UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 93-5030

(Summary Calendar)

PATRICK ISI IKHIFA,

Petitioner,

versus

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Review of an Order
of the Immigration and Naturalization Service
(A27-899-062)

(January 25, 1994)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:*

Patrick Ikhifa appeals a final order of the Board of Immigration Appeals ("BIA"), denying his motion to reopen his deportation proceedings. Ikhifa sought to reopen the proceedings to apply for adjustment of status based on a pending immediate relative visa petition filed on his behalf. Finding that the BIA abused its discretion, we vacate and remand.

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* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Ikhifa, a native and citizen of Nigeria, entered the United States in 1984 as a nonimmigrant visitor authorized to remain in this country for a period not to exceed six months. In 1986, Ikhifa married Pamela Hollins, a United States citizen. On October 19, 1988, Ikhifa was convicted of willful possession and use of a false immigration document in violation of 18 U.S.C. § 1546(a), willful use of an altered passport in violation of 18 U.S.C. § 1543, and two counts of willfully obtaining guaranteed student loans by fraud and false statements in violation of 20 U.S.C. § 1097. On October 20, 1988, the Immigration and Naturalization Service ("INS") issued an Order to Show Cause charging Ikhifa with deportability pursuant to 8 U.S.C. § 1251(a)(5). The immigration judge found Ikhifa deportable as charged, and also denied his motion for a continuance. The BIA denied Ikhifa's appeal of these determinations. Ikhifa then filed with the BIA a motion to reopen his deportation proceedings. The BIA denied this motion, and Ikhifa appeals.

"[W]e generally review the BIA's denial of a motion to reopen only for abuse of discretion." *Pritchett v. INS,* 993 F.2d 80, 83 (5th Cir.) (citing *INS v. Doherty,* 112 S. Ct. 719, 724-25 (1992)), *cert. denied,* 114 S. Ct. 345 (1993). In applying the abuse of discretion standard to a BIA's denial of a motion to reopen, we have explained that

> [t]he standard is whether the Board has acted within the bounds of an abundant discretion granted to it by Congress. It is our duty to allow [the] decision to be made by the Attorney General's delegate, even a decision that we deem in error, so long as it is not capricious, racially invidious, utterly without foundation in the

> evidence, or otherwise so aberrational that it is arbitrary rather than the result of any perceptible rational approach.

Osuchukwu v. INS, 744 F.2d 1136, 1142 (5th Cir. 1984); *see also Pritchett,* 993 F.2d at 83 (citing with approval *Osuchukwu*).

In support of its denial of Ikhifa's motion to reopen his deportation proceedings, the BIA gave the following explanation: "There is no indication in the record . . . that the visa petition filed on [Ikhifa's] behalf has . . . been approved. [Ikhifa] accordingly has not established prima facie eligibility for relief from deportation, and his motion to reopen is therefore denied." Record at 5-6. "A motion to reopen deportation proceedings to consider a newly-acquired claim of relief from deportation will generally be denied where the moving party fails to make a prima facie showing of eligibility for the relief sought." *Pritchett,* 993 F.2d at 83 (citing *Doherty,* 112 S. Ct. at 724-25). In *Matter of Garcia,* 16 Interim Dec. 653 (BIA 1978), the BIA recognized an exception to this general rule in cases such as the one before us))a case in which a beneficiary of a pending visa petition has moved to reopen his deportation proceedings to apply for adjustment of status. In *Garcia,* the BIA stated that "discretion should, as a general rule, be favorably exercised where a prima facie approvable visa petition and adjustment application have been submitted in the course of a deportation proceeding or upon a motion to reopen." *Id.* at 657. The BIA stated that Ikhifa's reliance on *Garcia* was "misplaced" because it "did not intend `to establish [in *Garcia*] an inflexible rule requiring the immigration

judge in all cases to continue the deportation proceedings' simply because an adjustment of status application and an accompanying visa petition have been filed." Record at 5 (quoting *Garcia*). The BIA further explained that *Garcia* did not apply because "[i]n the present case, [Ikhifa] has not supported his motion with evidence that the visa petition filed on his behalf has been approved." Record at 5. This explanation turns *Garcia* on its head, as *Garcia* clearly stands for the proposition that "for the purposes of ruling on a motion to reopen, a pending visa petition which is prima facie approvable should be treated as if it were already approved." *Pritchett,* 993 F.2d at 83 Because the BIA's stated reasons for not applying *Garcia* are irrational,[1] we hold that the BIA's denial of Ikhifa's motion to reopen constituted an abuse of discretion.

To the extent that the INS argues that *Garcia* does not apply because the pending visa petition was not prima facie approvable,[2] we note that the BIA did not cite this reason in support of its decision. As the INS points out in its own brief, *see* Brief for

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[1] As examples of acceptable reasons for denying a motion to reopen in a case such as this, the BIA stated the following:

> It clearly would not be an abuse of discretion for the immigration judge to summarily deny a request for a continuance or a motion to reopen upon his determination that the visa petition is frivolous or that the adjustment application would be denied on statutory grounds or in the exercise of discretion notwithstanding the approval of the petition.

Id. at 657.

[2] The INS contends that because the visa petition was initially denied by an immigration judge, and then on appeal to the BIA, remanded for further findings, the visa petition was not prima facie approvable.

INS at 13-14, the BIA denied Ikhifa's motion to reopen because Ikhifa failed to establish prima facie eligibility for adjustment of status because he did not have an approved visa available to him when his application was filed. "[A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency." *Central Power and Light Co. v. United States,* 639 F.2d 1104, 1106 n.3 (5th Cir.) (quoting *Securities and Exchange Commission v. Chenery Corp.,* 332 U.S. 194, 67 S. Ct. 1575, 91 L. Ed. 1995 (1947)), *cert. denied,* 102 S. Ct. 128 (1981); *see also Patel v. INS,* 638 F.2d 1199, 1201 (9th Cir. 1980) (same). Whether the pending visa petition was prima facie approvable, therefore, is of no consequence to this opinion.[3]

Accordingly, we VACATE the BIA's denial of the motion to reopen deportation proceedings, and REMAND for further proceedings consistent with this opinion.

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[3] Of course, the INS is not precluded by this opinion from concluding on remand that the pending visa petition was not prima facie approvable, if indeed that turns out to be its considered view. The INS should simply consider afresh Ikhifa's motion to reopen the deportation proceedings.