Wake Up Call For Regional Centers: "Get Your Act Together Upfront"

By Joseph P. Whalen (July 20, 2014)

Introduction

It dawned on me after writing my last piece, which consisted of annotations, highlighting, and commentary on a pdf version of the most recent AAO I-526 Dismissal. It is the most recent one posted as of this writing[1] that deals with a *Regional Center Affiliated* investor, specifically, the June 24, 2014[2], Decision. Anyway, I realized that an earlier AAO I-924 Dismissal from February 18, 2014[3], should be read in conjunction with the June 24, 2014, decision and read especially by Regional Center (RC) applicants, current RC principals, their counsel, and their staffs. I suggest this course of action because the reason for **denial** of the I-526 **could have been avoided** by the unnamed RC with whom that I-526 petitioner was affiliated, **if they had fulfilled and satisfied a particular level of competency or "knowledge, skills, and abilities" (KSAs); as was sought by the CSC adjudicator** in the underlying denial of the RC *proposal* discussed in that February dismissal.

Specifically, the CSC adjudicator was not satisfied with that portion of the proposal that was seen as lacking sufficient "***evidence that the regional center would perform adequate administrative oversight***." FEB212014_01K1610.pdf at p. 2 ***(Emphases Added)***. However, the AAO determined that since ***"... the application may not be approved on the other grounds the director identified, the AAO need not determine whether 8 C.F.R. § 204.6(m)(6) imposes evidentiary requirements on an applicant when it applies for designation as a regional center."*** *Id.* at p. 10 ***(Emphases Added)***. At the time that I first wrote about that February AAO RC application Dismissal, I confronted this issue and AAO's reticence to address it. I accused them of chickening out. Specifically, I wrote:

> "The RC Dismissal fell short of addressing a key point brought up in the underlying denial. In other words AAO chickened out of determining the potential Form I-924 evidentiary requirements for the RC's administration, oversight, management, and record-keeping, etc… All of that would be expected due to the need for annual reporting in form I-924A as per 8 CFR § 204.6(m)(6) and it just makes sense." [4]

[1] I began writing this on July 15, 2014, but I kept getting interrupted.
[2] A "clean copy" of the pdf is on the USCIS website. There is a July 2, 2014, I-526 Dismissal for a direct investment.
[3] A "clean copy" of the pdf is on the USCIS website.
[4] "*Comments on Recent AAO EB5 Decisions*", By Joseph P. Whalen (April 30, 2014) in *Immigration Daily* from ILW.com at: http://discuss.ilw.com/content.php?3081-Article-Comments-on-Recent-AAO-EB5-Decisions-By-Joseph-P-Whalen

The I-924 form instructions request much useful information that is geared towards testing the competencies or **K**nowledge, **S**kills, and **A**bilities (*KSAs*) of the applicant entity meaning the RC principal, staff, and counsel. Below are some excerpts from the I-924 form instruction which are incorporated into the controlling regulations as per 8 CFR § 103.2(a)(1).

> The business plan should also identify any and all fees, profits, surcharges, or other like remittances that will be paid to the regional center or any of its principals or agents through EB-5 capital investment activities.
>
> Provide the industry category title and the North American Industry Classification System (NAICS) code for each industrial category. The NAICS code can be obtained from the U.S. Department of Commerce, Census Bureau (www.census.gov/epcd/www/naics.htm). Enter the code from left to right, one digit in each of the six boxes provided in the form in Part 3, item 7. If you use a code with fewer than six digits, enter the code left to right and then add zeros in the remaining unoccupied boxes.[5]
>
> The application should be supported by a statement from the principal of the Regional Center that explains the methodologies that the Regional Center will use to track the infusion of each EB-5 alien investor's capital into the job creating enterprise, and to allocate the jobs created through the EB-5 investments in the job creating enterprise to each associated EB-5 alien investor. The anticipated minimum capital investment threshold (either $1,000,000 or $500,000) for each investor should also be identified.
>
> * * * * *
>
> **4.** Provide a detailed description of the past, current and, future promotional activities for the regional center. Include a description of the budget for this activity, along with evidence of the funds committed to the regional center for promotional activities.
>
> Submit a plan of operation for the regional center which addresses how investors will be recruited and how the regional center will conduct its due diligence to ensure that all immigrant investor funds affiliated with its capital investment projects will be obtained from lawful sources.

[5] It should be noted that the minimum length of a NAICS code is two (2) digits which covers a "sector" which is then further broken down by the addition of more numbers, usually one (1) at a time and that not all sectors are broken down into six digit codes for all of it various permutations.

I do see that AAO *might* be working towards a solution to workflow problems inherent in issuing a Precedent Decision under the still-new AAO-USCIS-DHS to BIA-EOIR-DOJ/A.G. process, so may be holding back on this particularly important issue in *interim-like I-924 non-precedents* currently being posted. It also may be, *in part*, that the long-awaited AAO rulemaking as well as the current EB-5 anticipated regulatory changes may be factoring into USCIS' overall approach to firmly addressing this and other critical aspects of EB-5 Regional Center adjudications, and maybe additional subjects also.[6] However, AAO still missed a golden opportunity in not addressing this ***reason*** *for the initial denial*, even if just in *dictum*, which is just a tiny bit less than what the entire decision would remain unless or until any such non-precedent is officially elevated to Precedent status.

I found this handy legal definition of the word "dictum" online, here.

> **Dictum** is a statement, comment, or observation in ~~a judicial~~ [an] opinion that is unnecessary to the decision in the case. Unlike the holding (final determination) in a case, dictum is not binding on other [adjudicators] ~~courts~~ deciding similar issues. However, sometimes dictum is so widely recognized by other [adjudicators] ~~courts~~ that it is adopted into an opinion as though it were binding authority on a matter, and in such a case it is referred to as "considered dictum". Although dictum may be cited in legal argument, it does not have the binding force of a precedent (previous ~~court~~ [*non-precedent* and non-binding] decisions or interpretations) since the remark was not part of the legal basis for the decision.[7]

Above, I indicated (in my roundabout way) that the entire *Interim-like non-precedent* would be worth a little more than just *dictum*. By that I mean that a worthy non-precedent may be exceedingly useful as "*persuasive argument*" such that it would be accorded at least *Skidmore* deference which is a bit lower than *Chevron* deference. Next, will be a short

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[6] For instance, L1-B "specialized knowledge" determinations have been addressed in non-precedents and the "customers" have jumped on board. Other subjects include decisions on the forms: I-140 for outstanding researchers and professors, extraordinary ability, National Interest Waivers, or Forms I-212 or I-601 for various aspects of waivers of various issues impeding admission, visa issuance, or adjustment of status, and the list goes on. As it always is, some folks have either intentionally or unintentionally "misread" or "painfully warped" the statements made is such non-precedents and presented them and relied upon them as if they were "binding" upon USCIS instead of making real arguments that certain concepts were worthy of at least Skidmore deference or should be acknowledged as "considered dictum", especially if the statement by AAO can be supported by some other authority.

[7] SEE: http://definitions.uslegal.com/d/dictum/. I would also add that an entire non-precedent decision from AAO when being cited back to AAO should follow rules such as those adapted from Appendix J of the Immigration Court Practice Manual as shown below in the discussion on *Skidmore* deference.

interlude to refresh the readers about *Skidmore*,[8] *Chevron*, [9] and 6 U.S.C. § 522 which is a subject I have written about previously. [10]

Different Levels of Deference to a Prior Decision

Probably anyone taking the time to read this article is already well aware of the concept of *Chevron* deference. In a nutshell, it means that in reviewing administrative agency's interpretations of the ambiguous portions of statutes it has been ordered to administer, the reviewer should accept the agency interpretation unless it is fundamentally unfair or flat-out wrong. It would have to be a truly flawed interpretation to be considered unworthy of deference. A court would overturn or refuse to adhere to anything it deemed incorrect as a *matter of law*; unconstitutional; or arbitrary, capricious, or an abuse of discretion as per 5 U.S.C. § 706.

In the aftermath of the terrorist attacks of September 11, 2001, Congress passed the Homeland Security Act of 2002 (HSA). Within that Act, Congress included a particular short bit of conforming language now codified in 6 U.S.C., Domestic Security, which **can be read as** *a directive respecting the issue of judicial deference to executive branch interpretations*, excerpt below. You be the judge as to its **AAO** and **EB-5 meaning(s) and applicability**.

> **§522. Statutory construction**
>
> Nothing in this chapter, any amendment made by this chapter, or in section 1103 of title 8, shall be construed to limit judicial deference to regulations, adjudications, interpretations, orders, decisions, judgments, or any other actions of the Secretary of Homeland Security or the Attorney General.
>
> (Pub. L. 107–296, title XI, §1103, Nov. 25, 2002, 116 Stat. 2274.)
>
> ***REFERENCES IN TEXT***
>
> This chapter, referred to in text, was in the original "this Act", meaning Pub. L. 107–296, Nov. 25, 2002, 116 Stat. 2135, known as the Homeland Security Act of 2002, which is classified principally to this chapter. For complete classification of this Act to the Code, see Tables.

In a Supreme Court Decision from 1944, we get the "lesser deference" for a non-precedent being cited as "persuasive argument" due to its "power to persuade". That 1944, case is cited as *Skidmore, et. al, v. Swift and Co.*,

[8] Full cite is: *Skidmore, et. al, v. Swift and Co.*, 323 U.S. 134 (1944).

[9] Full cite is: *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 S 837 - Supreme Court 1984

[10] SEE: http://www.slideshare.net/BigJoe5/deference-in-immigration-matters-skidmore-chevron-and-beyond.

323 U.S. 134 (1944). I would like to draw your attention to the following from *Skidmore* at 140:

> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Citation Considerations

When it seems ***appropriate*** **and** ***necessary*** to refer to a specific point made by AAO in one of its prior ***non-precedent*** decisions, one should always include a copy of the referenced case with the filing. Also, it may be necessary to format the citation a bit differently than practitioners may be accustomed to. However, in that there is a ***lack of any official guidance*** from USCIS, it may be that a "best practice" for this task should be selected among immigration practitioner groups, such as AILA, or IIUSA, ABIL, and the like, then submitted to USCIS as a formal suggestion. Heck, such a "best practice" might already exist, but if it does, it needs to be more widely disseminated. For comparison, here is an excerpt from the Immigration Court Practice Manual—Appendix J - **Citation Guidelines**:

> *Unpublished [BIA] decisions*. Citation to unpublished decisions is discouraged because these decisions are not binding on the Immigration Court in other cases. When reference to an unpublished case is necessary, a copy of the decision should be provided, and the citation should include the alien's full name, the alien registration number, the adjudicator, and the precise date of the decision. Italics, underlining, and "Matter of" should not be used.
>
> For example: Jane Smith, A 012 345 678 (BIA July 1, 1999)

May I suggest a format for the current type of "unpublished" decisions addressed herein? Here is one suggestion which takes into account the realities that we are dealing with currently. AAO's *non-precedent* decisions are being most expeditiously posted and thereby available for stakeholders to review rather quickly. Since AAO's non-precedent decisions are specific-case resolutions and overall are "confidential"; they are heavily redacted of most personally identifying information, sometimes to a ridiculous level to a seeming pointlessness in posting it. Also, they are not formally or officially intended to be used as a vehicle to announce any changes or even clarifications of anything. With that being said, in light of the agonizingly slow review process demanded in

order to get a real AAO Administrative Precedent Decision published, the non-precedents may actually be a prelude to an official announcement still years in the making. Some non-precedents may be acted upon by USCIS to inspire the issuance of a Policy Memo but some marvelous non-precedents might be unfortunately overlooked. Anyway, there is a particular format used by AAO to identify the various categories of "benefit" decisions being made which then is used to formulate a file name for web posting purposes.

Here are my specific suggestions:

Posted non-precedent AAO decisions. Citation to non-precedent decisions is discouraged because these decisions are **not** binding on USCIS in other cases. When reference to a non-precedent decision from some other case is necessary, a copy of the posted decision should be provided, and the citation should conform to the preferred format explained below.

Same case's initial decision, decisions on any Motions to initial adjudicator, and prior non-precedent AAO decisions, whether posted or not. Citation to these decisions is necessary because these decisions **are** binding on USCIS as "law of the case" unless successfully argued against on Motion or Appeal or are revisited and altered *sua sponte*. In addition to including full copies of these decisions (as appendices), and including excerpts from them in briefs or other narrative arguments; this type of cited decision will naturally be amendable to include additional personally identifiable information but it is unnecessary to do so. Applicant or petitioner is named, the beneficiary may be named, but that information becomes superfluous in later stages of the same case. Instead, application or petition file numbers and A-numbers are all available for use and are more helpful to the process. Ultimately, there will be standard *type-of-decision* titles or various *responses thereto* used along with dates of same. Such "titles" might be Director's Denial, Director's Approval, Director's Decision, Notice of Intent to Revoke (NOIR), Final Revocation Notice, Response to NOID, or Response to RFE, as examples. Each of these should have a specific date associated with it and any reference used such as for a tabbed "exhibit"—Exhibit A, for example.

Citation: When reference to an *AAO non-precedent decision* from some other case is necessary, a copy of the posted decision should be provided, and the citation should include the file name assigned to the posted non-precedent which consists of: an assigned category code, a sequential decision number for a given date, and the precise date of the decision. When copying and pasting off of a website, most "hyperlinks" will be displayed in a manner different from the other text in a document, such as a different color text which is underlined. Above all, "Matter of" should not be used.

Standards of Review-Revisited

AAO has pretty much the freest hand of just about any and all executive branch administrative Appellate Bodies. They can do full *de novo* review of anything sent to it. Any decision made by USCIS may be certified to AAO even if AAO has zero appellate authority for that particular benefit type. Even though

AAO has full de novo review authority and capability. Heck, AAO can even issue RFEs, NOIDs, ask for *Amicus Briefing*, and can, *if it chooses to do so*, allow or even call for, oral argument. AAO conceivably can employ *ad hoc* processes and procedures and like any other USCIS adjudicator can exercise *sua sponte* authority to reopen and reconsider any of its decisions.

In *United States v. Cooks*, 589 F.3d 173 (5th Cir. 2009), in the context of **reviewing** a "sentence", that was "within the guidelines range", **for reasonableness**, the 5th Circuit stated at 186, in pertinent part:

> The presumption is rebutted only upon a showing that the sentence does not account for a factor that should receive significant weight, it gives significant weight to an irrelevant or improper factor, or it represents a clear error of judgment in balancing sentencing factors. *United States v. Nikonova*, 480 F.3d 371, 376 (5th Cir.2007).

Let's explore the concept of *a clear error of judgment in balancing **other** factors*. Let's say that one needed to balance positive vs. negative traits or characteristics; and/or balance an individual's equities in the U.S. *vs.* in one's home country; or perhaps compare and contrast the seriousness of a crime or crimes *vs.* the seriousness of rehabilitation that is evident.

This appears to be an instance where the *reviewer* (AAO) may be re-weighing evidence and/or deeply examining the reasoning behind certain exercises or discretion or even substituting its own judgment for that of the adjudicator in the proceeding(s) below. These are all currently available to AAO due to its extraordinary plenary power to perform full *de novo* review of anything. Even with the vast and wide-open avenues of inquiry available it might prove more useful for AAO to adopt some more specific forms and levels of review in its upcoming rulemaking to improve its processes. While I do NOT advocate that AAO lay down hard and fast overarching frameworks, I do advocate at least listing the potential types of review standards that it may employ as needed to any of the numerous case types to which its review is amenable.

Under what circumstances will AAO employ the following:

1. Full *de novo* review;
2. Clear error review;
3. A Review for Substantial evidence;
4. A Review for proper exercise of judgment; or
5. A Review for proper exercise of discretion, etc…?

We may never have straightforward answers relating to this aspect of AAO reasoning.

Extraordinary Mistake Demands A Remand

The Director, Texas Service Center, denied the USCIS Form I-140, *Immigrant Petition for Alien Worker*, in this case, for as an Alien of Extraordinary Ability Pursuant to § 203(b)(1)(A) of the Immigration and Nationality Act, [8 U.S.C. § 1153(b) (1)(A)]. The self-petitioner appealed to the Administrative Appeals Office (AAO). AAO dismissed the appeal on June 25, 2014. That decision is shown below with highlighting and other forms of emphases of critical portions therein. Further below that is a copy of the *non-precedent* administrative decision as it appears posted on the USCIS website.

SYNOPSIS: AAO found a clear and gross error. While the decision states that "*three of the ten*" criteria were met, no final merits determination was made. There was a clear error in this decision because at one point it states that "the petitioner "has not met at least two of the six criteria," and that "USCIS will not conduct a final merits determination to determine whether the [petitioner] is recognized internationally as outstanding in the academic field." At P. 3. It appears that there was some confusion on the part of the adjudicator when writing up this decision. The adjudicator appears to have mixed up his or her templates or was re-using a previously written decision as a starting point. The reference to "*two of the six*" is what is needed for a different sub-classification within the employment-based, first preference (EB-1) series of "*Priority Workers*" as an "*outstanding professor or researcher*" while the current petitioner is for someone whom allegedly excelled at "*business*" and thus claimed an "*extraordinary ability*" in that field of endeavor.

AAO remanded the case for a new examination of the evidence against the correct regulations and a new decision. It that new decision is adverse it must be certified back to AAO for a follow-up review. During the *remand* and attendant *re-adjudication*, AAO gave *specific guidance* to examine the evidence of *published materials about the self-petitioner* and the self-petitioner's authorship of scholarly articles. If the new decision is to approve it, we won't see anything further about it from AAO. I am not clairvoyant so might never know the final outcome in this case.

If you are the self-petitioner or counsel in this case, could you let folks know how it turned out? I can be reached by phone at (716) 604-4233 or (716) 768-e-mail: joseph.whalen774@gmail.com . Thanks!

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. We will withdraw the director's decision and remand it for further action and consideration.

The petitioner seeks classification as an "alien of extraordinary ability" in business, pursuant to section 203(b)(l)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(l)(A). The director's decision concluded that the petitioner had met three of the ten criteria set forth at 8 C.F.R. § 204.5(h)(3), but, as stated by the petitioner on appeal, failed to "proceed[] to a final merits determination."

I. LAW

Section 203(b) of the Act states, in pertinent part, that:

> (1) Priority workers. --Visas shall first be made available ... to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> (A) Aliens with extraordinary ability.-- An alien is described in this subparagraph if--
>
> (i) the alien 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,
>
> (ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and
>
> (iii) the alien's entry into the United States will substantially benefit prospectively the United States.

U.S. Citizenship and Immigration Services (USCIS) and legacy Immigration and Naturalization Service (INS) have consistently recognized that Congress intended to set a very high standard for individuals seeking immigrant visas as aliens of extraordinary ability. *See* H.R. 723 101 51 Cong., 2d Sess. 59 (1990); 56 Fed. Reg. 60897, 60898-99 (Nov. 29, 1991). The term "extraordinary ability" refers only to those individuals in that small percentage who have risen to the very top of the field of endeavor. *Id.*; 8 C.F.R. § 204.5(h)(2).

The regulation at 8 C.F.R. § 204.5(h)(3) requires that the petitioner demonstrate the alien's sustained acclaim and the recognition of his or her achievements in the field. Such acclaim must be established either through evidence of a one-time achievement (that is, a major, international recognized award) or through the submission of qualifying evidence under at least three of the ten categories of evidence listed at 8 C.F.R. § 204.5(h)(3)(i)-(x).

In 2010, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) reviewed the denial of a petition filed under this classification. *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010). Although the court upheld the AAO's decision to deny the petition, the court took issue with the AAO's evaluation of evidence submitted to meet a given evidentiary criterion.[1] With respect to the criteria at 8 C.F .R. § 204.5(h)(3)(iv) and (vi), the court concluded that while USCIS may have raised legitimate concerns about the significance of the evidence submitted to meet those two criteria, those concerns should have been raised in a subsequent "final merits determination." *Id.* at 1121-22.

The court stated that the AAO's evaluation rested on an improper understanding of the regulations. Instead of parsing the significance of evidence as part of the initial inquiry, the court stated that "the proper procedure is to count the types of evidence provided (which the AAO did)," and if the petitioner failed to submit sufficient evidence, "the proper conclusion is that the applicant has failed to satisfy the regulatory requirement of three types of evidence (as the AAO concluded)." *Id.* at 1122 (citing to 8 C.F.R. § 204.5(h)(3)).

Thus, *Kazarian* sets forth a two-part approach where the evidence is first counted and then considered in the context of a final merits determination.

II. Analysis

The director concluded that the petitioner "has not met at least two of the six criteria," and that "USCIS will not conduct a final merits determination to determine whether the [petitioner] is recognized internationally as outstanding in the academic field." The classification sought, however, requires that the petitioner meet three of ten criteria and demonstrate sustained national acclaim. 8 C.F.R. § 204.5(h)(2), (3). Moreover, the director concluded that the petitioner meets the criteria at 8 C.F.R. § 204.5(h)(3)((iii), (iv), and (vi). As the director found that the submitted evidence satisfied the regulatory requirement of three types of evidence, he should have conducted a final merits determination to determine whether the petitioner (1) a "level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the[ir] field of endeavor," 8 C.F.R. § 204.5(h)(2); and (2) "that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise." 8 C.F.R. § 204.5(h)(3). *See Kazarian*, 596 F.3d at 1119-20. As the director concluded that the petitioner meets three criteria but did not perform a final merits determination, the petitioner was unable to file a meaningful appeal.

In his decision, the director should consider the following regarding the criteria at 8 C.F.R. § 204.5 (h)(iii) and (vi).

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires "[p]ublished 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." In general, in order for published

1 Specifically, the court stated that the AAO had unilaterally imposed novel substantive or evidentiary requirements beyond those set forth in the regulations at 8 C.F.R. § 204.5(h)(3)(iv) and 8 C.F.R. § 204.5(h)(3)(vi).

material to meet this criterion, it must be about the petitioner and, as stated in the regulations, be printed in professional or major trade publications or other major media. To qualify as major media, the publication should have significant national or international distribution. Some newspapers, such as the New York Times, nominally serve a particular locality but would quality as major media because of significant national distribution, unlike small local community papers.[2] The petitioner must also submit independent, objective evidence establishing that websites constitute major media. In addition, press releases are not "published material" consistent with the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) as they are not independent, journalistic coverage of the petitioner relating to her work.

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(vi) requires "[e]vidence of the alien's authorship of scholarly articles." The use of the plural is consistent with the statutory requirement for extensive evidence. Section 203(b)(l)(A)(i) of the Act.

In light of the above, the matter is remanded to the director for a full adjudication of the petition on the merits. If, upon review, the director continues to find that the petitioner meets the criteria the director identified as met in the November 13, 2013 decision, the director, if issuing another adverse decision, must perform a final merits determination. Any adverse decision must address all of the evidence as it relates to all of the regulatory criteria claimed in order to afford the petitioner the opportunity to present a meaningful appeal.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013).

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the petitioner, is to be certified to the AAO for review.

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2 Even with nationally-circulated newspapers, consideration must be given to the placement of the article. For example, an article that appears in the Washington Post, but in a section that is distributed only in Fairfax County, Virginia, for instance, cannot serve to spread an individual's reputation outside of that county.

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

DATE: JUN 2 5 2014 Office: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to Section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(A)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

www.uscis.gov

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. We will withdraw the director's decision and remand it for further action and consideration.

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I. LAW

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> > > (i) the alien 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,
> > >
> > > (ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and
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U.S. Citizenship and Immigration Services (USCIS) and legacy Immigration and Naturalization Service (INS) have consistently recognized that Congress intended to set a very high standard for individuals seeking immigrant visas as aliens of extraordinary ability. *See* H.R. 723 101st Cong., 2d Sess. 59 (1990); 56 Fed. Reg. 60897, 60898-99 (Nov. 29, 1991). The term "extraordinary ability" refers only to those individuals in that small percentage who have risen to the very top of the field of endeavor. *Id.*; 8 C.F.R. § 204.5(h)(2).

The regulation at 8 C.F.R. § 204.5(h)(3) requires that the petitioner demonstrate the alien's sustained acclaim and the recognition of his or her achievements in the field. Such acclaim must be established either through evidence of a one-time achievement (that is, a major, international recognized award) or through the submission of qualifying evidence under at least three of the ten categories of evidence listed at 8 C.F.R. § 204.5(h)(3)(i)-(x).

In 2010, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) reviewed the denial of a petition filed under this classification. *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010). Although the court upheld the AAO's decision to deny the petition, the court took issue with the AAO's evaluation of evidence submitted to meet a given evidentiary criterion.[1] With respect to the criteria at 8 C.F.R. § 204.5(h)(3)(iv) and (vi), the court concluded that while USCIS may have raised legitimate concerns about the significance of the evidence submitted to meet those two criteria, those concerns should have been raised in a subsequent "final merits determination." *Id.* at 1121-22.

The court stated that the AAO's evaluation rested on an improper understanding of the regulations. Instead of parsing the significance of evidence as part of the initial inquiry, the court stated that "the proper procedure is to count the types of evidence provided (which the AAO did)," and if the petitioner failed to submit sufficient evidence, "the proper conclusion is that the applicant has failed to satisfy the regulatory requirement of three types of evidence (as the AAO concluded)." *Id.* at 1122 (citing to 8 C.F.R. § 204.5(h)(3)).

Thus, *Kazarian* sets forth a two-part approach where the evidence is first counted and then considered in the context of a final merits determination.

II. Analysis

The director concluded that the petitioner "has not met at least two of the six criteria," and that "USCIS will not conduct a final merits determination to determine whether the [petitioner] is recognized internationally as outstanding in the academic field." The classification sought, however, requires that the petitioner meet three of ten criteria and demonstrate sustained national acclaim. 8 C.F.R. § 204.5(h)(2), (3). Moreover, the director concluded that the petitioner meets the criteria at 8 C.F.R. § 204.5(h)(3)((iii), (iv), and (vi). As the director found that the submitted evidence satisfied the regulatory requirement of three types of evidence, he should have conducted a final merits determination to determine whether the petitioner (1) a "level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the[ir] field of endeavor," 8 C.F.R. § 204.5(h)(2); and (2) "that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise." 8 C.F.R. § 204.5(h)(3). *See Kazarian*, 596 F.3d at 1119-20. As the director concluded that the petitioner meets three criteria but did not perform a final merits determination, the petitioner was unable to file a meaningful appeal.

In his decision, the director should consider the following regarding the criteria at 8 C.F.R. § 204.5(h)(iii) and (vi).

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires "[p]ublished 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." In general, in order for published

[1] Specifically, the court stated that the AAO had unilaterally imposed novel substantive or evidentiary requirements beyond those set forth in the regulations at 8 C.F.R. § 204.5(h)(3)(iv) and 8 C.F.R. § 204.5(h)(3)(vi).

material to meet this criterion, it must be about the petitioner and, as stated in the regulations, be printed in professional or major trade publications or other major media. To qualify as major media, the publication should have significant national or international distribution. Some newspapers, such as the *New York Times*, nominally serve a particular locality but would qualify as major media because of significant national distribution, unlike small local community papers.[2] The petitioner must also submit independent, objective evidence establishing that websites constitute major media. In addition, press releases are not "published material" consistent with the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) as they are not independent, journalistic coverage of the petitioner relating to her work.

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(vi) requires "[e]vidence of the alien's authorship of scholarly articles." The use of the plural is consistent with the statutory requirement for extensive evidence. Section 203(b)(1)(A)(i) of the Act.

In light of the above, the matter is remanded to the director for a full adjudication of the petition on the merits. If, upon review, the director continues to find that the petitioner meets the criteria the director identified as met in the November 13, 2013 decision, the director, if issuing another adverse decision, must perform a final merits determination. Any adverse decision must address all of the evidence as it relates to all of the regulatory criteria claimed in order to afford the petitioner the opportunity to present a meaningful appeal.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013).

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the petitioner, is to be certified to the AAO for review.

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[2] Even with nationally-circulated newspapers, consideration must be given to the placement of the article. For example, an article that appears in the *Washington Post*, but in a section that is distributed only in Fairfax County, Virginia, for instance, cannot serve to spread an individual's reputation outside of that county.