AAO CASES AFTER *KAZARIAN*

by Nicolai Hinrichsen and Stephen Yale-Loehr[1*]

While some argue against welcoming top international scholars to our academic institutions and doctors and nurses to our medical institutions, the vast majority of Americans understand and embrace the benefits of high-skilled immigrants.[2] For example, more than one in four doctors and one in six nurses in the United States are foreign-born. Indeed, an individual being treated for COVID-19 is likely being treated by an immigrant medical professional.[3]

The benefits to the United States extend beyond front-line medical workers.[4] The Center for American Entrepreneurship determined that immigrants or the children of immigrants founded 24 percent of Fortune 500 healthcare-related firms.[5]

Immigrant entrepreneurship has long been a significant driver of economic growth and job creation, though exact statistics are difficult to calculate. A study using Census Bureau data concluded that while immigrants constitute 15 percent of the general U.S. workforce, 25 percent of U.S. entrepreneurs are immigrants.[6]

Elsewhere in this book, Rita Sostrin has updated her 2011 article analyzing *Kazarian v. USCIS*,[7] which continues to hold sway over USCIS adjudications over a decade later. Interpretations of *Kazarian* can be the key to working in the United States for many of the most talented international workers. We reviewed current USCIS Administrative Appeals Office (AAO) adjudication trends based on a survey of over 100 EB-1A extraordinary ability decisions rendered in 2021 to offer insights that may assist in preparing successful petitions. Our review shows how some USCIS requests for evidence (RFEs) and denials contradict the plain meaning of applicable regulations and all preceding case law.[8]

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[2] Phillip Connor and Neil G. Ruiz, *Majority of U.S. Public Supports High-Skilled Immigration*, Pew Research Center (Jan. 22, 2019), www.pewresearch.org/global/2019/01/22/majority-of-u-s-public-supports-high-skilled-immigration/.

[3] Dany Bahar, *Don't Forget to Thank Immigrants, Too*, Brookings (Apr. 1, 2020), www.brookings.edu/blog/up-front/2020/04/01/dont-forget-to-thank-immigrants-too/.

[4] U.S. World and News Report, *2021 Best Global Universities Rankings*, www.usnews.com/education/best-global-universities/rankings (eight of the top ten global universities are in the United States).

[5] Startupusa.org, *Immigrant Founders of the 2017 Fortune 500*, http://startupsusa.org/fortune500/ (based on 2017 revenues).

[6] Sari Pekkala Kerr & William Kerr, *Immigrants Play a Disproportionate Role in American Entrepreneurship*, Harv. Bus. Rev. (Oct. 3, 2016), https://hbr.org/2016/10/immigrants-play-a-disproportionate-role-in-american-entrepreneurship.

[7] 596 F.3d 1115 (9th Cir. 2010).

[8] For a more comprehensive examination of AAO adjudication trends and useful practice pointers, see Dan Berger, Emma Binder, Philip Katz, David Wilks & Stephen Yale-Loehr, *Recent Trends in EB 1 Extraordinary Ability and Outstanding Professor/Researcher Green Card Petitions*, https://millermayer.com/2018/recent-trends-in-eb-1-extraordinary-ability-and-outstanding-professor-researcher-green-card-petitions/.

A survey of 102 nonprecedent EB-1A AAO decisions from January 2021 to June 2021 demonstrates how the AAO is adjudicating *Kazarian*'s final merits determination. The AAO in fact only reached the final merits determination in 28 percent of those cases, because the petitioner had failed to satisfy at least three of the regulatory criteria in the other 72 percent of cases. Out of those 28 percent, however, the AAO upheld the appeal or remanded only 12 percent. This is a high bar indeed, and it demonstrates the AAO's reluctance to reverse USCIS service center denials of EB-1A petitions.

A close reading of those AAO decisions provides no further insight into how the final merits determination of *Kazarian* should be properly applied. The AAO decisions brim with the circular reasoning a federal court found so objectionable in *Buletini v. INS*.[9] Here is the typical boilerplate language recited in AAO EB-1A decisions that reach a final merits determination:

> As the Petitioner has submitted the requisite initial evidence, we will evaluate whether the Petitioner has demonstrated, by a preponderance of the evidence, that he has sustained national or international acclaim and is one of the small percentage at the very top of the field of endeavor, and that his achievements have been recognized in the field through extensive documentation.[10]

This language simply regurgitates the regulatory criteria for EB-1A petitions. The boilerplate typically continues:

> In a final merits determination, we analyze a petitioner's accomplishments and weigh the totality of the evidence to determine if his successes are sufficient to demonstrate that he has extraordinary ability in the field of endeavor.[11]

For example, a number of recent AAO decisions claim that a given criteria is not satisfied because the petitioner has not maintained national or international acclaim "over a long period of time."[12] Another oft-cited deficiency is that "evidence of *past* acclaim cannot suffice to establish eligibility."[13] Another AAO decision dismissed an invitation to participate as a judge of the work of others on the grounds that "it is an invitation to do so in the future."[14] Whether past, present, or future, it appears that if the AAO dislikes qualifying criteria, it will find a way to undermine them in its final merits determination. Such decisions place too high a burden on the petitioner.

In 2011, not long after *Kazarian*, the AAO requested stakeholders to submit *amicus curiae* briefs analyzing the *Kazarian* approach.[15] Those briefs fell on deaf ears. A decade later USCIS continues to apply its misguided and legally suspect final merits determination to the detriment of deserving petitioners seeking to use their extraordinary skills for their own, and ultimately the United States', benefit. We hope that the Biden administration will call on the AAO to dust off those briefs and reevaluate the way the *Kazarian* standard has been implemented.

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[9] 860 F. Supp. 1222, 1231, 1234 (E.D. Mich. 1994).

[10] *See, e.g.*, *In re 11823566*, at 3 (AAO June 4, 2021), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2021/JUN042021_01B2203.pdf.

[11] *Id*.

[12] *Id*. at 4.

[13] *In re 16169358*, at 5 (AAO May 26, 2021) (emphasis in original), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2021/MAY262021_02B2203.pdf.

[14] *In re 16066129*, at 4 (AAO May 18, 2021), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2021/MAY182021_01B2203.pdf.

[15] AILA submitted an amicus brief. AILA Doc. No. 11110261.