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U.S. Citizenship and Immigration Services
Office of the Director (MS 2000)
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U.S. Citizenship and Immigration Services

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Memorandum

TO: Debra Rogers
Acting Citizenship and Immigration Services Ombudsman

FROM: Lori Scialabba
Deputy Director

SUBJECT: Response to Recommendation 51, Recommendations to Improve the Quality in Extraordinary Ability and Other Employment-Based Adjudications

Recommendations

The Citizenship and Immigration Services Ombudsman (CISOMB) recommends that U.S. Citizenship and Immigration Services (USCIS):

1. Conduct formal rulemaking to clarify the regulatory standard, and if desired, explicitly incorporate a final merits determination into the regulation; and
2. In the interim, provide public guidance on the application of the final merits determination; and
3. In the interim, provide Immigration Services Officers (ISOs) with additional guidance and training on the proper application of preponderance of the evidence standard when adjudicating EB-1-1, EB-1-2, and EB-2 petitions.

USCIS Response to Report

USCIS thanks the CISOMB for the thorough analysis in its report. USCIS provides responses to the individual recommendations below, but would first like to clarify certain statements and assumptions regarding the guidance and court decisions issued prior to the December 2010 policy memorandum.

1. Existing Regulations Interpreted in a Manner Consistent with *Kazarian*

The CISOMB report, extending arguments raised by some stakeholders regarding the extent of the holding by the Court in *Kazarian*, notes that USCIS adopted the two-part analysis and final merits determination from the Court's decision, even though the Court itself did not apply the

analysis in that case or further elaborate on the final merits determination. Some stakeholders have further argued that USCIS was wrong to adopt the two-part analysis and final merits determination. They contend that this was not part of the Court's holding.

USCIS believes that the Court's references to a final merits determination are not merely dicta; they are a critical part of the rationale for the Court's holding. If the Court had not assumed that the ultimate assessment of extraordinary ability would occur at some later stage, it might well have been unwilling to exclude it from consideration at the evidentiary stage.

The Form I-140 policy memorandum is an interpretative policy of the Agency, and one that is consistent with the approach endorsed by the Ninth Circuit Court of Appeals in *Kazarian*. The Court did not apply the two-part analysis because it had no occasion to reach the second stage (the final merits determination) as it had already found that the petitioner had failed to meet at least three of the antecedent evidentiary criteria. USCIS's interpretation follows from the Court's clear reference to a bifurcated analysis and as such is entirely appropriate. USCIS acknowledges that the *Kazarian* decision is legally binding only within the Ninth Circuit, but the Court's decision affirms that the two-part approach is at least a permissible interpretation of the existing regulation. Moreover, there is benefit in promoting a consistent, uniform, nationwide interpretation of the regulation. When USCIS has the opportunity to proceed in a way that conforms to the statute, the regulation, and a leading court decision, and makes good sense from a policy standpoint, there is good reason to seize that opportunity.

2. Prior Agency Statements and District Court Cases

In discussing the background and the guidance prior to the Form I-140 policy memorandum, the CISOMB reiterated the argument that some stakeholders have made pertaining to prior Agency statements and various U.S. District Court decisions. In essence, the argument is that prior Agency statements and the U.S. District Court in Michigan in *Buletini v. INS*[1] indicated that satisfying the antecedent evidentiary prongs was sufficient to establish eligibility for approval and, therefore, there is no final merits determination or support thereof. This argument, however, relies upon an erroneous reading of the prior Agency statements and *Buletini*.

a. The Weinig Letter

The argument by stakeholders is based first upon a letter issued in 1992 by then Acting Associate Commissioner of Examinations Lawrence Weinig. The letter stated:

> The evidentiary lists were designed to provide for easier compliance by the petitioner and easier adjudication by the examiner. The documentation presented must establish that the alien is either an alien of extraordinary ability or an outstanding professor or researcher. If this is established by the 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.

[1] 860 F. Supp. 1222, 1233 (E.D. Mich. 1994).

> There is no need for further documentation on the question of the caliber of the alien. However, please note that the examiner must evaluate the evidence presented. This is not simply a case of counting pieces of paper.

When read closely, this paragraph actually confirms that the documentation must establish that the alien has extraordinary ability (or is an outstanding professor, but for simplicity's sake, we will focus on the former), defined in the regulation as being in the small percentage at the top of the field. The sentence starting with "If…" is critical as it represents a contingency and not an automatic result. So, if extraordinary ability is established by meeting three of the criteria, then it would be sufficient. And inversely, if extraordinary ability is not established by meeting three criteria, then that would not be sufficient. Moreover, the letter concludes by noting that ISOs are not simply "counting pieces of paper." The letter, despite its intended effect, did not eliminate confusion regarding the proper interpretation and application of the regulatory requirements.

b. The Proposed Regulatory Change

As noted in the CISOMB report, in 1995, the former Immigration and Naturalization Service (INS) attempted to eliminate the continued confusion through a proposed rule (60 FR 29771) by adding a clarifying statement into the regulations expressly indicating that simply meeting the evidentiary criteria was not sufficient for approval. Although the report did not explain the context or purpose of the proposed rule, it is still useful to note. The Supplementary Information from the proposed rule stated that the proposed rule was to eliminate confusion that had arisen with regard to the role of the evidentiary criteria. It confirmed that "the evidence listed is intended to be a guideline for the petitioner and the Service to determine extraordinary ability in order to make the adjudication process easier for both the petitioner and USCIS. 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."

The explanation of the use of the evidentiary criteria was not in regard to the proposed change, but rather was an explanation of the purpose behind the existing structure of the regulations. That explanation was to be incorporated into the regulation in order to eliminate any confusion (similar to the CISOMB's first recommendation in the current report). The proposed rule contained many other unrelated changes and did not become final. That fact does not change the interpretation of the existing rule, an interpretation which was most recently reiterated in the Form I-140 policy memorandum.

c. The *Buletini* Decision

After the Weinig Letter and the proposed rule, the Court in *Buletini* supplied further guidance. The Court stated that, in denying the extraordinary ability petition of an alien who had met the initial evidentiary requirements, ISOs must set forth specific and substantiated reasons for the denial. That statement in the *Buletini* holding supports the *Kazarian* Court's endorsement that there is an additional determination, beyond the evidentiary criteria phase. If *Buletini* stood for the proposition that meeting the criteria was in and of itself sufficient, as some suggest, there

would have been no need for it to go any further. The additional analysis that *Buletini* described – i.e., the requirement that the ISO set forth specific and substantiated reasons – is consistent with *Kazarian* and the subsequent Form I-140 policy memorandum. Thus, it is reasonable to conclude that *Kazarian* was actually the logical culmination of this line of district court cases, including *Buletini*, and did not deviate from the course taken by these lower court cases.

3. No Significant Changes to Existing Practice or the Adjudicatory Standard

The CISOMB report noted that stakeholders have raised concerns before and after the final Form I-140 policy memorandum was issued, that the memorandum has not resulted in a clearer adjudicatory standard, and "Immigration Services Officers (ISOs) report that the I-140 policy memo did little to change their analysis of I-140 petitions."

The fact that ISOs report that the Form I-140 policy memorandum has done little to change their analysis is an important point. The relative consistency in the analysis before and after the issuance of the memorandum clearly demonstrates that USCIS has always conducted an additional review after the initial evidentiary criteria review to determine if the petition rises to the required standard for approval. What has changed in light of *Kazarian* and the policy memorandum is the fact that ISOs no longer combine these two separate analyses into one. Before *Kazarian,* ISOs were making what is now the final merits determination at the same time as they were reviewing the initial evidence. It was that conflated approach that the Court rejected. The Court's holding endorsed the existence of a final merits determination, and USCIS agrees that this two-part approach is the best interpretation of the statute and corresponding regulation.

USCIS Response to Recommendations

1. Conduct formal rulemaking to clarify the regulatory standard, and if desired, explicitly incorporate a final merits determination into the regulation.

USCIS does not concur with this recommendation. The agency's adjudicative approach is spelled out in clear terms in the Form I-140 policy memorandum, which is consistent with the approach endorsed by the Ninth Circuit, and indeed required under the current regulations. Additionally, USCIS would like to note that the Administrative Procedure Act (APA) does not require formal notice-and-comment rulemaking in this instance. The policy memorandum makes no substantive changes. As discussed above, the regulation already contemplates (or at least can very plausibly be interpreted as contemplating) a two-fold inquiry. The policy memorandum simply makes that two-part process explicit. The policy memorandum also specifies the chronological order in which the two determinations are to be made; that is an addition, but only a procedural one. And the policy memorandum specifies the preponderance of the evidence standard of proof, but that specification is not a change; it has long been the applicable standard in visa petitions generally. See *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010); *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997).

Of course, USCIS can use the APA formal rulemaking procedure even when it is not legally obligated to do so. APA formal rulemaking procedures, however, entail long delays, and in this instance, we saw no significant countervailing benefits. Clarity and consistency are achieved in this policy memorandum just as they could be achieved in a regulation or an Administrative Appeals Office (AAO) precedent decision. The AAO has, in fact, already taken steps towards the issuance of a precedent decision, which could be used to clarify the standard and the final merits determination. The AAO requested briefs on the nature of the "final merits determination" and how the AAO should apply this analysis to extraordinary ability visa petitions filed pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act. While the APA notice-and-comment procedure offers useful opportunity for public input, USCIS was able to receive similar feedback through the solicitation of amicus briefs and then by following up with a public engagement that was widely attended and similarly valuable.

USCIS received nine amicus briefs, which the AAO has been studying. USCIS sought permission from all individuals and entities who submitted amicus briefs to post them publicly. We are currently preparing copies of the briefs for posting from those who consented. The AAO will make a recommendation to USCIS leadership regarding a precedent decision in the near future.

2. **In the interim, provide public guidance on the application of the final merits determination.**

USCIS concurs in principle with this recommendation. USCIS believes that its Form I-140 policy memorandum provides appropriate guidance to ISOs and the public on the application of the final merits determination. As noted above, the AAO has sought briefs on the nature of the final merits determination with the goal of issuing a precedent decision. If a precedent decision is issued, it will be available to the public and will serve as binding guidance for ISOs in their adjudication.

3. **In the interim, provide Immigration Services Officers (ISOs) with additional guidance and training on the proper application of preponderance of the evidence standard when adjudicating EB-1-1, EB-1-2, and EB-2 petitions.**

USCIS concurs with this recommendation and believes it is important to train ISOs on the preponderance of the evidence standard for adjudicating *all* applications and petitions. The Office of Human Capital and Training and the Office of the Chief Counsel have been working to develop training that will provide specific examples for many immigrant and nonimmigrant classifications, to include aliens of extraordinary ability, outstanding professors and researchers, and aliens of exceptional ability. USCIS piloted the use of these training materials in its BASIC officer training course in February and will finalize the materials for broader use in the third quarter of FY2012. Once finalized, USCIS will make publicly available via USCIS.gov the BASIC training material related to the preponderance of the evidence standard. We welcome any feedback stakeholders may have on the materials.