

No. 03-70244

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

A92-002-074

JAIME PEREZ-ENRIQUEZ
Petitioner,

v.

ALBERTO GONZALES, United States Attorney General,
Respondent.

PETITION FOR REVIEW

AMICUS SUPPLEMENTAL BRIEF IN SUPPORT OF PETITIONER

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INTRODUCTION

Amicus, the American Immigration Lawyers Association, submits this supplemental brief addressing the question posed in the court's February 16, 2006 order. The court requested supplemental briefing regarding whether a series of unpublished decisions issued by the Board of Immigration Appeals' ("Board") should implicate this court's interpretation of the phrase "the time of adjustment of status" as used in 8 U.S.C. § 1227(a)(1)(A).¹

SUMMARY OF THE ARGUMENT

The language of the relevant statutory provisions, 8 U.S.C. § 1227(a)(1)(A) and 8 U.S.C. § 1160(a)(1)-(2), is clear and unmistakably indicates that "adjustment of status" refers to the moment in time when an alien must demonstrate his *admissibility* to the United States. This is clear from the text and context of the statute. Since the statutory language is clear, there is no basis to defer to any agency interpretation in this instance.

Alternatively, if there is a statutory ambiguity, the court of appeals should defer to the Board's authoritative, reasonable interpretation of § 1227(a)(1)(A)'s statutory language. In this case, the Board's authoritative,

¹ Unless otherwise noted, all references are to Title 8 of the United States Code.

reasonable interpretation of § 1227(a)(1)(A) in its precedential opinions, such as Matter of Connelly, 19 I&N Dec. 156 (BIA 1984), Matter of Rainford, 20 I&N Dec. 598 (BIA 1992), and Matter of Jimenez-Lopez, 20 I&N Dec. 738 (BIA 1993), merit Chevron deference.² Only published Board opinions, which are intended to make law, are authoritative. United States v. Mead Corp., 533 U.S. 218, 227 (2001). The language of § 1227(a)(1)(A) is flexible by Congressional design to accommodate the varied, complex immigration programs entrusted to the agency to administer. The Board's unpublished decisions offer no special interpretative guidance other than their power to persuade.

Under either approach, § 1227(a)(1)(A)'s reference to "adjustment of status" refers to the moment in time when Congress declares that an alien must demonstrate his admissibility. Because the statute under which Mr. Perez-Enriquez immigrated to the United States unambiguously required him to demonstrate his admissibility only at a time preceding his criminal conviction, he is not removable as charged.

²Following the Board's suggested mode of citation, we cite precedent decisions with "Matter of" and the case name. Unpublished opinions are cited as "In re". BIA Practice Manual, Appendix J, J-2 (June 14, 2004).

ARGUMENT

As in many immigration adjudications, the legal issue in this case revolves around the intersection of different statutory provisions. Mr. Perez-Enriquez immigrated to the United States under the Special Agricultural Worker ("SAW") program, § 1160(a)(1), on November 10, 1988. On February 27, 1989, he was convicted of a drug crime. On December 1, 1990, he was accorded lawful permanent residence status under § 1160(a)(2). On August 21, 2001, an immigration judge, in an unpublished decision, ordered Mr. Perez-Enriquez removed under § 1227(a)(1)(A). The Board affirmed without opinion on December 19, 2002.

I. Statutory Background

An individual does not adjust status or immigrate to the United States under §§ 1227 or 1182. Rather, these sections of the statute are generic, mostly categorical, listings of aliens who are either ineligible for admission to the United States or, who after admission, are now deportable. Elsewhere in the statute, Congress codified the substantive programs under which an individual immigrates or gains status in the United States. See, e.g., § 1255 (adjustment of status); § 1159 (refugee adjustment of status); § 1229b (cancellation of removal).

In its various substantive immigration programs, Congress establishes when and to what extent an immigrant must comply with the inadmissibility or deportability grounds. When admissibility is a prerequisite to obtaining a benefit under the substantive immigration program, the statute so states. See, § 1255(a) (requiring alien to be admissible); § 1159(c) (exempting applicants from particular inadmissibility grounds); § 1229b (making aliens ineligible for statutory benefits if classified under certain inadmissibility or deportability grounds).

Under the Special Agricultural Worker program, codified at § 1160, Congress clearly prescribed “when” an alien must demonstrate his admissibility: at the time temporary residence status is adjudicated. The text of the statute is unmistakably clear in this regard. Matter of Jimenez-Lopez, 20 I&N Dec. at 742.

II. The Statutes At Issue Are Clear And Provide That Mr. Perez-Enriquez Must Be Admissible Only At The Time Required Under § 1160(a)(1); Alternatively, The Board Opinion In Matter of Jimenez-Lopez Should Be Accorded Deference.

The question presented in Mr. Perez-Enriquez’s case is whether his adjustment to permanent (as opposed to temporary) residence status under the SAW program, § 1160, constitutes “an entry or adjustment of status” under §

1227(a)(1)(A)? The statutory language is clear that it does not. To the extent that there is any ambiguity in the statute, the authoritative, reasonable interpretation of the Board should be accorded deference. While the unpublished Board opinions referred to by the court do not deserve deference because they lack the force of a legal rule, the decisions are persuasive in this instance because they demonstrate a long-standing and well-reasoned approach of the agency.

A. The Statutory Language Is Clear.

Section 1227(a)(1)(A) is an unambiguous statutory provision. It empowers the government to expel an alien who, by inadvertence or concealment, obtains a substantive benefit in spite of being inadmissible. The terms "entry" and "adjustment of status" as used in the statute mean the point in time when the admissibility criteria are applied to the alien in adjudicating an immigration benefit. Matter of Rainford, 20 I&N Dec. at 601. The term "adjustment of status" is "a procedural mechanism by which an alien is assimilated to the position of one seeking to enter the United States." Id.; Matter of Connelly, 19 I&N Dec. at 159 (in § 1255 adjustment context, holding that "an alien applying for adjustment of status under section [1255] is assimilated to the position of an alien who is making an

entry. The only purpose of that 'assimilation' is to decide whether the alien meets the requirement of section [1255(a)] that he be 'admissible to the United States for permanent residence'").

Section 1160(a)(1) provides that:

The Attorney General shall adjust the status of an alien to that of an alien lawfully admitted for temporary residence if the Attorney General determines that the alien meets the following requirements:

. . .

(C) Admissible as immigrant.- The alien must establish that he is admissible to the United States as an immigrant, except as otherwise provided under subsection (c)(2).

Section 1160(a)(2) provides that:

(2) Adjustment to permanent residence. - The Attorney General shall adjust the status of any alien provided lawful temporary resident status under paragraph (1) to that of an alien lawfully admitted for permanent residence on [statutorily calculated dates including December 1, 1990].

8 U.S.C. § 1160. As is clear from the context, it is the admissibility requirement in § 1160(a)(1), and its conspicuous absence in § 1160(a)(2), that is determinative here.

The previous confusion regarding the meaning of the statutory language appears to stem from Congress's use of the phrase "adjust the status" in both sections. Although canons of construction provide that where Congress uses a term more than once in the same statute, it generally has

the same meaning, Boise Cascade Corp. v. EPA, 942 F.2d 1427, 1432 (9th Cir. 1991), Congress can, of course, do otherwise. A term must be understood in context and in relation to other words and statutory sections. The context of the statute is "the text of the Act of Congress surrounding the word at issue, or the texts of other related congressional Acts." United States v. Middleton, 231 F.3d 1207, 1211 (9th Cir. 2000).

In the context of the SAW program's statutory scheme, it is unmistakably clear that Congress intended § 1227(a)(1)(A) to refer to the moment in time when the alien must demonstrate admissibility under a substantive immigration program. Matter of Jimenez-Lopez, 20 I&N Dec. at 742 (analyzing plain language of statute). In this case, Mr. Perez-Enriquez had to show his admissibility at the time he adjusted status as temporary resident under 8 U.S.C. § 1160(a)(1), but not when he adjusted status to permanent residence under 8 U.S.C. § 1160(a)(2).

The statute is unambiguous. Consequently, the will of Congress must be enforced. Chevron, U.S.A., Inc. v. NRDC, 467 U.S. 837, 842-45 (1984); Socop-Gonzalez v. INS, 272 F.3d 1176, 1187 (9th Cir. 2001) (en banc). Any decision of the agency which is in derogation of Congress's command

must be disapproved without regard to whether the Board's decision is published or unpublished.

B. Even If The Statute Is Ambiguous, The Authoritative, Reasonable Board Opinion, Matter of Jimenez-Lopez, Should Be Afforded Deference.

Alternatively, if the statute is ambiguous, this Court should defer to the authoritative, reasonable interpretation of the Board of Immigration Appeals. Only published opinions of the Board implicate Chevron; and only those opinions which are reasonable constructions of ambiguous statutory provisions are entitled to deference. Non-binding, unpublished opinions of the Board, much like the unpublished memorandum dispositions of the courts, are not considered interpretations of the statute.

In the fiscal years 2004 and 2005, the Executive Office for Immigration Review adjudicated more than 650,000 cases in Immigration Court. U.S. Dep't of Justice, FY 2005 Statistical Yearbook B2 (2005). During the same period, the Board adjudicated nearly 95,000 cases. Id. This staggering output of EOIR has been the cause of much concern among the federal courts, e.g., Recinos de Leon v. Gonzales, 400 F.3d 1185, 1193 (9th Cir. 2005) (criticizing incoherent IJ decision and noting the heavy caseload); Benslimane v. Gonzales, 430 F.3d 828, (7th Cir. 2005)

(same) (collecting cases), scholars, e.g., Cruz, *Double the Injustice, Twice the Harm: The Impact of the Board of Immigration Appeals's Summary Affirmance Procedures*, 16 Stan. L. & Pol'y Rev. 481 (2005), and even the Attorney General himself, *Memorandum to Members of the Board of Immigration Appeals* (Jan. 9, 2006) (ordering a comprehensive review of Board and IJ decision-making because "I have watched with concern the reports of immigration judges. . .who fail to produce the quality of work that I expect from employees of the Department of Justice.")

In the immigration context, the Board's opinions usually are the agency's final say on the litigated matters. 8 C.F.R. § 1003.1(d)(7). "Board decisions are generally released in one of two forms: published and unpublished." BIA Practice Manual, Chapter 1, 1.4(d) (June 2004). Of the some 95,000 cases the Board completed in the last two years, 26 were adjudicated by published opinion.³ The remaining 94,974 were disposed of through unpublished memorandum dispositions.

³ The decisions are published in the Immigration and Nationality Decisions reporter. The compilation of opinions that will result in Volume 23 (covering the years 2000 - present) can be found at the EOIR's Virtual Law Library, <http://www.usdoj.gov/eoir/vll/libindex.html> (last accessed Feb. 27, 2006).

By publishing an opinion, the Board creates binding precedent for all the lower immigration adjudicators, including the Immigration Courts and District Directors. 8 C.F.R. § 1003.1(g). The regulations require that “the Board, through precedent decisions, shall provide clear and uniform guidance to the Service, the immigration judges, and the general public on the proper interpretation and administration of the Act and its implementing regulations.” 8 C.F.R. § 1003.1(d)(1); Matter of E-L-H, 23 I&N Dec. 814, 823 (BIA 2005) (interpreting regulation); cf. Hart v. Massanari, 266 F.3d 1155, 1176 (9th Cir. 2001) (regarding court opinions, “[p]recedential opinions are meant to govern not merely the cases for which they are written, but future cases as well.”).

Published opinions are specially prepared for public release. Practice Manual, Chap. 1, 1.4(d)(i). The Board selects cases for publication because there is a need for “the resolution of an issue of first impression; alteration, modification, or clarification of an existing rule of law; reaffirmation of an existing rule of law; resolution of a conflict of authority; and discussion of an issue of significant public interest.” Id. Notably, these criteria are also the hallmarks of the lawmaking and

interpretative function of published court of appeals opinions. Hart, 266 F.3d at 1176-77.

Conversely, an unpublished Board decision does not have a binding effect and does not create a rule of law. Matter of Medrano, 20 I&N Dec. 216, 220 (BIA 1991).

“Decisions which the Board does not designate as precedents are not binding on the Service or the immigration judges in cases involving the same or similar issues.” Id.; Hernandez v. Ashcroft, 345 F.3d 824, 839 n.13 (9th Cir. 2003). “A survey of unpublished BIA decisions shows that they are treated as limited to their facts. They do not serve as authority for later proceedings involving the same issues, nor do they make new law.” Leal-Rodriguez v. INS, 990 F.2d 939, 946 (7th Cir. 1993); cf. Mead, 533 U.S. at 233 (holding that because agency decision binds only the parties and “stops short of third parties” it lacks lawmaking power). The Board’s unpublished decisions, like this court’s memorandum dispositions, are “more or less, a letter from the court to parties familiar with the facts, announcing the result and essential rationale of the court’s decision.” Hart, 266 F.3d at 1178. They lack, by design, the reasoned and considered indicia required to provide guidance on important questions of law. There is no indication that the Board “ever set out with a lawmaking

pretense in mind" when it issues unpublished decisions. Mead, 533 U.S. at 233. The Board's unpublished decisions frequently do not provide a complete recitation of facts. Their language is often inadequate to inform or guide decision making beyond the narrow confines of the case decided. Cf. Hart, 266 F.3d at 1178 (explaining that "[l]anguage adequate to inform the parties how their case has been decided might well be inadequate if applied to future cases arising from different facts.").

Given the volume of cases completed by the Board, it is impossible to expect each decision to comport with the standard required of publication. Attempting to do so would actually be counter-productive. "Maintaining a coherent, consistent and intelligible body of caselaw is not served by writing more opinions; it is served by taking the time to make the precedential opinions" written by the Board "as lucid and consistent as humanly possible." Id. at 1179. The volume of decisions also underscores the point that unpublished decisions are not intended to make law. Mead, 533 U.S. at 233 ("And suggestion that rulings intended to have the force of law are being churned out at a rate of 10,000 a year at an agency's 46 scattered offices is simply self-refuting."); Lin v. Gonzales, 416 F.3d 184,

189-90 (2d Cir. 2005) (holding that IJ decisions lack the power to make law).

An unpublished Board opinion is not an authoritative source of the agency's interpretation of the law. Under the Chevron doctrine, only authoritative agency interpretations are afforded deference. Mead, 533 U.S. at 226-27. Accordingly, the unpublished Board opinions referred to by the court in its February 16, 2006 order do not provide an interpretation of the statute.

Nevertheless, in some circumstances, non-authoritative agency decisions can provide guidance to reviewing courts. Id. at 227. In such circumstances, the agency decision is useful only to the extent it is persuasive. Id.; Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). Most unpublished Board opinions, by the very fact that they were not intended to be precisely crafted or recite comprehensive factual accounts, will lack even the required indicia of persuasiveness outlined in Skidmore. "The weight [accorded to an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." Skidmore, 323 U.S. at 140.

Although unpublished Board opinions are not sources of agency interpretation, they may be relevant in evaluating whether the Board has maintained a consistently held view in adjudicating its cases. The Board “cannot merely flit serendipitously from case to case, like a bee buzzing from flower to flower, making up the rules as it goes along.” Haoud v. Ashcroft, 350 F.3d 201, 207 (1st Cir. 2003). Rather, the Board must adhere to its precedents and make reasoned decisions. Id.

Regarding Mr. Perez-Enriquez’s case, the Board published an opinion which is on point, Matter of Jimenez-Lopez. The Board cannot alter the rule in Matter of Jimenez-Lopez in an unpublished opinion. Matter of E-L-H-, 23 I&N Dec. at 822-823; Matter of Medrano, 20 I&N Dec. at 220. Nor can an Immigration Judge modify a published Board opinion. 8 C.F.R. § 1003.1(g); cf. Hart, 266 F.3d at 1170 (“[C]aselaw on point is the law. If a court must decide an issue governed by a prior opinion that constitutes binding authority, the later court is bound to reach the same result, even if it considers the rule unwise or incorrect.”).

Here, the series of unpublished Board opinions cited by the court demonstrate that the Board has taken a consistent view as to the meaning of and interplay between

§§ 1160(a)(1), 1160(a)(2), and 1227(a)(1)(A) with the notable exception of Mr. Perez-Enriquez's case. The immigration judge misunderstood the holding of Matter of Jimenez-Lopez. CR 37. The Board should have corrected the immigration judge's error; it was mistaken in not doing so. The appellate process, however, was designed to catch the Board's errors not magnify them into Circuit precedent. The panel's opinion in this case had the unfortunate result of transforming an unpublished, non-binding immigration judge opinion into the law of this Circuit. See, e.g., In re Flores-Munoz, 2004 WL 2418626, rev'd 2005 WL 1104190 (BIA Mar. 25, 2005).

The unpublished decisions are useful, in this instance, because they are persuasive: they explain the essential facts, outline the precise holding, and, importantly, adhere to the *published* Board opinion which is the rule of law that the Immigration Judge and the Board should have followed. The en banc court should instruct the agency to follow the rule of law.

CONCLUSION

The statute is clear that Mr. Perez-Enriquez is not removable as charged. For the reasons stated herein, the court should terminate the removal proceedings.

Submitted this 2nd day of March, 2006,

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE WITH FORMAT

I, Stephen W. Manning, certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, this amicus brief is double spaced, using monofaced typeface of 10.5 characters or fewer per inch and contains 2987 words (not including the table of contents, table of authorities, certificate of service, and certificate of compliance).

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