**No. 03-74442**

**IN THE UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

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**Hernan Ismael Delgado,**

**A#78-431-226,**

**Petitioner.**

**v.**

**ERIC H. HOLDER, JR., United States Attorney General,**

**Respondent.**

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On Petition For Review Of An Order Of The Board Of Immigration Appeals

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# Brief of Amicus Curiae in Support of Petitioner, American Immigration Lawyers Association

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NOT DETAINED

Calendared: Pasadena, Week of December 13, 2010

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## Introduction

"In the 25 years since *Chevron* was decided, [the Supreme Court] has continued to recognize that courts and agencies play complementary roles in the project of statutory interpretation." *Negusie v. Holder*, -- U.S. --, 129 S.Ct. 1159, 1171 (2009) (Stevens, J. concurring in part and dissenting in part) (referring to *Chevron U.S.A., Inc. v Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984)). The *Chevron* doctrine, as conceived of by the Supreme Court and implemented by the lower courts, clarifies how courts and agencies work together to achieve the goals articulated by Congress in legislation. Judicial deference to agencies' views on statutes they administer was not born in *Chevron* and the role of the judiciary to say what the law is did not die with it either. *Id.* at 1170-71.

*Chevron* famously provides a two-step structure for judicial review of agency decision making while preserving the legitimate authority of an agency and, ultimately, Congress. At *Chevron* step one, a court determines whether Congress' intent is expressed in the statute's plain language, and if it is, that intent must be given effect. *Chevron*, 467 U.S. at 843-44. However, when Congress has "explicitly left a gap for the agency to fill," a court



**AILA InfoNet Doc. No. 10101430. (Posted on 10/14/10).**

must proceed to step two, where the inquiry is whether Congress was silent or used language that is ambiguous. If so, the agency's interpretation is given controlling weight unless it is unreasonable. *Chevron*, 467 U.S. at 843-44.

This seemingly pristine *Chevron* doctrine, while simple in statement, can be difficult in application. The many doctrinal and practical questions of implementing *Chevron* have been a source of steady law-making for the Ninth Circuit, especially in the wake of the immigration landslide from the Board of Immigration Appeals to the federal courts. *See, e.g.,* Judicial Council of the Ninth Circuit, *Annual Report 2009* at 40 (describing percentage of BIA review cases). In a series of decisions, culminating in the *en banc* decision in *Marmolejo-Campos v. Holder*, 558 F.3d 903 (CA9 2009), the Ninth Circuit has resolved what had been an inconsistent approach to the *Chevron* doctrine.

It is now so that as to form, only published BIA decisions curry *Chevron* deference. *Marmolejo-Campos*, 558 F.3d at 909. An unpublished decision relying on a published opinion for dispositive effect will also trigger *Chevron* as to the contents of the published decision. *Id.* at 911. Immigration Judge decisions are not *Chevron* eligible. *Miranda-Alvarado v. Gonzales*, 449 F.3d 915, 921 (CA9 2006); *accord Lin v. U.S. D.O.J.*, 416 F.3d 184, 190

(CA2 2005). Single-member BIA decisions, like the unpublished BIA decisions, are not *Chevron* eligible. *Garcia-Quintero v. Gonzales*, 455 F.3d 1006, 1012-14 (CA9 2006).

As to content, the BIA decision must interpret its governing statute, such as the Immigration and Nationality Act, to be *Chevron* eligible. *Marmolejo-Campos*, 558 F.3d at 907. For example, BIA decisions interpreting criminal law are not reviewed under *Chevron*. *Id.*; *Leocal v. Ashcroft*, 543 U.S. 1 (2004) (finding BIA interpretation of a criminal statute not entitled to deference).

The panel majority in *Delgado v. Holder*, 563 F.3d 863, 867 (CA9 2009) and Judge Berzon's dissent, *id.* at 883, highlight a recurring, yet largely side-stepped *Chevron* question that merits *en banc* discussion and resolution: when reviewing a BIA decision, published or not, if the BIA does not actually invoke *Chevron* in its decision, is its statutory analysis eligible for *Chevron* deference?[1] In other words, if the BIA adopts a plain language analysis of the INA and it thereby does not exercise its administrative

[1] AILA limits its discussion to statutory analysis. The BIA's interpretation of regulations raise a different set of questions, especially in light of the different agencies that may issue regulations, that are not presented in this case. *See generally*, *Auer v. Robbins*, 519 U.S. 452, 461 (1997). Nor does AILA take a position on the ultimate resolution of the merits of Mr. Delgado's claim.

discretion or expertise to fill a statutory gap or give meaning to any ambiguous terms does *Chevron* matter at all? So to should the corollary be answered: if the BIA finds the statute to be clear, but a judicial court finds the statute to be ambiguous, what should the court do?

Amicus, the American Immigration Lawyers Association, proffers this brief to explain that when the BIA engages in a plain language statutory analysis, fills no statutory gaps, or does not particularize ambiguous statutory terms, its decision – published or not – is not eligible for *Chevron* deference. This is so even if the BIA is mistaken in its analysis and, indeed after judicial construction, a statute is ambiguous. Ambiguity, in the end, will always be a judicial determination. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

**Statement of Interest**

AILA is a national association with more than 11,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of

integrity, honor and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before the Department of Homeland Security and before the Executive Office for Immigration Review (immigration courts and the Board of Immigration Appeals), as well as before the United States District Courts, Courts of Appeal, and the Supreme Court of the United States.

This case implicates an important rule regarding the standard of review and the relationship between administrative agencies such as the Board of Immigration Appeals and the federal judiciary. AILA has particular interest in this area as it is part of the core mission and function of AILA.

**Argument**

When the BIA finds a statute is clear, it is constrained by the plain language of the statute and must give effect to congressional intent. *Chevron*, 467 U.S. at 843. If the BIA states that it is simply applying unambiguous statutory language then it is not: (1) interpreting the statute, (2) filling statutory gaps, or (3) giving concrete meaning to ambiguous terms through case-by-case adjudication. *See, e.g., INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987) (describing the BIA's

role in interpreting the statute). When the BIA finds that a statute is clear, a reviewing court is precluded from deferring and, instead, must interpret the statutory language *de novo*.

The principle that – as to content – an administrative agency must actually use its expertise to fill statutory gaps or particularize ambiguous statutory terms before *Chevron* will apply appears to be well-accepted in administrative law outside the immigration context. *Peter Pan Bus Lines Inc. v. Federal Motor Carrier Safety Admin.*, 471 F.3d 1350, 1354 (D.C. Cir. 2006) (collecting cases) ("*Chevron* step 2 deference is reserved for those instances when an agency recognizes that the Congress's intent is not plain from the statute's face."); *Arizona v. Thompson*, 281 F.3d 248, 253-54 (D.C. Cir. 2002) ("Deference to an agency's statutory interpretation 'is only appropriate when the agency has exercised its *own* judgment,' not when it believes that interpretation is compelled by Congress."). When reviewing BIA decisions, though, there is nothing clear about how the Ninth Circuit – or any of the circuits, really – approach the standard of review.

There is no discernable reason why BIA decisions should be treated differently from other administrative agency decisions. The point of *Chevron*, after all, is for

the agency to bring its expertise to bear on an ambiguity or gap in the statutory scheme – an interstitial matter *Chevron* presumes Congress delegated to the agency to work out. *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 165 (2007). The federal judiciary is the expert at statutory construction for that is the bread and butter of the judicial function. *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 520 ("The judicial task, every day, consists of finding the right answer, no matter how closely balanced the question may seem to be. In appellate opinions, there is no such thing as a tie."). The BIA certainly understands its *Chevron* role in the system and how to invoke its *Chevron* interpretative powers. *E.g.*, *Matter of Guang Li Fu*, 23 I & N Dec 985 (BIA 2006); *Matter of Rodarte-Roman*, 23 I. & N. Dec. 905, 909 (2006); *Matter of Avila-Perez*, 24 I&N Dec. 78, 83 (BIA 2007).

The Supreme Court does not treat BIA decisions any differently. In *Negusie v. Holder*, 129 S.Ct. 1159 (2009), the dispute centered on whether coercion or duress is relevant in determining if a noncitizen assisted or otherwise participated in the persecution of others such that he or she would be ineligible for asylum. *Id.* at 1162. The BIA in denying the application had concluded that its

caselaw did not recognize coercion or duress as a defense to the persecutor bar. The government defended this decision on the basis of *Chevron* – the BIA was entitled to deference in interpreting the Immigration and Nationality Act. *Id.* at 1166. The problem in that defense though, Justice Kennedy pointed out, was that the BIA had not actually "interpreted" anything. *Id.* The BIA, erroneously, had concluded that its rulings were compelled by a Supreme Court decision interpreting a different statute. Accordingly, *Chevron* was inapplicable because the BIA had not used it's *Chevron* delegated power to make law. *Id.* at 1167 ("Our reading of these decisions confirms that the BIA has not exercised its interpretive authority, but, instead, has determined that *Federenko* controls…Having concluded that the BIA has not yet exercised its *Chevron* discretion to interpret the statute in question, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.") (internal citations omitted).

Applying these precepts here, is the BIA's decision in *Matter of N-A-M-*, 24 I&N Dec. 336 (BIA 2007) entitled to deference under *Chevron*? The answer is straightforward: no. Analytically, *Matter of N-A-M-* is largely beside the point. In *Matter of N-A-M-*, the BIA interpreted the

statutory language at § 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3), and found it to be clear. The BIA held that "[a] *plain reading* of the Act indicates that the statute does not require an offense to be an aggravated felony in order for it to be considered a particularly serious crime." *N-A-M-*, 24 I&N Dec. at 338 (emphasis added). Because the BIA felt compelled by the plain language of the INA to reach its conclusion means that it did none of the things that *Chevron* instructs courts to defer. And even if the BIA were wrong as to the ambiguity of the statute, it would not matter. *Negusie* instructs that in such a situation remand is appropriate, not deference. *Negusie*, 129 S.Ct. at 1167.[2]

**Conclusion**

*Chevron* deference means deference to an agency's use of its expertise to interpret ambiguous statutory terms or statutory gaps. A court should not defer to an agency interpretation of the plain language of the statute under *Chevron*. Because the BIA's statutory interpretation in

[2] In *Anaya-Ortiz v. Holder,* 594 F.3d 673 (CA9 2010) and *Morales v. Gonzales*, 478 F.3d 972 (CA9 2007), the Ninth Circuit deferred to the BIA's interpretation of what type of evidence could be considered to determine if an offense was particularly serious. In both instances, the Ninth Circuit found that the BIA's interpretation was reasonable and therefore, under *Chevron*, the court deferred. AILA takes no position on the holdings in *Anaya-Ortiz* or *Morales*.

*Matter of N-A-M-* was not premised on *Chevron*, *Chevron* does not apply and no deference is due. In this *en banc* proceeding, the Ninth Circuit should plainly state this rule and make it applicable to BIA decisions.

Respectfully submitted October 11, 2010

__s/ Stephen W Manning_____

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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 brief is double spaced, using monofaced typeface of 10.5 characters or fewer per inch and contains 1,976 words (not including the table of contents, table of authorities, certificate of service, and corporate disclosure statement).

*s/ Stephen W. Manning*

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**CORPORATE DISCLOSURE STATEMENT**

I, Stephen W. Manning, certify that, pursuant to Fed. R. App. P. 26.1 the American Immigration Lawyers Association is a professional association operated for the purpose of promoting the general professional interests of the membership. There are no shares or stock within the meaning of Rule 26.1.

*s/ Stephen W. Manning*

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**CERTIFICATE OF SERVICE**

I, Stephen W. Manning, certify that on October 11, 2010, I electronically filed the Brief of Amicus, American Immigration Lawyers Association with the Clerk of Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

*s/ Stephen W. Manning*

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