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AMIN V. MAYORKAS: FIFTH CIRCUIT DENIES EB-1 EXTRAORDINARY ABILITY PETITION EVEN THOUGH PETITIONER MET THREE OUT OF TEN REGULATORY CRITERIA

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By Cyrus D. Mehta and Jessica Paszko*

Establishing extraordinary ability under the employment-based first preference (EB-1) visa category is neither an easy nor straightforward feat. In 2010, *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010), which we wrote a blog about, muddied the waters when it tacked onto the EB-1 determination, a vague, second step analysis known as the "final merits determination" as part of the USCIS Policy Manual. While the Fifth Circuit's recent *Amin v. DHS*, No. 21-20212 (5th Cir. 2022), decision has provided further guidance, it has also grounded the final merits determination even deeper into the EB-1 framework.

As background, an individual can obtain permanent residence in the U.S. under EB-1 by establishing 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. *See* INA § 203(b)(1)(A)(i). Furthermore, the individual seeks entry to continue work in the area of extraordinary ability and his or her entry will substantially benefit prospectively the U.S. *See* INA § 203(b)(1)(A)(ii) & (iii). Unlike most other petitions, no job offer is required and one can even self-petition for permanent residency. Evidence to demonstrate "sustained national or international acclaim" could be a one-time achievement such as a major international award (for example, a Nobel Prize, Oscar or Olympic Gold Medal). If the applicant is not the recipient of such an award, then documentation of any three of the following is sufficient:

- Receipt of lesser nationally or internationally recognized prizes or awards.
- Membership in an association in the field for which classification is sought, which requires outstanding achievement of its members, as judged by recognized national or international experts.
- Published material about the person in professional or major trade publications or other major media.
- Participation as a judge of the work of others.
- Evidence of original scientific, scholastic, artistic, athletic or business-related contributions of major significance.
- Authorship of scholarly articles in the field, in professional or major trade publications or other media.
- Artistic exhibitions or showcases.
- Performance in a leading or cultural role for organizations or establishments that have a distinguished reputation.
- High salary or remuneration in relation to others in the field.
- Commercial success in the performing arts.

See 8 C.F.R. § 204.5(h)(3)(i)-(x). An applicant may also submit comparable evidence if the above standards do not readily apply.

Initially, applicants must submit the required "initial evidence" demonstrating that they meet at least three out of the ten criteria. However, successfully demonstrating that three criteria have been met is not commensurate with an EB-1 approval. It is only the first hurdle in establishing extraordinary ability. The USCIS subsequently conducts the final merits determination "to determine whether, as a whole, the evidence is sufficient to demonstrate that the applicant meets the required high level of expertise." The Fifth Circuit provides a helpful analogy, even if depressing, to illustrate this two-step process––the first step is akin to the hopeful college applicant submitting all requisite application materials to a dream university, and the second step is where the applicant receives a rejection letter despite complying with all of the university's admission criteria.

Before the Fifth Circuit, was the case of Bhaveshkumar Amin, a project manager in the field of chemical engineering who has worked for oil companies, and contributed to novel inventions, including a portable sulfur-forming unit, modularized well pads, and a high-efficiency drill rig. It was undisputed that Amin satisfied three criteria: judging the work of others, holding a leading role

in industry organizations, and earning a high salary relative to peers. But that was not so initially. The USCIS, when first denying the petition, only agreed that he met the fourth criterion relating to judging the work of others. Amin bypassed the Appeals Administrative Office (AAO) and directly sought review of the denial in federal district court under the Administrative Procedures Act that allows challenges of final agency decisions that are arbitrary and capricious. After filing the lawsuit, USCIS agreed to reconsider the denial and determined that Amin had met three out of the ten criteria but still issued a denial because Amin did not meet the final merits determination. Amin continued with his lawsuit but the district court found that the USCIS's reasoning behind the denial was insufficient to render it arbitrary and capricious.

Amin appealed to the Fifth Circuit. As a preliminary matter, the Fifth Circuit agreed that Amin could bypass the AAO and directly seek review in federal court under *Darby v. Cisneros*, 509 U.S. 137, 146-47 (1993). In *Darby v. Cisneros*, the Supreme Court held that when the statute or regulation does not require administrative appeal then the agency's decision constitutes a final agency action. 8 C.F.R. § 204.5(n)(2) does not require administrative appeal, and thus Amin's failure to appeal to the AAO did not deprive the court of jurisdiction under the APA. As an aside, it is good news that the Fifth Circuit did not invoke the jurisdiction stripping provision for discretionary determinations, INA 242(a)(2)(B), to deprive Amin of jurisdiction because of the discretionary nature of the final merits determination as the Ninth Circuit did in *Poursina v. USCIS* with a challenge to a denial of a national interest waiver denial under INA § 203(b)(2)(1)(A). Unlike INA § 203(b)(2)(1)(A) where discretion is clearly embedded, INA § 203(b)(1)(A) does not so explicitly state that the granting of EB-1 is discretionary.

The Fifth Circuit also disposed of Amin's challenge to the USCIS Policy Manual that it was not consistent with the regulation and that it was issued without notice and comment. The Fifth Circuit held that the Policy Manual's guidance regarding conducting a final merits determination was consistent with the regulation as the regulation did not presumptively state that meeting the three criteria guaranteed an extraordinary ability finding. 8 C.F.R. § 204.5(h)(3) referred to "initial evidence" and also stated that applicants must submit evidence of "*at least* three" criteria. Furthermore, the USCIS Policy Manual was an interpretive rather than a legislative rule, according to the Fifth Circuit, and so it could be issued without notice and comment. It is unfortunate that the

Fifth Circuit gave short shrift to *Buletini v. INS*, 860 F. Supp. 1222 (E.D. Mich. 1994). In *Buletini,* the court held that once an applicant met three out of the ten criteria, the regulation shifts the burden to the government to explain why the applicant has not demonstrated extraordinary ability. The USCIS Policy Manual, seizing on the Ninth Circuit's "final merits determination" in *Kazarian,* shifted this burden onto the applicant in elaborating a highly subjective second step analysis. *Kazarian's* curse has gone beyond the Ninth Circuit and has now afflicted the Fifth Circuit.

The Fifth Circuit then reviewed Amin's objection to the USCIS's determination that he did not prove a fourth criterion: original scientific or business-related contributions of major significance in the field. It is interesting that Amin pushed for a finding recognizing that he had met this fourth criterion since 8 C.F.R. § 204.5(h)(3)(i)-(x) only requires a satisfaction of three criteria. Amin's petition has been denied because he did not meet the final merits determination, and it appears that getting recognition that he met the fourth criterion would potentially be used to argue that he met the final merits determination if he met one more criterion. Indeed, the Fifth Circuit's decision, namely footnote 7 states: "we review the agency's step one analysis because if Amin satisfies a fourth regulatory criteria, he has a stronger overall case for extraordinary ability at the second step." Amin pointed to his contributions in designing the world's first portable sulfur-forming units, the first modularized well pads in the Alberta Oil Sands, and a high-efficiency "walking" drill rig capable of being moved from one well pad to another without being disassembled.

The USCIS determined, and the Fifth Circuit agreed, that Amin did not meet his burden of proving that his designs were of major significance to his field. According to the Fifth Circuit, a letter of support provided by Amin's employer, calling his design a response to an industry need, did not demonstrate how Amin's first design had any impact on the field, beyond merely benefiting his employer. The China National Offshore Oil Corporation also provided a letter of support describing how it utilized Amin's second design and how it adopted similar strategies to build modules in China but had proved unsuccessful at achieving the same efficiency. The Fifth Circuit called this Amin's "best evidence" because it addressed the impact of his work beyond his own employer, but it still proved insufficient because it failed to show "widespread replication of the design." While the USCIS's denial did not specifically address Amin's

contributions to the third design, the drill rig, it did acknowledge the letter of support provided on Amin's behalf, and according to the Fifth Circuit, any error on this point was harmless because Amin's evidence did not show that anyone beyond his company used, or even attempted to use, the rig design. Ultimately, although Amin provided great value to his employers, the record did not demonstrate that either the quality or quantity of his work is indicative of sustained national or international acclaim or that his achievements have been recognized in the field of expertise.

It is unfortunate that the Fifth Circuit likened the EB-1 to a "genius" or "Einstein" visa. Although the INA requires the petitioner to demonstrate sustained national or international acclaim, it does not mean that one needs to be an "Einstein" to win an EB-1 approval, which incidentally was granted to Melania Trump when she was a well-known model, although not in the same league as a super model. Indeed, even Einstein may not have been able to meet three out of the ten criteria when he published his papers on Special Relativity and General Relativity in 1905 and 1915. Still, both Einstein in 1915 and Trump were deserving of EB-1 classification. It is thus disheartening that the Fifth Circuit wrote: "If the three criteria Amin proved—leadership in an industry organization, a high salary, and peer review experience—are enough to automatically show that acclaim, then the 'extraordinary ability' visa will look less like an Einstein visa and more like a Lake Wobegon one." The Fifth Circuit assuming that the EB-1 is an Einstein visa is as fictional as Lake Wobegon. In fact, DHS also updated and broadened its guidance related to O-1A nonimmigrant status for noncitizens of extraordinary ability who have recently graduated in STEM fields. The legal standard under the O-1A visa for establishing extraordinary ability is identical to the EB-1. For the first time, this update provides examples of evidence that might satisfy the criteria by those who have recently graduated or formed startups.

Despite the grim fate this decision casts on EB-1 petitions, there may be a possible glimmer of hope in the Fifth Circuit's decision because it suggests in footnote 7 that successfully satisfying more than three criteria can bolster one's case for extraordinary ability at the final merits determination stage. Many petitioners who file under EB-1 may satisfy more than three out of the ten criteria, and they must make every effort to have USCIS recognize more than three so that they may get a better shot at passing the final merits determination.

(This blog is for informational purposes and should not be viewed as a substitute for legal advice).

***Jessica Paszko is a Law Clerk at Cyrus D. Mehta & Partners PLLC. She graduated with a J.D. degree from Brooklyn Law School in 2021, passed the New York Bar Examination and is awaiting admission to the New York Bar.**