At Sidebar

by Caroline Johnson Levine

Chevron Requires Judicial Deference for Reasonable Construction

Congress enacted the Immigration and Nationality Act (INA), Title 8 of the U.S. Code, in 1952 and has amended it on several occasions. The executive branch administers Title 8 of the Administrative Code of Federal Regulations. Therefore, the U.S. Office of the Attorney General delegates its authority to the Department of Justice's Executive Office for Immigration Review (EOIR), which administers and interprets immigration law and regulations. The EOIR contains the Board of Immigration Appeals (BIA), which reviews decisions of immigration judges and other officials.

The statutory enactments of the INA have promulgated clear rules regarding immigration law, however, the U.S. Supreme Court recently issued a decision that elucidates the quandary facing the legislative, executive, and judicial branches as each attempts to rationalize a significant response to a societal dilemma requiring an expeditious resolution. As an illustration of the polarization of the national sentiment regarding immigration law, the Supreme Court in *Scialabba v. Cuellar de Osorio*,[1] created a plurality opinion authored by Justice Elena Kagan, in which Justice Anthony Kennedy and Justice Ruth Bader Ginsburg joined. Chief Justice John Roberts authored an opinion concurring in judgment in which Justice Antonin Scalia joined. However, Justice Samuel Alito authored a dissenting opinion. Additionally, Justice Sonia Sotomayor authored a dissenting opinion in which Justice Stephen Breyer and Justice Clarence Thomas joined.

Rosalina Cuellar de Osorio's mother had achieved citizenship status, which led Cuellar de Osorio to petition to emigrate to the United States and leave her 13-year-old son behind in his native country. Cuellar de Osorio was granted "lawful permanent resident" status through the "family-sponsored immigration process, which allows certain aliens to immigrate based on their status as relatives of either U.S. citizens or lawful permanent residents."[2] At the time of Cuellar de Osorio's immigration, her son "would have been eligible to immigrate with [her] under the INA."[3] Subsequently, her son became ineligible to join Cuellar de Osorio when he exceeded 21 years of age. Cuellar de Osorio argued that the ineligibility findings of the U.S. Citizenship and Immigration Services (USCIS) were arbitrary and capricious[4] and that her son was entitled to "relief under the Child Status Protection Act (CSPA), 8 U.S.C. § 1153(h), which was enacted to help keep families together by expediting the immigration process for certain aged-out aliens."[5]

The Board of Immigration Appeals upheld the findings of USCIS and interpreted 8 U.S.C. § 1153(h) as inapplicable in this case. The District Court for the Central District of California affirmed the decision of the BIA. Subsequently, a panel of the Ninth Circuit Court of Appeals agreed with the BIA and the district court's grant of summary judgment and held that Cuellar de Osorio's son was "not among the aged-out aliens entitled to relief under § 1153(h)."[6] However, the "Ninth Circuit then granted rehearing *en banc* and reversed in a 6 to 5 decision. The majority concluded that 'the plain language of the CSPA unambiguously grants automatic conversion and priority date retention to [all] aged-out derivative beneficiaries,' and that the Board's contrary conclusion 'is not entitled to deference.'"[7] The Supreme Court granted *certiorari* "to resolve a Circuit split on the meaning of § 1153(h)(3), and [reversed] the Ninth Circuit's decision."[8]

There are several avenues to obtain U.S. residence and citizenship status, to include visas issued for family sponsorship, employment, and a diversity lottery. Family sponsorship provides that either a citizen or lawful permanent resident may petition to have an immigrating relative obtain lawful permanent resident status and reside in the United States.[9] There "is no annual cap on the number of permanent resident visas (also known as 'green cards') available to immediate relatives of U.S. citizens, [and] a citizen's spouse, child under the age of 21, or parent can apply for one immediately."[10] The number of visas for other qualifying relatives (including adult children) is capped, and therefore, the INA has created a separate preference system. "These family preference categories are referred to as F1, F2A, F2B, F3, or F4, corresponding to § 1153(a)'s numbered paragraphs. The beneficiary's place in line is determined by the date the petition was filed, which is known as the 'priority date.'"[11] Further, the primary beneficiary's child, a derivative beneficiary, is entitled to the same immigration priority date and status.

Foreign citizens who wish to legally immigrate to the United States must often wait a period of time prior to entering the country.

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Therefore, the derivative beneficiaries often age out by becoming 21 years of age and lose derivative status. In response, "Congress enacted the CSPA to provide relief to 'aged out' alien children by allowing them either to maintain 'child' status longer[12] or to automatically convert to a valid adult visa category while retaining the priority date associated with their original petition."[13]

In *Scialabba*, the Supreme Court was presented with a question as to "whether the CSPA grants a remedy to all aliens who have thus outpaced the immigration process—that is, all aliens who counted as child beneficiaries when a sponsoring petition was filed, but no longer do so (even after excluding administrative delays) by the time they reach the front of the visa queue."[14] In Cuellar de Osorio's appeal, the BIA interpreted the CSPA as granting relief to only "those aged-out aliens who qualified or could have qualified as principal beneficiaries of a visa petition, rather than only as derivative beneficiaries piggy-backing on a parent."[15] The Supreme Court's plurality opinion found that the BIA decision was entitled to deference under *Chevron*[16] and upheld the BIA's "determination as a permissible construction of the statute."[17]

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,[18] requires that a statute's plain meaning is preeminent over an agency's ruling, however, "if the law does not speak clearly to the question at issue, a court must defer to the [BIA's] reasonable interpretation, rather than substitute its own reading."[19] Justice Kagan, with Justice Kennedy and Justice Ginsburg, opined that the statutory text of 8 U.S.C. § 1153(h)(3) is ambiguous and speaks to the issue of "aged-out derivative beneficiaries" in divergent ways. The divergence occurs when separating the statute in half, where the first clause appears to provide sweeping relief "which would reach every aged-out beneficiary of a family preference petition" and the second clause provides a "remedy that can apply to only a subset of the beneficiaries."[20] Further, when a statute provides alternative constructions, *Chevron* "dictates that a court defer to the agency's choice—here, to the Board's expert judgment about which interpretation fits best with, and makes most sense of, the statutory scheme."[21] Further, when the BIA was "confronted with a self-contradictory, ambiguous provision in a complex statutory scheme, the Board chose a textually reasonable construction consonant with its view of the purposes and policies underlying immigration law."[22] The plurality refused to overturn the BIA and "assume as our own the responsible and expert agency's role."[23]

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Justice Roberts and Justice Scalia concurred, however, they disagreed with the plurality's suggestion that deference is warranted "because of a direct conflict between these clauses."[24] Rather, "courts defer to an agency's reasonable construction of an ambiguous statute because we presume that Congress intended to assign responsibility to resolve the ambiguity to the agency."[25] Finally, it appears clear that the "particular benefit provided by

section 1153(h)(3) is found exclusively in the second clause——the only operative provision."[26]

Justices Alito, Sotomayor, Breyer, and Thomas dissented and argued that the statutory construction of section 1153(h)(3) provides that because all "categories of aged-out children satisfy this [derivative beneficiary] condition, all are entitled to relief."[27] Further, Justice Alito argued that the BIA ignored the "clear statutory command" to allow the derivative beneficiary to retain the original priority date, even after achieving 21 years of age.[28]

In *Scialabba*, the U.S. Supreme Court clarified the priority status of various types of petitioners who desire to become U.S. citizens through the legal immigration process. More importantly, the Court upheld *Chevron's* precedent that government agency decisions should receive deference as those agencies attempt to execute legislative enactments. ⊙

Endnotes

[1]*Scialabba v. Cuellar de Osorio*, 573 U.S. ——, 134 S.Ct. 2191 (2014).

[2]*Cuellar de Osorio v. Mayorkas*, 656 F.3d 954, 955 (9th Cir. 2011).

[3]*Id.* at 955; *see also* 8 U.S.C. §§ 1101(b)(1), 1153(d); *see also Scialabba v. Cuellar de Osorio*, 573 U.S. ——, 134 S.Ct. 2191, 2213 (2014)("If his parent had obtained a visa before he aged out, he would have been eligible for a visa too, because the law does not demand that a prospective immigrant abandon a minor child.").

[4]*Id.* at 957 ("Cuellar de Osorio filed a lawsuit against CIS in the Central District Court of California along with several other similarly situated plaintiffs who had asked CIS for (and not obtained) priority date retention for their aged-out children. They sought declaratory and mandamus relief, alleging that CIS arbitrarily and capriciously failed to grant the requested priority dates in violation of the CSPA provisions codified at 8 U.S.C. § 1153(h)(3)").

[5]*Id.* at 956.

[6]*Id.*

[7]*Scialabba v. Cuellar de Osorio*, 573 U.S. ——, 134 S.Ct. 2191, 2202 (2014), quoting *de Osorio v. Mayorkas*, 695 F.3d 1003, 1006 (9th Cir. 2012).

[8]*Id.* at 2202, finding that *de Osorio v. Mayorkas*, 695 F.3d 1003, 1006 (9th Cir. 2012) and *Khalid v. Holder*, 655 F.3d 363, 365 (5th Cir. 2011) granted relief to every aged-out derivative beneficiary and were decisions in conflict with *Li v. Renaud*, 654 F.3d 376, 385 (2nd Cir. 2011), which agreed with the BIA's contrary holding.

[9]8 U.S.C. § 1153(a).

[10]*Cuellar de Osorio v. Mayorkas*, 656 F.3d at 956.

[11]*Id.*

[12]8 U.S.C. § 1153(h)(1).

[13]*Cuellar de Osorio v. Mayorkas*, 656 F.3d at 957; *see also* 8 U.S.C. § 1153(h)(3).

[14]*Scialabba v. Cuellar de Osorio*, 134 S.Ct. at 2196.

[15]*Id.* at 2197 (emphasis added).

[16]*Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778 (1984).

[17]*Scialabba v. Cuellar de Osorio*, 134 S.Ct. at 2197.

[18]*Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778 (1984).

[19]*Scialabba v. Cuellar de Osorio,* 134 S.Ct. at 2203.

[20]*Id.*

[21]*Id.*

[22]*Id.* at 2213.

[23]*Id.*

[24]*Id.* at 2214.

[25]*Id.*

[26]*Id.* at 2215.

[27]*Id.* at 2217.

[28]*Id.* at 2216.

Supreme Praise for *The Federal Lawyer*

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SONIA SOTOMAYOR

September 2, 2014

Hon. Gustavo A. Gelpi, Jr.
U.S. District Judge
District of Puerto Rico
National President, FBA
via email: gustavo_gelpi@prd.uscourts.gov

Dear Judge Gelpi:

I have received your kind letter and copy of the Federal Bar Association's most recent issue of *The Federal Lawyer* that highlights the work of our U.S. Magistrate Judges.

Thank you for thinking of me.

With warm regards,

Sonia Sotomayor