United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
February 11, 2025
Lyle W. Cayce
Clerk

No. 24-40249

SEBIN JOSEPH,

Plaintiff—Appellant,

versus

THE DIRECTOR OF TEXAS SERVICE CENTER, UNITED STATES CITIZENSHIP and IMMIGRATION SERVICES,

Defendant—Appellee.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 4:22-CV-973

Before GRAVES, ENGELHARDT, and OLDHAM, *Circuit Judges*.

Per Curiam:[*]

Sebin Joseph applied for an EB-1 "extraordinary ability" visa which would allow him to obtain permanent residence in the United States. 8 U.S.C. § 1153(b)(1)(A); 8 C.F.R. § 204.5(h). The United States Citizen and Immigration Services (USCIS) denied the application. The district court upheld USCIS's determination. Joseph appeals the district court's denial of

[*] This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

his motion for summary judgment and grant of summary judgment in favor of USCIS. We AFFIRM.

I.

A.

An EB-1 visa is the most difficult type of employment visa to obtain.[1] Employment-based admission to the United States generally requires (1) that the applicant have a job offer from a United States employer and (2) that the Department of Labor certify there are insufficient American citizens able, willing, and qualified to perform the job and that the employment of the applicant will not adversely affect the wages and working conditions of similarly employed American workers. *See* 8 U.S.C. § 1182(a)(5). After the employer receives certification from the Department of Labor, it may file an I-140 with USCIS for the prospective employee's employment-based immigration. *See* 8 C.F.R. § 204.5(c).

The Immigration Act of 1990 carves out an exception to these prerequisites for those with "extraordinary ability" who have demonstrated "sustained national or international acclaim." 8 U.S.C. § 1153(b)(1)(A)(i). Aliens who obtain "extraordinary ability" admission to the United States are "employment-based first-preference immigrants" or "EB-1." Those with extraordinary ability are rare, which means this exception is "extremely restrictive"—indeed it is colloquially referred to as the "Einstein" or "genius" visa. *Amin v. Mayorkas*, 24 F.4th 383, 386–87 (5th Cir. 2022); *Kazarian v. U.S. Citizenship & Immigr. Servs.*, 596 F.3d 1115, 1120 (9th Cir. 2010). To qualify, one cannot merely excel in his or her field. Another visa with less

[1] We have not found a single circuit court opinion reversing USCIS's denial of an EB-1 visa.

stringent requirements is available for those individuals: the "exceptional ability" visa. *See* 8 U.S.C. § 1153(b)(2).

Those who have received the "extraordinary ability" visa include John Lennon, a member of the internationally-known Beatles, who had support letters from other renowned individuals including Andy Warhol. *Amin*, 24 F.4th at 386. Another recipient was a golfer who won the World Series of Golf, Canadian Open, ranked tenth in the PGA Tour, made $714,389 in 1991 alone, and provided extensive major media coverage of his accomplishments as well as letters of support from other celebrated golfers including Jack Nicklaus. *Matter of Price*, 20 I. & N. Dec. 953, 955–56 (BIA 1994). Winning an Olympic Gold Medal or receiving an acclaimed prize like the Nobel Peace Prize or the Pulitzer Prize can also qualify an individual for this visa.

The Immigration Act of 1990 itself does not define "extraordinary ability." But in 1991 the Immigration and Naturalization Service (INS) issued a notice-and-comment rule defining the term as: "a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor." 8 C.F.R. § 204.5(h)(2).[2] To meet this definition the applicant can either submit evidence of a major one-time achievement (e.g., Nobel Peace Prize or Olympic Gold Medal) or the applicant may present evidence that satisfies three of ten provided criteria.[3] If those criteria

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[2] This is consistent with the best meaning of the statute. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 400 (2024).

[3] Those criteria are:

> (i) Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor;
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> (ii) Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding

do not "readily apply" to the applicant's occupation, he may submit "comparable evidence to establish . . . eligibility" for the EB-1 visa. *Id.* § 204.5(h)(4).

In 2010, USCIS issued a policy memorandum providing further guidance on how the agency reviews EB-1 applications. U.S. CITIZENSHIP & IMM. SERVS., DEP'T OF HOMELAND SEC., PM-602-0005.1, EVALUATION OF EVIDENCE SUBMITTED WITH CERTAIN FORM I-140 PETITIONS; REVISIONS TO THE *ADJUDICATOR'S FIELD MANUAL (AFM)* CHAPTER 22, *AFM* UPDATE AD11-14, at 1 (2010) (POLICY MEMO). In the memo the agency adopted a

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achievements of their members, as judged by recognized national or international experts in their disciplines or fields;

(iii) Published material about the alien in professional or major trade publications or other major media, relating to the alien' work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation;

(iv) Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought;

(v) Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field;

(vi) Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media;

(vii) Evidence of the display of the alien's work in the field at artistic exhibitions or showcases;

(viii) Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation;

(ix) Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field; or

(x) Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.

8 C.F.R. § 204.5(h)(3).

two-step approach to adjudicating EB-1 applications. *See* POLICY MEMO, at 3; *Amin*, 24 F.4th at 388. First, USCIS assesses the submitted evidence to establish which, if any, of the ten criteria are met by a preponderance of the evidence. *See* POLICY MEMO, at 5. Second, USCIS conducts a final merits determination to decide whether the totality of the evidence is sufficient to demonstrate the "required high level of expertise." *Id.*

B.

Sebin Joseph seeks the rare EB-1 visa. He is a citizen of India and was admitted to the United States on a temporary basis as a nonimmigrant student. Once admitted, Joseph co-founded a 3D-printing construction company, Von Perry. Joseph is now the Chief Technology Officer (CTO) of the company.[4] As CTO, Joseph earns a salary of $72,000 annually. Von Perry took on a 3D-printed house project. This project was written about in several Dallas publications. The firm has several other prospective 3D-printed housing projects in Texas. Joseph believes that this, along with the fact that he has made original contributions to the 3D-printing construction industry, including creating a method for implementing automated construction and application of geopolymers and Aircrete in 3D-printing construction, demonstrate that he is at the very top of his field of endeavor. Joseph argues his success is further supported by the fact that he judged three events in the months leading up to him filing this petition.

Joseph provides several letters speaking to this entrepreneurial work in the field of 3D-printing construction. Because he believes he is at the very top of his field, Joseph submitted an I-140 petition with USCIS requesting immigrant classification as an EB-1 "alien of extraordinary ability."

[4] The other co-founder, Treyvon Perry, is the CEO of the company.

USCIS reviewed Joseph's I-140 application and issued a notice of intent to deny his EB-1 visa application. Joseph then submitted 27 additional exhibits to USCIS. Ultimately, USCIS denied the visa application.

Joseph contested the denial in the Eastern District of Texas, arguing that USCIS's denial of his "extraordinary ability" visa was arbitrary, capricious, and not in accordance with the law. Joseph moved for summary judgment. USCIS also moved for summary judgment. Joseph responded to the cross motion, and USCIS replied. The magistrate judge issued a report and recommendation that the district court grant USCIS's motion and deny Joseph's motion. Joseph objected. The district court adopted the report and recommendation.[5] Joseph timely appealed.[6]

II.

The Administrative Procedure Act (APA) allows for judicial review of a final agency action. A court may set aside an agency action if it finds the agency action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see also Nat'l Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472, 1475 (5th Cir. 1989). If the agency "articulates a rational relationship between the facts found and the choice made" it does not act arbitrarily or capriciously. *Louisiana, ex rel. Guste v. Verity*, 853

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[5] This court has consistently upheld "the use of summary judgment as a mechanism for review of agency decisions." *Girling Health Care, Inc. v. Shalala*, 85 F.3d 211, 214 (5th Cir. 1996). A district court's grant of summary judgment is reviewed *de novo*. *See Petro Harvester Operating Co. v. Keith*, 954 F.3d 686, 691 (5th Cir. 2020). This court may affirm the grant of summary judgment on any ground supported by the record. *See Smith v. Reg'l Transit Auth.*, 827 F.3d 412, 417 (5th Cir. 2016).

[6] Joseph chose to appeal the administrative determination directly to the district court alleging an APA violation, rather than challenging it in an Administrative Appeals Office proceeding. This does not make his claim unreviewable. *See Amin*, 24 F.4th at 390 ("Because 8 C.F.R. § 204.5(n)(2) does not clearly require administrative appeal, we have jurisdiction despite [plaintiff's] failure to exhaust administrative remedies.").

F.2d 322, 327 (5th Cir. 1988). Although a reviewing court "may not supply a reasoned basis for the agency's action that the agency itself has not given," it may nevertheless "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285–86 (1974). "Our task is merely to ask whether the agency considered the relevant facts and articulated a satisfactory explanation for its decision[.]" *Amin*, 24 F.4th at 393 (citing *Dep't of Com. v. New York*, 588 U.S. 752, 773 (2019)).

Joseph alleges that USCIS acted arbitrarily, capriciously, with disregard to the law, or abused its discretion at both steps of its analysis.

A.

We turn first to USCIS's step one determination. The parties agree that Joseph met three criteria[7], but they depart on whether Joseph provided evidence establishing two additional criteria at step one. Those two criteria regard Joseph's published material and commercial success.[8]

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[7] (iv) Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought;

(v) Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field; and

(viii) Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.

8 C.F.R. § 204.5(h)(3).

[8] (iii) Published 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. Such evidence shall include the title, date, and author of the material, and any necessary translation; and

(x) Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.

1. USCIS considered four articles Joseph submitted that contained quotes of Joseph on Von Perry's 3D-printed home project in North Texas. These articles appeared in the Dallas Morning News, Dallas Business Journal, and Dallas Innovates. USCIS determined that the articles were insufficient because they were not about Joseph and his work in the field. USCIS explained that the articles focus on the first house in Collin County, Texas that is to be built with a 3D printer. While the articles quote Joseph and mention Von Perry, USCIS determined the articles were primarily about the *house* being built and not Joseph. USCIS reasoned that quoting a company's leader in an article about the work of the company does not make the article about the leader, here Joseph. The plain language of this criterion requires the publication be about Joseph and his work in the field of 3D printing. It was reasonable for USCIS to determine that the articles failed this criterion.

2. To demonstrate commercial success, Joseph submitted plans and invoices for Von Perry's projects, as well as the company's waitlist. Joseph argues these are analogous to box office sales. Joseph also submitted reference letters speaking to his accomplishments. And evidence was provided that his salary was $72,000 annually. USCIS reviewed all of the submitted evidence but did not expressly speak to why it was denying the commercial success prong. Even so, USCIS determined Joseph did not meet the requirements for commercial success. We agree.

While box office sales show the success of a movie or show by showing actual sales, Joseph's evidence goes towards prospective sales. It does not appear from the record that, at the time of USCIS's decision, Joseph or Von Perry had completed even one 3D-printed house. The reference letters

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8 C.F.R. § 204.5(h)(3).

underscore the *potential* of Joseph's advancements. Potential success is not comparable to the actual commercial success that the regulation requires. We agree with the district court that the evidence provided was not of "commercial successes in the performing arts" and any error made by USCIS on this point was harmless. *See Amin*, 24 F.4th at 394; *see also Worldcall Interconnect, Inc. v. FCC*, 907 F.3d 810, 818 (5th Cir. 2018) ("[W]e will not reverse an agency action due to a mistake where that mistake 'clearly had no bearing on the procedure used or the substance of decision reached.'" (quoting *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 444 (5th Cir. 2001))).

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USCIS reviewed Joseph's evidence for the two criteria at issue, and it credited Joseph's accomplishments but determined that he did not meet his burden. USCIS's decision to view Joseph's proof as insufficient is reasonable. The agency's determinations on the above two criteria were not arbitrary, or otherwise unlawful.

B.

We next consider Joseph's objection to USCIS's final merits determination that he did not show "extraordinary ability." USCIS's decision was rationally connected to its denial of Joseph's visa application.

USCIS "examined the entire record." It reasoned that the evidence Joseph presented that he judged events fails to establish that Joseph was "set . . . apart from others in the field" and fails to establish "a career of acclaimed work." USCIS, too, found that the evidence Joseph presented of original contributions did not demonstrate "sustained national or international acclaim." And Joseph did not provide the "extensive documentation" necessary.

USCIS also reviewed the evidence of Joseph's leading or critical role in the field. USCIS determined that while Joseph is the CTO of a 3D-printing construction company, the evidence does not reflect that Joseph himself has garnered "national or internal acclaim." There are, indeed, many who hold such positions. And USCIS explained that Joseph's leading role in a successful or distinguished company does not demonstrate that Joseph "has a sustained career or that the impact of his work has risen to the level where it places him at the very top of the field."

USCIS's final merits determination that Joseph failed to show "extraordinary ability" was reasonable. It was not arbitrary, capricious, or otherwise unlawful.

III.

After evaluating the evidence, USCIS reached the familiar conclusion that Joseph "is not one of that small percentage who have risen to the top of [his] field of endeavor. Furthermore, the evidence does not show that [Joseph's] achievements set him significantly above almost all others in the field at a national or international level and does not establish sustained acclaim. Therefore, USCIS does not find [Joseph] to be an individual of extraordinary ability." We see no error. As this court said in *Amin*, "Extraordinary ability is such an elite level of accomplishment that recognizing it necessarily entails a judgment call. Arguing that the agency was compelled to find extraordinary ability is a bit like saying that the only possible grade on an exam was an A+." 24 F.4th at 394–95.

Joseph, like Amin, appears to argue that because he has met at least three criteria in step one, USCIS acted unlawfully in denying his visa application. But as this court articulated in *Amin*, were that true, there would be no step two of the analysis. That step is the agency's ultimate merits

determination on whether the evidence shows the applicant has "extraordinary ability" as "demonstrated by sustained national or international acclaim."

USCIS's decision reflects the reasoned consideration the APA requires. We AFFIRM.