

Conflating the Starling Line with the Finish Line

By Joseph P. Whalen (Friday, November 25, 2016)

Probably one of the best, and fairly recent, big-name examples of the mistake of *conflating issues in immigration benefits adjudication* is still [*Kazarian v USCIS*, 596 F.3d 1115 \(9th Cir. 2010\)](#). In that case, the petitioner sought a first-preference, employment-based immigrant visa based on extraordinary ability (EB-1A or E11). The initial adjudicator and then the Administrative Appeals Office (AAO) followed a confused approach to the adjudication process which had developed over time. But first, a brief synopsis of the case.

Poghos Kazarian had received a Ph.D in **Theoretical Physics** in his native country of Armenia. It is unclear what his immigration status was when he filed his I-140 on December 31, 2003. However, the Ninth Circuit decision indicates that he had been teaching and tutoring **math** at a community college, on a volunteer basis for four years prior to filing his I-140. AAO found that he had not satisfied any of the ten criteria. The District Court upheld the AAO decision. The Ninth Circuit at first, in 2009, agreed in full. The Ninth Circuit panel revisited the case in 2010, and changed their opinion, finding instead that he had met two of the ten criteria, which was still not enough. He was denied the visa in the long run.

The regulations controlling the adjudication of this visa classification call for an initial evidentiary showing. Then a qualitative analysis and evaluation of that initial evidence, in order to determine if the evidence meets the statutorily required standard of proof. The process described above is a two-step adjudication. The first step is merely the submission of initial evidence and the second step has been called a “final merits determination” (FMD). The FMD consists of the qualitative analysis and evaluation described above. In short, the initial evidence must either show a one-time major internationally recognized award or meet at least three of ten possibilities listed in the regulations. The only example Congress provided of an award was the Nobel Prize but many others qualify.

A problem developed over time which led to the **improper exclusion of** valid and qualifying **evidence** at the initial stage described above. **Questions** pertaining to the evidentiary value and weight of the documentary evidence were being **asked too soon** in the process. This improper approach meant that individual pieces of evidence that qualified as satisfying various regulatory criteria were erroneously found inadequate because they were being held to the incorrect higher standard. Numerous petitions were incorrectly found not to meet the minimum “three out of ten” evidence categories. By holding the individual pieces of **regulatorily** defined evidence to the higher **statutory** standard of proof instead of the regulatory descriptions of these evidence categories, Officers were “**conflating**” these evidentiary issues. For example, a scholarly article alone, only needs to satisfy [8 C.F.R. § 204.5\(h\)\(3\)\(vi\)](#) {and maybe (v)}.

That scholarly article alone, does **not** have to prove “*sustained national or international acclaim and achievements ... recognized in the field*”, *infra*. As a reminder to the reader, the verb “**conflate**” means to bring together into a composite whole; or to combine. It can also be defined as “to fail to differentiate (a thing) from something similar or related <be careful not to *conflate* gossip with real news>
Synonyms [confuse](#), [confound](#), [mistake](#), [mix](#) (up)”; [Merriam-Webster Thesaurus online](#).¹

Very subtle characteristics were being confused with one another but the worse part was that the various steps in the adjudication process was being jumbled. Officers took many procedural and processual missteps. The statutory **standard of proof** requires that **all of the evidence taken as a whole**, must demonstrate that “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**,” [8 U.S.C. § 1153\(b\)\(1\)\(A\)\(i\)](#) [[INA § 203\(b\)\(1\)\(A\)\(i\)](#)], (**emphases added**). In the incorrect adjudication method, each piece of evidence was being examined as to whether it individually demonstrated sustained international acclaim for recognized achievements. Sometimes, you just have to slow down and see things for what they really are.

That's My Two-Cents, For Now!

¹ Last visited on November 25, 2016.