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FEDERAL COURT RELIES ON LOPER BRIGHT TO OVERTURN EB-1 DENIAL BASED ON THE FINAL MERITS DETERMINATION

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In *Mukherji v. Miller*, a district court in Nebraska recently set aside the denial of a petition of extraordinary ability on the ground that the "final merits" determination was unlawful.

Although the petitioner satisfied five out of the ten criteria for establishing extraordinary under 8 CFR 204.5(h)(3), when only three were needed to be satisfied, the USCIS denied the extraordinary ability petition because the petitioner failed to establish the "high level of expertise required for the E11 immigrant classification through the "final merits determination."

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.

The Plaintiff in *Mukherjee v. Miller* contended that this "final merits" determination is not found in the statute or regulation and is taken from the Ninth Circuit's decision in *Kazarian v. USICS*, which the USCIS adopted as a nation-wide policy on December 2, 2020. The Court held that the USCIS did not properly create the two step process. Indeed, the USICS unlawfully adopted the final merits determination without notice and comment rulemaking. The final merits determination had the force of law, and the USCIS ought to have ordinarily abided by the notice and comment procedures prescribed by the Administrative Procedure Act, 7 U.S.C. § 553(b).

In addition, the agency acted arbitrarily and capriciously for failing to acknowledge and reason that it was changing its policy. Pursuant to *Encino Motorcars LLC v. Navarro*, agencies are free to change their existing policies as long as they provide a reasoned explanation for the change. *Encino Motorcars* requires that the agency must display awareness that it is changing its position and that there are good reasons for the new policy. This did not happen with the final merits determination.

Perhaps the most significant part of the decision is that the court acknowledged *Loper Bright Enterprises v. Raimundo*, wherein the Supreme Court in 2024 diminished the validity of deference to an agency's interpretation of a

statute under *Chevron*. With the very limited deference after *Loper Bright*, all questions of law will be determined by the Court. The validity of the final merits determination is clearly a question of law, not fact. Accordingly the Court found that the two-tier analysis was not valid at its inception.

Mukherjee v. Miller did not go against *Kazarian* in its entirety, it only found that the final merits determination was unlawful. In my prior blog entitled *The Curse of Kazarian v. USCIS in Extraordinary Ability Adjudications under the Employment-Based First Preference* I wrote that when *Kazarian* was first decided, it was received with much jubilation as it was thought that the standards for establishing extraordinary ability would be more straightforward and streamlined. *Kazarian* essentially holds that a petitioner claiming extraordinary ability need not submit extraordinary evidence to prove that he or she is a person of extraordinary ability. If one of the evidentiary criteria requires a showing of scholarly publications, the petitioner need not establish that the scholarly publications in themselves are also extraordinary in order to qualify as a person of extraordinary ability. This is a circular argument, which Kazarian appropriately shot down. If *Kazarian* just stopped there, it would have been a wonderful outcome. Unfortunately, *Kazarian* had been interpreted to also require a vague and second step analysis known as the "final merits determination," which can stump even the most extraordinary.

Now *Mukherjee v. Miller* has relied on *Loper Bright* to hold that the final merits determination was unlawful although many courts have adopted it. Even the Fifth Circuit in *Amin v. Mayorkas* adopted the final merits determination, based upon which it upheld the denial of Mr. Amin's extraordinary ability petition even though he met three of the ten criteria. The Fifth Circuit held that the USCIS did not violate the APA by not adopting a formal rule as the final merits determination was an interpretive rather than a legislative rule and do it did not need to go through notice and comment. The Fifth Circuit issued *Amin v. Mayorkas* in 2022 before the Supreme Court brought about the demise of *Chevron* deference.

The Court in *Mukherjee v. Miller* while reviewing the merits of the USICS's decision held that it was an arbitrary and capricious decision. The reviewing officer hailed to articulate the required standard and the failure to meet the standard by the plaintiff. It appeared that the plaintiff did not meet the final merits because she failed to indefinitely stay at the top of her field. The Court held that "t is clear that the Plaintiff in this case was at the top of her field. No

one argues that is not accurate. The Agency based its decision on whether she continuously received awards recognizing her status or kept up with that level of production. The Court finds nothing in the statutory scheme that would support such a finding."

It remains to be seen whether other courts will also be nudged by *Loper Bright* to disregard the USCIS's final merits determination. In *Scripps College v. Jaddou*, a case decided just prior to *Loper Bright*, the Court did not discard the final merits analysis but still overturned the USCIS by holding that USCIS cannot and should not, under the cover of the second step final merits determination, be allowed to introduce new requirements outside the parameters of the regulatory criteria or reverse its prior acceptance of evidence under the regulatory criteria. Prior to *Mukherjee v. Miller*, most courts have clung onto the final merits determination even when reversing the USCIS denial (as in *Scripps College*), but now future courts have *Loper Bright* on their side to not pay deference to the final merits determination while still relying on *Kazarian* to shoot down the circular argument, which is that one does not need to submit extraordinary evidence under one of the ten criteria to establish extraordinary ability.