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## IMMIGRATION LAW

### Limits to Arbitrary Agency Action

Required initial criterion must be present in visa regulations

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Immigration issues constitute an increasing percentage of federal courts' caseloads, but few people are aware of their procedural posture or relevance. While most of these cases have to do with improper reentry by aliens or fraudulent use of visas, occasionally such decisions impact the ability of legal and highly skilled immigrants to stay in this country. In a recent decision, *Kazarian v. USCIS*, 2010 WL 725317 (C.A. 9), the Court of Appeals for the Ninth Circuit held that the United States Citizenship and Immigration Service (USCIS) (the component of the Department of Homeland Security charged with overseeing lawful immigration) had overstepped its bounds by requiring that the petitioner prove criteria that weren't present in the regulatory scheme.

In general, under current law and wait times, if an alien is eligible to file for permanent residence (a green card) through employment sponsorship, the process can take many years even for those with skills or a bachelor's degree. Sometimes, employees may not be able to continuously maintain temporary legal status and may have to leave

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the United States. Also, in many cases, employees with willing sponsors are not even eligible to apply because they are undocumented.

There are only a few categories of employment-based immigration that do not take so long. In the first employment-based category, or EB-1, one can apply as an outstanding professor or researcher or as an alien who possesses "extraordinary ability." In this latter classification an applicant can "self-petition," or apply by him or herself. Applicants in this category avoid both employment sponsorship requirements as well as long backlogs associated with other visa categories. Only an alien who is one of a small percentage of people who has risen to the top of his field and whose achievements have received "sustained national or international acclaim" is eligible for an "extraordinary ability" visa. One way to prove extraordinary ability is to provide evidence of a one-time achievement of major international significance, such as a Nobel Prize. Since most applicants lack this particular honor, alternate proof of extraordinary ability must include evidence of at least three out of 10 other indicia of accomplishments as defined by administrative regulations, including documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of

endeavor; documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members; evidence of the alien's participation, either individually or on a panel, as a judge of the work of others; or evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media, which was the main criterion at issue in *Kazarian*.

Understandably, extraordinary ability is not an easy category in which to obtain a green card, nor should it be. Nevertheless, as this recent case shows, USCIS has attempted to make it unnecessarily difficult by arbitrarily adding requirements to the regulatory framework.

On December 31, 2003, Poghos Kazarian, a 34 year-old native and citizen of Armenia, filed a self-petition for an employment-based immigrant visa as an alien of extraordinary ability in the area of theoretical physics. 8 USC Section 1153 (b)(1)(A).

In August 2005, the USCIS denied the petition and Kazarian appealed to the Administrative Appeals Office ("AAO"), which has jurisdiction over the USCIS regional service centers that make individual case decisions. In order to satisfy the criterion regarding authorship of scholarly articles in his submission to the regional service center, Kazarian had submitted proof that he authored six articles in astrophysics and an electronic article in the archives of the Los Alamos National Laboratory. The AAO held that because he had failed to sub-

mit evidence that other scholars had cited to those publications, Kazarian's articles did not meet the regulatory definition of evidence, because the decision-making body had to "consider the research community's reaction to these articles." In essence, the agency was requiring the applicant to show the effect of his scholarly articles on others, rather than just that he had authored such articles. Kazarian filed a complaint in the Central District of California, which granted the USCIS's motion for summary judgment, and Kazarian appealed to the circuit court.

The court of appeals initially justified the AAO's reasoning. While the AAO's approach seemed to ignore the reality of academic research, in which an author must normally go through a selective review process to get an article published in the first place, the more important issue was that the citation demand simply does not exist as a threshold requirement in the regulatory framework. Petitioner and an amicus, the Legal Action Center of the American Immigration Council, argued vigorously for rehearing to try to force the court of appeals to acknowledge that the service's requests were *ultra vires*.

On rehearing, the Ninth Circuit agreed with the petitioner, and decided that the AAO's conclusion rested on an "improper understanding" of 8 C.F.R. Section 204.5(h)(3)(vi). The court

stated:

Nothing in that provision requires a petitioner to demonstrate the research community's reaction to his published articles before those articles can be considered as evidence, and neither USCIS nor an AAO may unilaterally impose novel substantive or evidentiary requirements beyond those set forth at 8 C.F.R. § 204.5.

The court acknowledged that while the presence of other authors' citations to the petitioner's articles might be relevant to the final decision regarding whether the applicant is at the top of his field, such a finding was not relevant to the initial requirement to provide at least three types of required evidence. (The regulations also allow an applicant to provide "other comparable evidence.") In other words, you can't make this stuff up.

Similarly, the applicant was required to show that he was selected to serve as a dissertation reviewer for a university other than his own, rather than showing that, as the regulation states, he was selected to be a judge of the work of the others. The Court of Appeals again indicated that the government had imposed a "novel evidentiary requirement" that Kazarian should not have had to sat-

isfy at the initial stage of proof.

In the end, Kazarian could not prevail, because he presented only two types of evidence instead of at least three required by the regulatory scheme. Therefore, the AAO's decision, in the eyes of the Ninth Circuit, was harmless error.

Why, then, is this decision notable, if Kazarian was ultimately not qualified for the benefit he sought? USCIS's errors are not "harmless" to those highly skilled EB-1 applicants who have been subject to invented requirements. The Ninth Circuit's decision — apparently the highest level opinion to address such an EB-1 issue, according to the petitioner's counsel, Bernard Wolfsdorf — demonstrates that USCIS cannot simply impose additional requirements on a petitioner for this type of benefit. Because USCIS routinely works such requirements into the Requests for Evidence (RFEs) it issues to petitioners after their initial filing, this decision adds weight to petitioners' usual counter-arguments. The decision may also influence USCIS to train its service center adjudicators to be sensitive to the Ninth Circuit's words of admonition not to add requirements that arbitrarily increase the burden of proof. Ultimately, Kazarian did not win a visa based on extraordinary ability, but he did lead a successful fight against arbitrary agency action. ■