

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 98-16471, 98-16472
DC Nos. CV-96-2272, 96-3583

JOSE MANUEL ORTIZ, et al.,

Plaintiffs/Appellees,

v.

DORIS M. MEISSNER, Commissioner,
Immigration and Naturalization Service,

Defendant/Appellant.

ON PETITION FOR REVIEW OF AN ORDER OF
THE BOARD OF IMMIGRATION APPEALS

BRIEF FOR DEFENDANT/APPELLANT

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Plaintiffs/Appellees

v.

DORIS MEISSNER,

Commissioner, Immigration and Naturalization Service,

Defendant/Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR APPELLANT

STATEMENT OF JURISDICTION

The statutory sources of jurisdiction relied upon by plaintiffs below are 28 U.S.C. § 1329 and 5 U.S.C. §§ 701-706. The government contests the existence of the district court's subject matter jurisdiction over this case based on the Supreme Court's holdings in McNary v. Haitian Refugee Center, Inc., et al., 498 U.S. 479 (1991) ("McNary"), and Reno v. Catholic Social Servs., Inc., et al., 509 U.S. 43 (1993) ("CSS"), as well as this

Court's decision in Naranjo-Aguilera v. INS, 30 F.3d 1106, 1113 (9th Cir. 1994).¹

This Court has jurisdiction under 28 U.S.C. § 1291.

Defendant appeals from the following orders: April 10, 1998 Order granting plaintiffs' motion for summary judgment and granting declaratory and injunctive relief; July 27, 1998 Order denying defendant's motion to alter or amend April 10, 1998 Order.² A timely notice of appeal was filed August 7, 1998. Fed. R. App. P. 4(a)(4)(C).

STATEMENT OF THE ISSUES

1. Whether the district court lacked jurisdiction over plaintiffs' complaint because a challenge to the INS's interpretation of the statute with respect to denial of benefits, which are integrally related to the substantive denial of their legalization applications, must be made in accordance with the judicial review procedures prescribed in the statute.
2. Whether the district court erred in holding that the final determination of a legalization application occurs upon judicial rather than administrative review of the application's denial, and, thus, that legalization applicants are statutorily entitled

¹ The District Court's orders are silent on the issue of jurisdiction. DN 15, 44, 62.

² This brief refers to the parties as "plaintiffs" and "defendant." Fed. R. App. P. 28(d). "DN" refers to the docket number in the clerk's record. All key pleadings and orders have been reproduced in the excerpts of record which has been submitted herewith. "E.R." refers to the excerpts of record.

to work authorization until their legalization applications have been judicially reviewed.

STATEMENT OF THE CASE

This case challenges the decision by the Immigration and Naturalization Service ("INS") not to extend the temporary work permits of plaintiffs, illegal aliens who had unsuccessfully sought Special Agricultural Worker ("SAW") status under the Immigration Reform and Control Act of 1986 ("IRCA"), as amended, 8 U.S.C. § 1160, et seq., or legalization under 8 U.S.C. § 1255a, et seq. This case turns on one question: whether the "final determination" on a legalization application, referenced in both statutes, occurs at the administrative or judicial review stage. Under those statutes, a legalization applicant is entitled to work authorization and to a stay of deportation "until a final determination on the application has been made." 8 U.S.C. § 1160(d)(2), 8 U.S.C. § 1255a(e)(2). Plaintiffs were given such work authorization upon submission of their legalization applications. The INS terminated plaintiffs' work authorizations upon dismissal of the administrative appeals of the denial of their legalization applications. Plaintiffs challenged that decision, arguing that a "final determination" occurs only upon judicial review of the denial of a legalization application, and, thus, that plaintiffs were entitled to work authorization until judicial review has occurred.

STATEMENT OF THE FACTS

1. Factual Background

The facts in this case are not in dispute. Plaintiffs filed nonfrivolous or prima facie applications for legalization under 8 U.S.C. § 1160 or 8 U.S.C. § 1255a. While their applications were pending, plaintiffs were issued temporary work permits pursuant to 8 U.S.C. § 1160(d)(2) and 8 U.S.C. § 1255a(e)(2). Plaintiffs' applications were denied. Plaintiffs administratively appealed the denials, and their appeals were dismissed. As a result, their work permits were not extended. With one exception, plaintiffs have not yet been placed in deportation proceedings.

2. Course of Proceedings and Disposition Below

On June 21, 1996, plaintiffs filed a complaint for declaratory and preliminary and permanent injunctive relief, asking that the court find that plaintiffs were entitled to work authorization until judicial review had occurred or been abandoned. DN 1. Plaintiffs filed an amended complaint on August 5, 1996. DN 3. Defendant filed an answer on September 4, 1996. DN 4. Plaintiffs then filed a motion for preliminary injunction with a supporting memorandum on September 16, 1996. DN 5-7. On October 15, 1996, defendant filed an opposition to plaintiffs' motion for preliminary injunction, to which plaintiffs filed a response on October 22, 1996. DN 13-14. On November 5, 1996, the District Court denied the motion for preliminary injunction and ordered plaintiffs to submit a

memorandum demonstrating cause why the action should not be dismissed or judgment entered in favor of defendant. DN 15.

On November 13, 1996, plaintiffs filed a memorandum as ordered by the District Court opposing dismissal of their complaint and judgment in favor of the defendant. DN 16. Defendant filed a reply on November 22, 1996. DN 17. On December 6, 1996, plaintiffs filed an expedited motion for leave to move for reconsideration of the District Court's November 5, 1996 Order, which was granted on July 18, 1997. DN 18, 26. Plaintiffs filed a memorandum in support of their motion for reconsideration and motion for summary judgment on October 15, 1997, defendant filed an opposition on November 4, 1997, and plaintiffs filed a reply on November 10, 1997. DN 36-38. A hearing was held on the motions on March 17, 1998, and on April 6, 1998, the District Court granted the motions for reconsideration and for summary judgment in favor of plaintiffs and ordered defendant to provide plaintiffs with work authorization benefits. DN 43, 45, 72.

Defendant filed a motion to alter or amend the District Court's order granting summary judgment pursuant to Fed. R. Civ. P. 59(e) on April 23, 1998, along with a motion for a stay of the judgment pending the 59(e) motion on April 24, 1998. DN 48, 50, 51. Plaintiffs filed an opposition on May 8, 1998, and defendant filed a reply on May 19, 1998. DN 57, 60. A hearing was held on the motion on June 2, 1998, and on July 27, 1998, the District Court denied defendant's motion to alter or amend and motion for

stay. DN 61, 62, 69. Defendant filed a notice of appeal on August 7, 1998. DN 67.

3. The District Court's Order Granting Summary Judgment

In its April 6, 1998, Order, the District Court noted that its review of the INS's interpretation of the meaning of "final determination" of a legalization application was governed by the Supreme Court's decision in Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984). DN 45, E.R. 4. The District Court determined, however, that because defendant had initially mistakenly represented the INS's interpretation of the statute by arguing that "final determination" referred to the first-level adjudication of a legalization application rather than the administrative review, its interpretation should be accorded less than the significant deference it would be accorded under Chevron. Id. In support of this conclusion, the District Court cited INS v. Cardozo-Fonseca, 480 U.S. 421, 447 n.30 (1987) (citation omitted). Id.

The District Court concluded that the INS's position that a "final determination" occurs at the conclusion of administrative, not judicial, review "would give effect to section 1160(e)(2) [which provides for administrative review] while completely ignoring section 1160(e)(3)," which provides for judicial review. Id., E.R. 5. The District Court found that the phrase "in accordance with this section" found in section 1160(d)(2) refers to the "final determination" which triggers the end of benefits. Id., E.R. 6. Thus, because "the section" provides for a level of

review beyond administrative review, namely judicial review in subsection (e) of § 1160, "final determination" must refer to judicial review. *Id.* Finally, the District Court was unpersuaded by the INS's argument that permitting plaintiffs to work through judicial review would yield the absurd result that plaintiffs, while residing here illegally, would be permitted to work legally for an indefinite period of time, because judicial review would not occur until such time as plaintiffs were the subject of final orders of deportation. *Id.*, E.R. 5. The District Court noted that defendant could avoid this result by simply initiating deportation proceedings immediately upon dismissal of plaintiffs' administrative appeals. *Id.*, E.R. 6.

4. The District Court's Order Denying Motion to Alter or Amend

Defendant sought reconsideration of the District Court's April 6, 1998, Order pursuant to Fed. R. Civ. P. 59(e). DN 48. Defendant argued that the District Court's judgment was erroneous because it had been based in part on the incorrect assumption that the INS could immediately begin deportation proceedings against plaintiffs. DN 48, at 5-7. Defendant cited the confidentiality provisions of IRCA, which provide that the INS may not use information obtained from an alien in a legalization application for any purpose, including initiation of proceedings, other than those permitted by IRCA. *Id.* at 5-6 (citing 8 U.S.C. § 1160(b)(6), 8 U.S.C. § 1255a(c)(5)). Because there was no way to avoid the absurd result anticipated by defendant, and because

the District Court's decision directly conflicted with the Supreme Court's decisions in Reno v. Catholic Social Services, Inc., 509 U.S. 43 (1993) ("CSS"), and McNary v. Haitian Refugee Center, Inc., 498 U.S. 479 (1991) ("McNary"), defendant argued that the District Court had committed clear error in granting plaintiffs summary judgment.

The District Court denied defendant's motion, finding that defendant had not demonstrated that it had committed clear error. DN 62, E.R. 8. The District Court rejected defendant's arguments concerning the inability of the INS to immediately initiate deportation proceedings against plaintiffs, finding that the principle basis of the District Court's order had been the plain language of the statute. Id., E.R. 9. The District Court reemphasized the link between the language "final determination . . . in accordance with this section" and the provision for judicial review in the section. Id. Finally, the District Court concluded that its ruling would be consistent with Congress's intent in enacting IRCA:

The fact that an illegal alien would receive a work permit during the pendency of the review of his application for legalization is consistent with Congress's interest in determining whether members of this specifically targeted group fall within the bounds of the amnesty provisions. The process of determining their status, even with latent judicial review, is consistent with the Congressional interest in providing as [sic] incentive for members of these groups to come forward.

Id., E.R. 10.

SUMMARY OF ARGUMENT

The District Court lacked jurisdiction over the plaintiffs' complaint because a challenge to either the substantive denial of a legalization application or the INS's interpretation of the statute must be made in accordance with the judicial review procedures prescribed in the statute. The INS withdrew plaintiffs' work authorization upon the final administrative denial of their applications because they were not eligible for legalization or any of its benefits, such as work authorization. Hence, the termination of work authorization was integrally related to the substantive eligibility determination and indeed was dependent upon that eligibility determination so that it is a "determination respecting an application." The district court therefore lacked jurisdiction to review plaintiffs' wrongful work authorization claims just as much as it would have lacked jurisdiction over plaintiffs' claims of a wrongful denial of legalization, had they brought such claims to the district court.

The District Court erred in concluding that "final determination" on a legalization application -- the trigger for termination of the temporary employment benefits afforded a legalization applicant under the statute -- means final judicial determination rather than final administrative determination. Contrary to the District Court's finding, the language of the statute does not provide a clear definition of the meaning of "final determination." As a result, the INS's construction of the statute that "final determination" occurs at the

administrative review stage is due considerable deference. The District Court erred in substituting its own interpretation of the relevant statutory provision for the reasonable one made by the INS. The District Court's decision directly conflicts with how the Supreme Court envisioned the legalization scheme would operate.

It cannot be said that Congress intended the result that would flow from the District Court's decision — that legalization applicants enjoy "temporary" employment benefits indefinitely, possibly forever, while awaiting judicial review of the denial of their legalization applications. Because judicial review may occur only in the context of review of a final order of deportation, and because information obtained in the course of adjudicating a legalization application may not be used to initiate proceedings against an applicant, aliens such as plaintiffs may never become subject to final orders of deportation and thus may never obtain judicial review. The result of the District Court's order would be inapposite to Congress's intent in enacting IRCA: that illegal aliens be given an opportunity to adjust their status but that, failing that, those aliens remaining here illegally be discouraged from doing so. The right to work legally would only serve to maintain the large "shadow population" of illegal aliens residing here that Congress sought to eliminate.

ARGUMENT

THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT
IN FAVOR OF PLAINTIFFS AND IN DENYING DEFENDANT'S
MOTION TO ALTER OR AMEND ITS JUDGMENT

A. Standard of Review

A grant of summary judgment is reviewed de novo. Farr v. US West Communications, Inc., 151 F.3d 908, 913 (9th Cir. 1998); see also Covey v. Hollydale Mobilehome Estates, 116 F.3d 830, 834 (9th Cir. 1997); Ablang v. Reno, 52 F.3d 801, 803 (9th Cir. 1995). Review is governed by the same standard used by the trial court under Federal Rule of Civil Procedure 56(c). See Ghotra v. Bandila Shipping, Inc., 113 F.3d 1050, 1054 (9th Cir. 1997). The Court must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. See Covey, 116 F.3d at 834. Because there is no issue of material fact, this Court need only determine whether the District Court correctly applied the relevant substantive law.³

The Court must review the statutory issues in this case mindful of the "principle of deference to administrative interpretations." Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 844-45 (1984). "[C]onsiderable weight should be accorded to an executive department's construction of a

³ The arguments in this brief address the error in both the District Court's decision granting summary judgment and its order denying defendant's motion to alter or amend that judgment.

statutory scheme it is entrusted to administer" Id. More recently, in Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633 (1990), the Supreme Court restated the standard of review of agency interpretations of statutes they administer:

When a court reviews an agency's construction of a statute it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based upon a permissible construction of the statute.

Pension Benefit, 496 U.S. at 647-48 (quoting Chevron, 467 U.S. at 842-43. "[An agency] need not show that its construction is the best way to read the statute; rather, courts must respect [an agency's] judgment so long as its reading is a reasonable one."

Holly Farms Corp. v. NLRB, 517 U.S. 392, 409 (1996).

B. The District Court Lacked Jurisdiction Over Plaintiffs' Complaint

The INS withdrew plaintiffs' work authorization upon the final administrative denial of their applications because they were not eligible for legalization or any of its benefits, such as work authorization. Hence, the termination of work authorization was integrally related to the substantive

eligibility determination and indeed was dependent upon that eligibility determination so that it is a "determination respecting an application." IRCA requires that the alien save all challenges to a determination respecting an application for a court of appeals review of the administrative deportation or exclusion order and therefore precludes district court jurisdiction over the determination. The pertinent review provision of the IRCA provides for a single level of administrative appellate review over legalization denials, 8 U.S.C. §§ 1160(e)(2), 1255a(f)(3), and states that "[t]here shall be judicial review of such a denial only in the judicial review of an order of exclusion or deportation under section 1105a of [8 U.S.C.]," 8 U.S.C. § 1160(e)(3) (emphasis added); see also 8 U.S.C. § 1255a(f)(4). The district court therefore lacked jurisdiction to review plaintiffs' wrongful work authorization claims just as much as it would have lacked jurisdiction over plaintiffs' claims of a wrongful denial of legalization, had they brought such claims to the district court.

That the district court lacked jurisdiction is supported by two Supreme Court legalization cases. The first of these two cases, McNary v. Haitian Refugee Center, Inc., 498 U.S. 479 (1991) ("McNary"), established the principle that a district court has jurisdiction to examine aliens' procedural claims under the IRCA where such claims receive no practical judicial review

within the scheme established by the legalization statute.⁴ Although McNary involved only the SAW provisions of the IRCA, the judicial review provision at issue in that case is similar to the legalization provision found at 8 U.S.C. § 1255a(f). Thus, the Supreme Court's analysis in McNary is applicable to all plaintiffs in this action.

In McNary, the Supreme Court considered the narrow question of whether a district court had jurisdiction over the aliens' statutory and constitutional claims in spite of the limited judicial review provisions set forth in the IRCA. In its analysis, the Court noted that

In view of the fact that the courts of appeals constitute the only fora for judicial review of deportation orders, . . . the statute plainly foreclosed any review in the district courts of individual denials of SAW status applications. Moreover, absent initiation of a deportation proceeding against an unsuccessful applicant, judicial review of such individual determinations was completely foreclosed.

McNary, 498 U.S. at 486 (emphasis added). The Court had no quarrel with the IRCA's limited judicial review provision as applied to denials of individual SAW applications, but found that the aliens' claims were properly before the district court because their complaint attacked certain collateral procedures

⁴ The plaintiffs in McNary challenged the INS's procedures in administering the SAW provisions of the IRCA, 8 U.S.C. § 1160, et seq., alleging, inter alia, that the INS provided incompetent interpreters during their interviews, that SAW applicants were denied the opportunity to present evidence on their own behalf, and that INS procedures did not provide SAW applicants the opportunity to challenge adverse evidence on which denials were based. McNary, 498 U.S. at 487-88.

employed in the implementation of the program. *Id.* at 495. In other words, because the aliens' claims did not seek to establish their actual eligibility for SAW status and related benefits and because their sort of claims did not appear in the administrative record and could not be adequately presented for effective judicial review, the Court found that the district court had jurisdiction to hear the aliens' claims. *Id.* at 493, 495, 496 (commenting, e.g., that even if the aliens prevailed on the merits of the procedural objections, that fact alone would not have the effect of establishing their entitlement to SAW status).

Two years later, the Supreme Court issued its ruling in Reno v. Catholic Social Servs., Inc., et al., 509 U.S. 43 (1993) ("CSS"), clarifying the McNary exception. CSS, 509 U.S. at 56-64 (making clear that district courts lack jurisdiction to entertain aliens' lawsuits which challenge the INS's interpretation of the IRCA or its regulations in order to establish the aliens' substantive eligibility for relief) (emphasis added). The Court explained that an alien plaintiff's challenge to the INS regulations becomes ripe once the INS had substantively denied his legalization application on the ground that the challenged regulation rendered him ineligible for legalization. *Id.* at 60. Once the alien's claim ripens, however, the IRCA's exclusive review provision, 8 U.S.C. § 1255a(f), is triggered, thereby precluding jurisdiction in the district courts. *Id.* This exclusive judicial review provision confines attacks upon aliens' substantive legalization eligibility to appeals of final

deportation orders to the circuit courts. 8 U.S.C. § 1255a(f)(4). Thus, CSS established the principle that the appropriate means of challenging the INS's substantive interpretations of the IRCA and its regulations would not be in a district court action, but rather through individual appeals from an order of deportation pursued through the IRCA's exclusive administrative and judicial review provisions.

In compliance with the Supreme Court's rulings, the Ninth Circuit in Naranjo-Aquillera rejected the alien plaintiffs' challenge against the INS's regulations and policies which mandated denial or termination of their temporary resident status under the legalization program. 30 F.3d at 1108; see 8 U.S.C. § 1160(a)(3)(B)(ii)(II). The plaintiffs in Naranjo-Aquillera had either applied for temporary resident status and been denied on the basis of the challenged regulations, or had their status terminated on the same basis. Naranjo-Aquillera, 30 F.3d at 1113. Thus, their claims were ripe and they were limited to pursuing further review of their claims through IRCA's exclusive judicial review provisions. Id. at 1114. This Court rejected plaintiffs' argument that because they had brought a class action suit, the ripeness analysis was necessarily changed. Id. Instead, this Court pointed out that the plaintiffs relied on denials and determinations in presenting their case and their substantive challenges were "efforts to gain federal district court review of INS interpretations of IRCA" and further held that the attempt was foreclosed by CSS. Id. at 1113-14 (quoting Ayuda, Inc. v.

Reno, 7 F.3d 246, 249 (D.C. Cir. 1993)). This Court specifically noted that "individual plaintiffs whose claims are ripe by virtue of INS denials of their legalization applications may not avoid the holding in CSS, merely by joining in a class-action challenge to nationwide INS 'practices.'" Id.

Thus, the jurisdictional landscape for claims brought under the IRCA is clear: district courts have no jurisdiction over challenges to the INS's substantive denials of legalization or over challenges to the INS's interpretations of the IRCA which lead to those denials and to the denials of benefits which are integral to the substantive denials. See Naranjo-Aquilara, 30 F.3d at 1113. Moreover, although McNary established the exception that district court jurisdiction is proper when aliens present procedural challenges collateral to their actual eligibility for the benefit being sought, McNary, 498 U.S. at 495, it does not stand for the proposition that district courts have jurisdiction to remedy any and all claims challenging INS procedures under the IRCA. See Thunder Basin Coal Co. v. Reich, 114 S. Ct. 771, 779 (1994) (stating that collateral claim is one that is incapable of review under the statutory scheme); Naranjo-Aquilara, 30 F.3d at 1113 (same). Rather, as two circuits and the district court in this case have recognized, the McNary exception "applies only if a plaintiff can establish that the claim being asserted is entirely collateral to the statute's review procedures. Moreover, even if the plaintiff can make that showing, the plaintiff may also have to establish that meaningful

review would be foreclosed absent initial review in the district court." Massieu v. Reno, 91 F.3d 416, 424 (3d Cir. 1996); Ayuda, 7 F.3d at 249 (stating that "[j]urisdiction of the federal courts could be invoked, as in McNary, only when it is necessary to supplement or aid ultimate court of appeals review under section 1255a(f)(1)").⁵

C. Defendant's Interpretation Of The Statute Is Directly Supported by the Supreme Court's Interpretation of the Legalization Scheme and Congress' Intent in Enacting IRCA

Defendant's interpretation of the statute — that "final determination" of a legalization application, and the consequent termination of the right to work authorization, is the dismissal of the administrative appeal -- is a reasonable one that is supported by Supreme Court precedent. In Reno v. Catholic Social Services, Inc., 509 U.S. 43 (1993) ("CSS"), the Court explained that IRCA "provides an exclusive scheme for administrative and judicial review of 'determination[s] respecting application[s] for adjustment of status.'" CSS, 509 U.S. at 53-54. Under the scheme, an alien whose application is denied at the administrative level returns to the position he or she held before applying, that of an illegal alien entitled to no benefits: "an alien whose appeal has been rejected by the Associate Commissioner stands (except for a latent right to

⁵ The Supreme Court, in CSS, limited McNary's "reach to situations in which plaintiffs raised 'procedural' objections that could not receive 'practical judicial review within the [statutory] scheme." Ayuda, 7 F.3d at 249 (citations omitted).

judicial review of that rejection) in the same position he did before he applied: he is residing in the United States in an unlawful status, but the Government has not found out about him yet." *Id.* at 54-55 (emphasis added). The road to judicial review may be a long one: "the alien must first either surrender to the INS for deportation or wait for the INS to catch him and commence a deportation proceeding, and then suffer a final adverse decision in that proceeding, before having an opportunity to challenge the INS's denial of his application in court." *Id.* at 55. The District Court's decision linking a benefit such as work authorization to an event that may never occur -- judicial review -- is erroneous. Giving aliens who are illegally residing in this country work authorization until such time, if ever, that they obtain judicial review not only is contrary to the statutory scheme as explicated by the Supreme Court, but it also would yield the absurd result of the indefinite right of illegal aliens to work.

The Court's decision also conflicts with the Supreme Court's decision in McNary. In McNary, the Court also analyzed the statutory scheme for the legalization of agricultural workers, including the statute's provision of employment authorization. McNary, 498 U.S. at 484-91. The Court stated that the "mere filing of a 'non-frivolous application' entitled the alien to a work authorization that would remain valid during the entire period that the application was being processed," id. at 484, and that "the denial of SAW status places the alien in an even worse

position than he or she was in before the Reform Act was passed because lawful employment opportunities are no longer available to such persons." *Id.* at 490-1; see also *id.* at 491 (stating that "the impact of a denial on the opportunity to obtain gainful employment is plainly sufficient to mandate constitutionally fair procedures in the application process) (emphasis added).

In the course of its analysis of the statutory text and scheme, the Court indicated that the "period that the application was being processed" or "the application process" refers to the administrative adjudication of the application and that the "denial" of the application of SAW status means the administrative denial of the application. See *id.* at 484-5 (stating that "the Reform Act directed the Attorney General to enlist the assistance of [organizations] to encourage aliens to apply and to provide them with counsel and assistance during the application process" and that "the legalization appeals unit . . . was authorized to make the final administrative decision in each individual case"); see also *id.* at 492 (noting that "the earlier reference to 'a determination respecting an application' describes the denial of an individual application"). It is the final administrative determination, i.e., the denial of the application, which subsequently becomes subject to judicial review, that triggers the termination of work authorization. Thus, the Supreme Court in McNary expressed its understanding that the statutory scheme provided for employment authorization through the end of the application process and for termination of

employment authorization when a final administrative determination on the application resulted in a denial of the application, even though the final administrative determination was subject to judicial review in the courts of appeals at a later time, but only in conjunction with a final order of deportation.

Defendant's interpretation of the statute, and the Supreme Court's explication of it in CSS and McNary, comport with Congress's intent in enacting IRCA. IRCA as a whole clearly indicates an intent by Congress to limit the temporary work authorization granted to legalization applicants. IRCA was designed specifically to create hardship for applicants who were denied legalization: "Congress sought to stem the tide [of illegal immigration] by making the plight of the undocumented alien even more onerous in the future than it had been in the past; thus, the Reform Act imposed criminal sanctions on employers who hired undocumented workers⁶ and made a number of federally funded welfare benefits unavailable to these aliens." , 498 U.S. at 481-2 (footnotes omitted). The legalization and employment sanctions components of the statute dovetail to result in the revocation of work authorization after denial of legalization so as to discourage aliens who are residing here illegally from continuing to do so and to encourage them to return to their countries. Congress' intent to "stem the tide"

⁶ Prior to IRCA's enactment, "employment of undocumented aliens did not violate federal law." McNary, 498 U.S. at 482 n.2.

of illegal immigration by inducing those who were residing here illegally to return to their countries would clearly be frustrated if these same illegal aliens were permitted to work legally through judicial review, or indefinitely.

Given that the Supreme Court's understanding of the statutory scheme matches the defendant's and yields the result clearly intended by Congress, the defendant's interpretation of the statute is owed the substantial deference due under Chevron. That defendant's interpretation is supported by Supreme Court precedent demonstrates that it is a permissible and reasonable construction of the statute. See Chevron, 467 U.S. at 843.⁷

⁷ The District Court disagreed that defendant's interpretation is due substantial deference, noting that defendant had initially mistakenly taken the position that "final determination" occurs at the first level of adjudication of a legalization application. The District Court cited a footnote from INS v. Cardozo-Fonseca to support its conclusion. INS v. Cardozo-Fonseca, 480 U.S. 421, 447 n.30 (1987) (citation omitted)). In the footnote cited, however, the Supreme Court was referring to the "inconsistency of the positions the [Board of Immigration Appeals] has taken through the years." Id. "The BIA ha[d] answered the question of the relationship between [two statutory provisions] in at least three different ways . . . [d]uring the period between 1965 . . . and 1972," and then in 1973, 1984, and 1985. Id. The facts in this case are strikingly dissimilar to those in the footnote in Cardozo-Fonseca cited by the District Court. In this case, there is one mistaken argument regarding the INS's position made by an attorney in the context of ongoing litigation that was corrected when the error was revealed. Unlike the situation presented in Cardozo-Fonseca, the agency tribunal itself was not taking inconsistent positions. The INS' interpretation as revealed in its administration of the legalization program, including its adjudication of plaintiffs' applications, is that work authorization terminates upon the final administrative denial of an application.

D. Under The Language of the Statute, The Final Determination Of A Legalization Application Occurs Upon Administrative, Not Judicial, Review Of The Application

Moreover, analysis of the language of the relevant provisions of the statute yields the unmistakable conclusion that "final determination" on a legalization application means administrative, not judicial, review of such an application. The statute provides:

The Attorney General shall provide that in the case of an alien who presents a nonfrivolous application for adjustment of status under subsection (a) of this section during the application period, and until a final determination on the application has been made in accordance with this section, the alien --

. . .
(B) shall be granted authorization to engage in employment in the United States and be provided an "employment authorized" endorsement or other appropriate work permit.

8 U.S.C. § 1160(d)(2) (emphasis added).⁸ The District Court interpreted the language "in accordance with this section" to mean that "final determination" must include judicial review, because judicial review is provided for in the section, specifically in subsection (e)(3) of 8 U.S.C. § 1160.

However, a closer examination of the text supports the defendant's position. By reading the statute fully and in

⁸ Nearly identical language appears in 8 U.S.C. § 1255a(e)(2). The only difference, which is not relevant for purposes here, is that section 1255a(e)(2) provides that the alien must have filed a "prima facie" application for legalization in order to qualify for temporary work authorization.

context, rather than parsing out the discreet language relied upon by the District Court, it becomes clear what is meant: "a final determination on the application has been made in accordance with this section" means that the application has been processed and adjudicated according to the requirements set forth in the section as a whole. The statute enumerates requirements for legalization applications that must have been met in order to obtain a favorable adjudication. For example, there is a particular application period for legalization applications, 8 U.S.C. § 1160(a)(1)(A), the alien must establish residency and employment, 8 U.S.C. § 1160(a)(1)(B), and the alien must be admissible as an immigrant, 8 U.S.C. § 1160(a)(1)(C). 8 U.S.C. § 1160(3) tells the alien what he must prove, and how he must prove it, in order to succeed in his legalization application.⁹

Indeed, whenever the word "determination" appears in the statute, it is always in reference to the adjudication or decision by the agency official, never in reference to one by a reviewing court. For example, in subsection (e)(1) of 8 U.S.C. § 1160,¹⁰ the language "determination respecting an application" refers to the agency denial of the application. This is subject to independent review under IRCA's exclusive review scheme. The word "determination" in subsection (e)(2)(A) refers to the

⁹ This analysis applies with equal force to 8 U.S.C. § 1255a(e)(2) because the pertinent language is identical.

¹⁰ The following analysis applies also to 8 U.S.C. § 1255a, because the pertinent language, found in subsection (f), is identical.

"determination" described in paragraph (1), again a clear reference to the administrative decision. Subsection (e) (2) (B) refers to the administrative record established at the time of the "determination on the application," clearly a reference to the administrative decision. In subsection (e) (3) (B), the word "determination" is used to refer to decisions in the administrative record, another unmistakable reference to the agency's actions. Thus, the textual use of the word "determination" clearly results in the conclusion that the word refers not to an Article III judicial decision but rather to an administrative decision. Accordingly, "final determination" refers to a "final" administrative decision on the legalization application.

A reading of the language of the statute alone yields the conclusion that defendant's interpretation is a reasonable one. "[A]n agency need not show that its construction is the best way to read the statute; rather, courts must respect [an agency's] judgment so long as its reading is a reasonable one." Holly Farms Corp., 517 U.S. at 409 (emphasis added). Even if the statute can be read in a way different from how the INS reads it, because the INS's interpretation is reasonable, it must stand.

E. Under The Applicable Regulations, A Legalization Applicant's Right To Temporary Work Authorization Terminates Upon Administrative Review Of The Application

The regulation which addresses the work authorization rights of applicants for legalization under the SAW program pursuant to

8 U.S.C. § 1160 during the pendency of their applications states as follows:

(2) *Employment and travel authorization prior to the granting of temporary resident status.* Permission to travel abroad and to accept employment will be granted to the applicant, after an interview has been conducted in connection with a nonfrivolous application at a legalization office. . . . Employment and travel authorization subsequent to an interview will be granted on Service Form I-688A, and will be restricted to six months duration, pending final determination on the application for temporary resident status. If a final determination has not been made on the application prior to the expiration date of the I-688A, that date may be extended upon return of the I-688A by the applicant to the legalization office where it was obtained.

8 C.F.R. § 210.4(b)(2) (1995) (emphasis added).¹¹ Based on the regulations which address appeals of legalization denials, it can be concluded that the "final determination" on an application occurs at the administrative appeal.

First, applicants under the SAW program whose applications are initially denied may appeal this decision. 8 C.F.R. § 210.2(f) (1995).¹² If the applicant fails to file an appeal within thirty days of service of the notification of the denial of his application, the notice of denial becomes the "final notice of ineligibility." 8 C.F.R. § 103.3(3)(i) (1995)

¹¹ The following analysis applies with equal force to 8 C.F.R. § 245a.2(n)(2), the regulations applicable to legalization applicants under 8 U.S.C. § 1255a.

¹² Applicants for legalization under 8 U.S.C. § 1255a may also appeal the denial of their applications. 8 C.F.R. § 245a.2(o), (p) (1995).

(emphasis added). Second, dismissal of an appeal will be accompanied by a final notice of ineligibility. 8 C.F.R. § 103.3(3)(iii) (1995).¹³ Finally, if an applicant fails to file such an appeal, his employment benefits will terminate on the last day of the appeal period. 8 C.F.R. § 245a.2(n)(4) (1995).

These regulations clearly indicate that a denial of a legalization application is final at the administrative appeal level, either upon the dismissal of such an appeal or failure to file a timely appeal. Just as one of these two events -- failure to file a timely appeal or dismissal of an appeal -- triggers the "finality" of the denial of status, it follows that, although the regulation is explicit only in terminating benefits upon failure to file a timely appeal, benefits are also terminated upon dismissal of an appeal.

Finally, the regulation setting out the classes of aliens permitted to accept employment lends further support to the INS's position. The relevant portion of that regulation provides that an alien who applies for legalization under either 8 U.S.C. § 1160 or § 1255a may accept employment. 8 C.F.R. § 274a.12(c)(20), (22). "Employment authorization shall be granted in increments not exceeding 1 year during the period the application is pending (including any period when an administrative appeal is pending)." *Id.* (emphasis added).

The two competing interpretations of the statute at issue

¹³ These procedures are also applicable to denial of legalization under 8 U.S.C. § 1255a. 8 C.F.R. § 245a.2(p) (1995).

here are not evenly weighted. The district court's interpretation, that work authorization extends through judicial review of a denial of a legalization application, is unreasonable and yields an absurd result clearly not intended by Congress. The INS's interpretation that work authorization terminates at the dismissal of the administrative appeal is a reasonable one, especially in light of the Supreme Court's understanding of the legalization scheme and Congress's intent in enacting IRCA, and must give way under Chevron. Under the Chevron standard, the District Court's substitution of its own construction of the statute for that of INS must be reversed.

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CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the district court granting summary judgment in favor of plaintiffs. The Court should vacate the permanent injunction and enter summary judgment for defendant.

Respectfully submitted,

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STATEMENT OF PRIOR OR RELATED APPEALS

Counsel for respondent Immigration and Naturalization Service states that she has inquired of her colleagues and has learned of no case which presents issues identical or similar to the issue presented here.

BRIEF FORMAT CERTIFICATION

Pursuant to Rule 32(e) of the Rules of this Court, I hereby certify that Appellant's Brief is monospaced, has 10.5 or fewer characters per inch, and does not exceed 40 pages.

Thankful Vanderstar
THANKFUL T. VANDERSTAR
United States Department of Justice

October 8, 1998

CERTIFICATE OF SERVICE

I hereby certify that on October 8, 1998, two copies of appellant's brief and one copy of the excerpts of record were served on counsel for appellees by deposit in the established Department of Justice mail collection location in sufficient time for same-day collection and transmittal to the U.S. Postal Service for first-class mailing to:

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