of her field. Instead, based on the statue and regulations, if the petitioner/beneficiary has presented a *prima facie* case, then the burden shifts to USCIS to articulate substantiated, specific reasons why the burden of proof has not been satisfied. Otherwise, the burden of proof has been satisfied and USCIS must follow the regulatory framework to approve the benefit.

The Ninth Circuit's decision in *Kazarian* must not be read alone, as the principles found in *Buletini*, *Muni*, *Gulen*, and other cases that address the statutory and regulatory framework are essential to the "final merits determination" portion of the analysis. None of the prior cases discussed a two-step approach as such a procedural/substantive distinction is nowhere to be found in the statute or regulations. The super-imposition of a totality of circumstances determination and re-analysis of submitted evidence goes beyond the application statutory provisions, regulations, pre-*Kazarian* guidance, and federal case law.

Respectfully submitted,

AMERICAN IMMIGRATION
LAWYERS ASSOCIATION

By: Deborah S. Smith
Attorney for Amicus AILA