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Kazarian v. United States Citizenship and Immigration Services: Clarifying “Extraordinary Ability” Visa Qualifications

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CASE SUMMARY

KAZARIAN V. UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES: CLARIFYING “EXTRAORDINARY ABILITY” VISA QUALIFICATIONS

I. INTRODUCTION

The Immigration Act of 1990 created thousands of employment-based immigrant visa categories, including one by which aliens possessing “extraordinary ability” could obtain lawful permanent resident status.¹ The statutory definition of an “extraordinary ability” is “a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor.”² An application for an “extraordinary ability” visa must be accompanied by evidence that the alien has sustained national or international acclaim, along with proof that his or her achievements have been recognized in the field of expertise.³ However, attempts by applicants to actually obtain “extraordinary ability” visas have had mixed results.⁴

¹ 8 U.S.C. § 1153(b)(1)(A) (Westlaw 2010).

² 8 C.F.R. § 204.5(h)(2) (Westlaw 2010).

³ 8 C.F.R. § 204.5(h)(3) (Westlaw 2010).

⁴ Compare *Matter of Price*, 20 I. & N. Dec. 953, 955-56 (BIA 1994) (granting an “extraordinary ability” visa to a professional golfer who won the 1983 World Series of Golf and the 1991 Canadian Open and received widespread major media coverage), with *Lee v. Ziglar*, 237 F. Supp. 2d 914 (N.D. Ill. 2002) (finding that “arguably one of the most famous baseball players in Korean history” did not qualify for the “extraordinary ability” visa as a baseball coach for the Chicago White Sox because his acclaim was limited to his skills as a player).

418 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 40]

In 2007, Dr. Poghos Kazarian appealed the United States Citizenship and Immigration Service's denial of his application for an "extraordinary ability" visa.⁵ Prior to *Kazarian v. US Citizenship & Immigration Services*, the Ninth Circuit had never addressed the issue of how the statutory and regulatory requirements for the "extraordinary ability" visa should be interpreted.⁶ The *Kazarian* court determined that the regulations outlining the evidence sufficient to qualify for the "extraordinary ability" classification were extremely restrictive.⁷ The court then concluded that, since Dr. Kazarian had presented only two of the three types of evidence required to meet the eligibility criteria, the agency's determination that his petition was insufficient to support an "extraordinary ability" visa was correct.⁸

II. FACTS AND PROCEDURAL HISTORY

In 1997, Dr. Poghos Kazarian, a native and citizen of Armenia, received his Ph.D. in Theoretical Physics from Yerevan State University in Yerevan, Armenia.⁹ Dr. Kazarian's specialty was "non-Einsteinian theories of gravitation."¹⁰ From 1997 to 2000, Dr. Kazarian worked as a research associate.¹¹ In 2000, Dr. Kazarian began work at Glendale Community College in California as a physics and math tutor, an instructor, and a speaker in the "Science Lecture Series."¹²

On December 31, 2003, Dr. Kazarian filed an application for an "extraordinary ability" visa based on his knowledge of, and work in, theoretical physics.¹³ Dr. Kazarian submitted several letters of recommendation from colleagues in support of his application.¹⁴ Dr. Kazarian also noted that he had authored a textbook and he included information in his petition regarding his Science and Lecture Series.¹⁵

⁵ *Kazarian v. US Citizenship & Immigration Servs.*, 596 F.3d 1115, 1118 (9th Cir. 2010).

⁶ *Kazarian*, 596 F.3d at 1120.

⁷ *Id.*

⁸ *Id.* at 1122.

⁹ *Id.* at 1117.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 1117-18. Between 2000 and 2004, Dr. Kazarian worked as a volunteer, joining the faculty in 2004.

¹³ *Kazarian*, 596 F.3d at 1117.

¹⁴ *Kazarian*, 596 F.3d at 1118.

¹⁵ *Id.*

The United States Citizenship and Immigration Service (USCIS) denied Dr. Kazarian's petition, and Dr. Kazarian then appealed to the Administrative Appeals Office (AAO).¹⁶ But the AAO dismissed the appeal, concluding that Dr. Kazarian had not established that he met any of the regulatory requirements demonstrating that he possessed the requisite "extraordinary ability" necessary to obtain the special visa.¹⁷

Dr. Kazarian then filed a complaint in the U.S. District Court for the Central District of California challenging the denial.¹⁸ The district court adopted all of the findings of fact submitted by the USCIS and granted the USCIS's motion for summary judgment without hearing argument.¹⁹ Dr. Kazarian then appealed to the Ninth Circuit.²⁰

The sole issue before the Ninth Circuit in *Kazarian* was whether Dr. Kazarian had established his eligibility for an "extraordinary ability" visa.²¹ On September 4, 2009, the Ninth Circuit affirmed the district court's denial, concluding that there was substantial evidence supporting all of the AAO's findings and that the AAO's determination that Dr. Kazarian failed to meet any of the statutory qualifications was correct.²²

Judge Pregerson dissented, taking issue with the majority's interpretation of the visa's eligibility requirements.²³ Judge Pregerson rejected the majority's interpretation of 8 C.F.R. § 204.5(v), which permits an applicant to demonstrate extraordinary ability by producing evidence of having been published, as containing an additional requirement that the applicant demonstrate that his or her publication received a favorable reaction from the scientific community.²⁴

On March 4, 2010, the appellate panel withdrew the September 4, 2009, opinion and filed a superseding amended opinion.²⁵ The amended opinion contained different determinations than the original opinion but ultimately reached the

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Appellant's Brief at 3, *Kazarian*, 596 F.3d 1115 (No. 07-56774), 2007 WL 5185662.

²⁰ *Kazarian*, 596 F.3d 1115.

²¹ *Kazarian*, 596 F.3d at 1120.

²² *Kazarian v. U.S. Citizenship & Immigration Servs.*, 580 F.3d 1030, 1035 (9th Cir. 2009), *withdrawn and superseded*, 596 F.3d 1115 (9th Cir. 2010).

²³ *Id.* at 1037 (Pregerson, J., dissenting).

²⁴ *Id.*

²⁵ *Kazarian*, 596 F.3d at 1117.

420 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 40]

same result.²⁶

According to the amended *Kazarian* opinion, the AAO erred by failing to conclude that Kazarian met two of the required “extraordinary ability” visa qualifications.²⁷ However, because an “extraordinary ability” applicant must meet a minimum of *three* statutory requirements, the court concluded that the AAO’s error was harmless and that the district court correctly denied Dr. Kazarian’s petition.²⁸ Judge Pregerson concurred with the amended *Kazarian* opinion.²⁹

II. NINTH CIRCUIT ANALYSIS

A. “EXTRAORDINARY ABILITY” VISA CRITERIA

The *Kazarian* court outlined the law governing the “extraordinary ability” visa and the regulatory requirements that must be met before an immigration petition can be granted. Under the Immigration Act of 1990, thousands of employment-based visas were created according to three employment preferences.³⁰ Aliens of “extraordinary ability” are designated “priority workers” and receive first preference for immigration approval.³¹ Pursuant to 8 U.S.C. § 1153(b)(1)(A), an alien seeking entry into the United States may apply for and receive a visa on the basis of an “extraordinary ability” if “the alien has an 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.”³²

The regulations provide that an alien can establish the requisite “national or international acclaim” in one of two ways. An applicant could prove an “extraordinary ability” by presenting evidence of a one-time achievement, such as a Nobel Prize.³³ Alternatively, the regulation states that an applicant could provide evidence of at least three of ten regulatory criteria.³⁴

²⁶ *Id.*

²⁷ *Kazarian*, 596 F.3d at 1122.

²⁸ *Id.*

²⁹ *Id.* at 1123 (Pregerson, J., concurring).

³⁰ Immigration Act of 1990, Pub. L. No. 101-649, 101 Stat. 4978 (1990).

³¹ 8 U.S.C. § 1153(b)(1) (Westlaw 2010).

³² 8 U.S.C. § 1153(b)(1)(A) (Westlaw 2010).

³³ 8 C.F.R. § 204.5(h)(3); *Kazarian*, 596 F.3d at 1119.

³⁴ The ten criteria are:

Once a petitioner has submitted the requisite evidence, the USCIS must then determine whether the evidence demonstrates both a “level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor” and “that the alien has sustained national or international acclaim.”³⁵ Furthermore, the USCIS must decide whether the alien’s achievements have been recognized within the field of expertise.³⁶

B. DR. KAZARIAN’S EVIDENCE OF “EXTRAORDINARY ABILITY”

Only four of the ten “extraordinary ability” criteria were at issue in Dr. Kazarian’s appeal: 1) authorship of scholarly articles in the field of endeavor, 2) participation as a judge of the work of others, 3) evidence of original scientific or scholarly contributions of major significance in the field of endeavor, and 4) display of the alien’s work at artistic exhibitions or showcases. The court addressed each, finding that the AAO had incorrectly rejected Dr. Kazarian’s qualifying evidence on two of the criteria.

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- (1) Documentation of the alien’s receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor;
 - (2) Documentation of the alien’s membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields;
 - (3) Published material about the alien in professional or major trade publications or other major media, relating to the alien’s work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation;
 - (4) Evidence of the alien’s participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought;
 - (5) Evidence of the alien’s original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field;
 - (6) Evidence of the alien’s authorship of scholarly articles in the field, in professional or major trade publications or other major media;
 - (7) Evidence of the display of the alien’s work in the field at artistic exhibitions or showcases;
 - (8) Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation;
 - (9) Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field; or
 - (10) Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.

8 C.F.R. § 204.5(h)(3) (Westlaw 2010).

³⁵ 8 C.F.R. § 204.5(h)(2)-(3); *Kazarian*, 596 F.3d at 1119-20.

³⁶ 8 C.F.R. § 204.5(h)(3) (Westlaw 2010); *Kazarian*, 596 F.3d at 1119-20.

1. *Authorship of Scholarly Articles in the Field of Endeavor*

According to the AAO, Dr. Kazarian submitted proof that seven of his articles had been published but had not demonstrated that other scholars had cited to his publications.³⁷ The AAO concluded that, without evidence of such citations, Dr. Kazarian's articles did not meet the authorship criterion.³⁸

But the Ninth Circuit disagreed, holding that the AAO's finding rested on an "improper understanding" of the regulatory criterion.³⁹ The court held that, while other authors' citations might be relevant to determining whether an applicant is at the very top of his or her field, nothing in the regulations specifically requires an applicant to demonstrate the reaction to his or her published articles before those articles could be considered.⁴⁰ Since the USCIS and the AAO had thus imposed an extra requirement on Dr. Kazarian, the court concluded that this was abuse of discretion.⁴¹

2. *Participation as a Judge of the Work of Others*

Dr. Kazarian also submitted proof that he was a judge of graduate-level diploma works at Yerevan State University.⁴² But in the AAO's opinion, reviewing diploma works for fellow students at one's own university failed to establish sustained national or international acclaim.⁴³ Without evidence that Dr. Kazarian had served as an external dissertation reviewer for a university with which he was not otherwise affiliated, the AAO concluded that Dr. Kazarian's submission was insufficient to satisfy this criterion.⁴⁴ But again the Ninth Circuit disagreed, concluding that the AAO's finding rested on an "improper understanding" of the regulatory criterion.⁴⁵

³⁷ *Kazarian*, 596 F.3d at 1121.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*; 8 C.F.R. § 204.5(h)(3)(vi).

⁴¹ *Kazarian*, 596 F.3d at 1121.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

3. *Evidence of Original Scientific or Scholarly Contributions of Major Significance in the Field of Endeavor*

In support of his position, Dr. Kazarian also submitted several letters from physics professors attesting to his contributions in the field.⁴⁶ But the AAO found that his contributions were not major and thus did not meet the statutory requirements.⁴⁷ The Ninth Circuit agreed, holding that the AAO's analysis of Dr. Kazarian's scientific contributions was consistent with the relevant regulatory language⁴⁸ and was neither arbitrary, capricious, nor an abuse of discretion.⁴⁹

4. *Display of the Alien's Work at Artistic Exhibitions or Showcases*

Finally, Dr. Kazarian submitted proof that he had self-published a textbook, given lectures at a community college, and made presentations at conferences in support of his petition.⁵⁰ But the AAO determined that none of these activities constituted displays at artistic exhibitions or showcases.⁵¹ Again, the Ninth Circuit agreed, concluding that the AAO's analysis was consistent with the relevant regulatory language and that the AAO's determination that Kazarian did not submit proper evidence was neither arbitrary, capricious, nor an abuse of discretion.⁵²

C. HARMLESS ERROR

The Ninth Circuit determined that the AAO should have concluded that two of the four types of evidence submitted by Dr. Kazarian in support of his petition were satisfactory.⁵³ As a result, the court held that the AAO had committed clear legal error by rejecting all of the evidence Dr. Kazarian presented with his visa application.⁵⁴

However, the procedure for determining whether to grant the

⁴⁶ *Id.* at 1122.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Kazarian*, 596 F.3d at 1122.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Kazarian*, 596 F.3d at 1122.

⁵⁴ *Id.*

424 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 40]

“extraordinary visa” to an applicant is to determine whether *three* of the ten regulatory criteria have been met.⁵⁵ The AAO concluded that Dr. Kazarian failed to establish that he met at least three of the ten regulatory criteria.⁵⁶ Although the Ninth Circuit determined the AAO had improperly discounted two of the four types of evidence Dr. Kazarian submitted, the court found the AAO had properly concluded that Dr. Kazarian failed to meet statutory requirements for obtaining the “extraordinary visa” since he had not presented the requisite three types of satisfactory evidence.⁵⁷ Therefore, the Ninth Circuit found the AAO’s error to be harmless.⁵⁸

D. CONCURRENCE

Judge Pregerson concurred with the amended opinion but wrote separately to emphasize what he deemed an “injustice perpetuated by the immigration laws and system in this case.”⁵⁹ In Judge Pregerson’s opinion, Dr. Kazarian’s contributions to the field of theoretical physics in the United States had been valuable.⁶⁰ Consequently, Judge Pregerson stated that forcing Dr. Kazarian to depart from the country was “undoubtedly wasteful” and indicative of “something haywire in the system.”⁶¹ While Judge Pregerson agreed with the majority that Dr. Kazarian failed to submit the three types of evidence required for the “extraordinary ability” visa, he concluded that Dr. Kazarian would have been an excellent candidate for an “exceptional ability” visa.⁶² However, Dr. Kazarian’s attorney failed to counsel him to apply for such a visa.⁶³

IV. IMPLICATIONS OF THE DECISION

Kazarian stands as a clear reminder that neither the USCIS nor the AAO has the authority to unilaterally impose additional

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Kazarian*, 596 F.3d at 1122.

⁵⁸ *Id.*

⁵⁹ *Id.* at 1123 (Pregerson, J., concurring).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Kazarian*, 596 F.3d at 1123 (Pregerson, J., concurring).

⁶³ *Id.* In a footnote, Judge Pregerson pointed out that the attorney who advised Dr. Kazarian to apply for the “extraordinary ability” visa had been indefinitely suspended from immigration practice. *Id.* at n.1.

evidentiary requirements not found within the regulations. In overturning the AAO's interpretation of the requirements for the "extraordinary ability" visa, the Ninth Circuit firmly reminded both the USCIS and the AAO that they must carefully apply the statutory and regulatory requirements when performing their duties. Although the "extraordinary ability" visa requirements are restrictive, the AAO cannot impose arbitrary requirements on applicants.⁶⁴ By forcing the USCIS and the AAO to make their determinations based on the regulations exactly as written, the Ninth Circuit has assured that the burden placed on future "extraordinary ability" visa applicants will not be higher than what the immigration regulations require.

V. CONCLUSION

Immigration is a complex and often confusing area of the law. In *Kazarian*, while upholding the denial of an "extraordinary ability" visa, the Ninth Circuit found that the USCIS had erroneously imposed additional requirements on a visa petition that were not contained within the immigration regulations. The court held that neither the USCIS nor an AAO may unilaterally impose novel substantive or evidentiary requirements beyond those set forth at 8 C.F.R. § 204.5.⁶⁵ In doing so, the court ensured that future "extraordinary ability" visa applicants will not encounter arbitrary hurdles or be required to meet evidentiary burdens beyond those set forth in the language of the relevant statutes and immigration regulations when they seek entry into the United States.

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⁶⁴ *Id.*

⁶⁵ *Id.*

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