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USCIS WITHDRAWS APPEAL IN MUKHERJI: WHAT CHANGES—AND WHAT DOES NOT?

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In our previous blog, we discussed the decision of a district court in Nebraska in *Mukherji v. Miller*, which relied on *Loper Bright* principles to overturn an EB-1A denial based on USCIS's use of the "final merits determination" framework. As explained in that post, the court questioned whether USCIS could lawfully impose an adjudicatory structure that was not expressly grounded in statute or regulation. USCIS had appealed that decision to the U.S. Court of Appeals for the Eighth Circuit. Brian Green, who was lead counsel in *Mukherji v. Miller* has posted that USCIS has withdrawn its appeal.

While the withdrawal of the appeal is noteworthy, its practical significance should not be overstated. The decision does not necessarily signal an immediate change in how USCIS adjudicates extraordinary ability petitions.

To briefly recap, the district court in Mukherji held that USCIS improperly denied the petitioner's EB-1A petition by relying on a second evaluative step—the so-called "final merits determination"—that, according to the court, was not properly adopted through notice-and-comment rulemaking under the Administrative Procedure Act (APA). Rather than continuing to litigate the matter before the Eighth Circuit, USCIS has now chosen to withdraw its appeal, leaving the district court's ruling intact in that individual case.

The withdrawal of the appeal is undoubtedly significant, but it is equally important to understand what it does not mean.

First, the withdrawal does not create a binding precedent beyond the district court case itself. Had the Eighth Circuit issued a decision affirming the lower court, the ruling may have carried broader precedential value within that

jurisdiction and potentially influenced courts elsewhere. By withdrawing the appeal, USCIS avoided an appellate ruling on the merits.

Second, USCIS has not rescinded its long-standing adjudicatory approach to extraordinary ability petitions, and it does not appear that the government withdrew the appeal because it plans to rescind the final merits determination policy. USCIS is still likely to continue adjudicating EB-1A and EB-1B petitions using the familiar framework associated with the Ninth Circuit decision in *Kazarian v. USCIS*, including a broader evaluation of whether the evidence collectively demonstrates sustained acclaim and whether the beneficiary has risen to the top of the field. Petitioners should therefore continue preparing filings with the expectation that a holistic review will occur. Indeed, the USCIS has been denying EB-1A petitions even where the petitioner has met three or more of the ten criteria for determining extraordinary ability.

At the same time, it would be difficult to ignore the broader significance of USCIS's decision not to pursue the appeal. One possible explanation is institutional caution. If USCIS had proceeded and lost before the Eighth Circuit, it risked creating an unfavorable appellate decision concerning the agency's authority to impose adjudicatory standards not expressly rooted in regulation. The decision to withdraw the appeal may therefore reflect an effort to preserve flexibility while avoiding a precedential rule with wider consequences, and to allow the USCIS to deny meritorious EB-1A cases with impunity under the final merits determination.

For individuals pursuing extraordinary ability classifications, the practical takeaway is measured rather than dramatic. While Mukherji eliminated the "final merits determination" in that case, it does not broadly eliminate the "final merits determination" in all cases, nor does it automatically alter how petitions will be adjudicated tomorrow. However, the case may provide an additional point of discussion in litigation involving denials where USCIS appears to impose expectations untethered from the regulatory text. It also serves as a reminder that courts may increasingly scrutinize agency-created frameworks in the post-Loper Bright era. It is surprising that the USCIS withdrew its appeal in the Eight Circuit, which is conservative, which means that after *Loper Bright* the final merits determination is vulnerable in any federal court.

Whether Mukherji ultimately proves to be an isolated district court decision or

the beginning of a broader reassessment of extraordinary ability adjudications remains to be seen. What is clear, however, is that USCIS's withdrawal of its appeal leaves unresolved—but very much alive—the broader debate over the limits of agency authority in immigration adjudications that are not tethered to the INA, particularly in the post-Loper Bright landscape.

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