SHABAJ V. HOLDER: HAS THE COURT OF APPEALS FOR THE SECOND CIRCUIT SPLIT WITH THE THIRD CIRCUIT ON JUDICIAL REVIEW OF CERTAIN USCIS APPLICATION DENIALS? WHAT SORT OF JUDICIAL REVIEW OF USCIS LEGAL ERRORS REMAINS AVAILABLE?

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On January 15, 2013, the Court of Appeals for the Second Circuit issued a precedential decision in the case of *Shabaj v. Holder*, No. 12-703. Paulin Shabaj, the plaintiff in the case, had come to the United States in November 2000 with a false Italian passport and sought asylum. His asylum application was ultimately denied, but while in asylum-only proceedings before an immigration court, he had married a U.S. citizen in July 2005. Although USCIS determined Mr. Shabaj's marriage to be bona fide and approved his wife's I-130 petition, it denied his application for a waiver under INA § 212(i) of his inadmissibility due to his previous fraud, and denied his related application for adjustment of status. Mr. Shabaj filed a lawsuit in the U.S. District Court for the Southern District of New York, challenging the determination of the USCIS Administrative Appeals Office (AAO) that he had failed to demonstrate that his wife would suffer extreme hardship if he were removed from the United States. The Second Circuit, in its recent decision, affirmed the District Court's decision that it lacked jurisdiction to review this denial, even though Mr. Shabaj asserted "that CIS's decision to deny his section 212(i) waiver application was erroneous as a matter of law." *Shabaj*, slip op. at 4.

As the Second Circuit indicated in *Shabaj*, there is a specific provision in the second subparagraph of section 212(i) stating that "o court shall have jurisdiction to review a decision or action of the Attorney General regarding a

waiver under paragraph (1)." 8 U.S.C. § 1182(i)(2). There is also a more general provision regarding judicial review of discretionary relief, 8 U.S.C. § 1252(a)(2)(B), which provides that "no court shall have jurisdiction to review . . . any judgment regarding the granting of relief under" various sections of the INA providing for discretionary relief, including INA § 212(i). Shabaj sought to rely on the exception provided by 8 U.S.C. § 1252(a)(2)(D) that preserves jurisdiction over "constitutional claims or questions of law," but the Second Circuit rejected this argument because § 1252(a)(2)(D) applies to "constitutional claims or questions of law raised upon a *petition for review filed in an appropriate court of appeals*"; Shabaj had raised his arguments about the denial of his § 212(i) waiver not in a petition for review (his earlier petition for review from the Visa Waiver Program removal order against him having been denied previously, *see* *Shabaj v. Holder*, 602 F.3d 103 (2d Cir. 2010)), but in a suit before the district court. Thus, because Shabaj, having participated in the Visa Waiver Program with his false Italian passport, was unable to seek to reopen his removal order and file a new petition for review, he could not obtain judicial review of the asserted legal errors in the USCIS denial of his § 212(i) waiver and adjustment application.

At first glance, there might appear to be a conflict between *Shabaj* and the decision of the Court of Appeals for the Third Circuit in *Pinho v. Gonzales*, 422 F.3d 193 (3d Cir. 2005). Gummersindho Pinho, the plaintiff in that case, had been arrested and charged with three counts relating to possession of cocaine and intent to distribute it. His application for New Jersey's "Pre-Trial Intervention" (PTI) program was rejected because of a subsequently invalidated policy "against accepting into PTI any defendant against whom there was a viable case for possession with intent to distribute drugs at or near a school",*id.* at 196, and in 1992 he pled guilty topossession of cocaine. He then sought post-conviction relief in 1997 based on the ineffective assistance of his criminal defense counsel. At the hearing on Pinho's ineffective-assistance claim, pursuant to prior discussions between Pinho's then-counsel and the state prosecutor, it was explained that Pinho had been accepted into PTI, and his conviction was vacated and the charges dismissed. Nonetheless, Pinho's 2000 application for adjustment of status was denied by the then-INSon the theory that his 1992 guilty plea met the INA definition of a "conviction" despite having been vacated, rendering him inadmissible and ineligible for adjustment of status.

Pinho was not placed in removal proceedings, and so sought review of the denial of his adjustment application through a lawsuit in District Court seeking a declaratory judgment that the denial of his adjustment of status was arbitrary, capricious and unlawful because his vacated state conviction should no longer be a bar to his eligibility for adjustment." 422 F.3d at 198. Despite the statutory bar on review of discretionary decisions, including the denial of an application for adjustment of status under INA § 245 (which is specifically mentioned among the types of discretionary relief covered by § 1252(a)(2)(B)), the Third Circuit found that the District Court had jurisdiction over this suit. As the Third Circuit explained:

It is important to distinguish carefully between a denial of an application to adjust status, and a determination that an immigrant is legally ineligible for adjustment of status. This distinction is central to the question of subject-matter jurisdiction, and is easy to elide. Indeed, such distinctions are crucial to administrative law generally; the framework of judicial review of agency action that has evolved over the past half-century is grounded in a sharp distinction between decisions committed to agency discretion, and decisions, whether 'ministerial' or 'purely legal,' governed directly by the applicable statute or regulation. . . . Whatever the label, our case law distinguishes between actions which an agency official may freely decide to take or not to take, and those which he is obligated by law to take or not to take. In the case of adjustment of status, an eligible immigrant may have his application denied within the discretion of the agency. But the immigrant's eligibility itself is determined by statute. To treat all denials of adjustment as discretionary, even when based on eligibility determinations that are plainly matters of law, is to fundamentally misunderstand the relationship between the executive and the judiciary.
. . . .

Determination of *eligibility* for adjustment of status — unlike the *granting* of adjustment itself —is a purely legal question and does not implicate agency discretion. . . . . The determination at issue here is precisely such a determination: whether under the applicable statutory language as interpreted by the BIA, Pinho was "convicted" so as to render him ineligible for adjustment of status. This is a legal question, not one committed to agency discretion.

Pinho, 422 F.3d at 203-204. That is, the Third Circuit found that a District Court had jurisdiction over the claim that Pinho had been found ineligible for adjustment of status based on a legal error, even outside the context of

removal proceedings. At first glance, this would seem to reach the opposite result as *Shabaj*, under analogous circumstances.

The jurisdiction of the Second Circuit includes New York, Connecticut, and Vermont, while the jurisdiction of the Third Circuit includes New Jersey, Pennsylvania, and Delaware, as well as the U.S. Virgin Islands. If there is a split between the Second and Third Circuits on this issue, therefore, it would mean that adjustment applicants in New York would have less access to judicial review than adjustment applicants in New Jersey. There may, however, be a way to read *Shabaj*and *Pinho* in harmony with one another.

Although it is not entirely clear from the decision in *Shabaj* what sort of legal error was alleged, there does not seem to have been any dispute that Mr. Shabaj required a waiver of inadmissibility due to his past fraud, or that his U.S. citizen wife was actually his wife and was actually a U.S. citizen. Rather, the dispute was over whether he had sufficiently established that his wife would suffer extreme hardship if he were removed—a decision that the Second Circuit had held to be discretionary, *see* *Camara v. Dep't of Homeland Sec.*, 497 F. 3d. 121 (2d Cir. 2007). In *Pinho*, on the other hand, the dispute was over whether Mr. Pinho was inadmissible at all. The disputed determination of eligibility for adjustment in *Pinho* was, one might say, logically prior to the discretionary decision on the ultimate adjustment application, while the disputed determination of hardship in *Shabaj* was itself one that is deemed discretionary.

In the context of § 1252(a)(2)(D) jurisdiction over constitutional claims and questions of law raised on a petition for review, it is possible for a reviewable legal error to exist even within a discretionary determination, if the adjudicating authority has used an incorrect legal standard or has committed some other legal error in making the discretionary determination. In *Pareja v. Att'y Gen.*, 615 F.3d 180 (3d Cir. 2010) (in which this author was counsel for the petitioner), for example, the Third Circuit found jurisdiction to hold that the agency could not consider the petitioner's number of qualifying relatives as a factor necessarily weighing against her ability to establish exceptional and extremely unusual hardship to a qualifying relative for purposes of cancellation of removal under INA § 240A(b)(1)(D). Similarly, the Second Circuit in *Mendez v. Holder*, 566 F.3d 316 (2d Cir. 2009), found that the agency had made an error of law in its determination of exceptional and extremely unusual hardship "where . . . some facts important to the subtle determination of 'exceptional and extremely

unusual hardship' have been totally overlooked and others have been seriously mischaracterized," *id.* at 323. *Shabaj*may stand for the proposition that the sort of legal error at issue in *Pareja* or *Mendez*, which is a part of the hardship analysis or other discretionary analysis, cannot be the basis of a lawsuit in district court; this is not necessarily inconsistent with the idea that a legal error like that at issue in *Pinho*, which is part of an eligibility determination logically prior to the discretionary analysis, can be the basis of such a lawsuit. One could certainly argue with some force that the *Pareja/Mendez*type of error should also be cognizable in district court, on the ground that the agency has no discretion to commit a legal error of any sort, but there is a potential distinction between the two sorts of legal error that could allow one to read *Shabaj* and *Pinho* as consistent with one another.

In any event, whether or not one reads *Shabaj*to conflict with *Pinho*, it is at least clear that *Shabaj* should not prevent judicial review of USCIS denials of petitions or applications that are not made discretionary by statute.The decision to deny an immigrant petition for a relative or prospective employee (an I-130 petition, I-140 petition, or I-360 petition for a religious worker), for example, is not discretionary, because INA 204(b) states that the Attorney General "shall" approve the petition if he determines that the facts in the petition are true, and the alien for whom the petition is filed is an immediate relative as defined by statute or is eligible for the requested preference. (This decision is normally now made by the Secretary of Homeland Security and her delegates within USCIS, although a BIA decision on an administrative appeal regarding an I-130 petition is still under the authority of the Attorney General.) Thus, district courts have jurisdiction to review the denial of such petitions, as has been held in such cases as *Ogbolumani v. Napolitano*, 557 F.3d 729 (7th Cir. 2009);*Ruiz v. Mukasey*, 552 F.3d 269 (2d Cir. 2009); *Ayanbadejo v. Chertoff*, 517 F.3d 273 (5th Cir. 2008); and *Soltane v. U.S. Dep't of Justice*, 381 F.3d 143 (3d Cir. 2004). Similarly, district courts should have jurisdiction to review denials of H-1B and other nonimmigrant visa petitions, as described in an earliest post on this blog by Cyrus D. Mehta, because the decision on those petitions as well is not specified by the statute to be in the discretion of the Attorney General: INA § 214(c)(1) states that "the question of importing any alien as a nonimmigrant under shall be determined by the Attorney General, after consultation with appropriate agencies of the government, upon petition of the importing employer." In *Kucana v. Holder*, 558 U.S. 233 (2010), the Supreme Court made

clear that only decisions actually declared discretionary by statute can be immunized from judicial review, superseding some earlier Court of Appeals decisions which had suggested that decisions made discretionary by regulation could also be immune from review. (At least one such pre-*Kucana* decision, *CDI Information Services Inc., v. Reno*, 278 F.3d 616 (6th Cir 2002), had refused on that basis to review the denial of an H-1B application for extension of stay.)

In addition to not precluding judicial review of denials of petitions or applications that are not explicitly made discretionary, *Shabaj* may not preclude judicial review of a USCIS denial of a discretionary waiver or adjustment application when the denial relates to an applicant who at that time or subsequently is the subject of an otherwise reviewable order of removal, even if the discretionary waiver or adjustment denial comes from USCIS rather than the immigration courts and the BIA—as could happen with many "arriving aliens" whose adjustment applications fall outside immigration court jurisdiction. As the *Shabaj* opinion explained in footnote 4:

> *Although Shabaj is ineligible to reopen his removal proceedings and file a petition for review because of his participation in the Visa Waiver Program, see 8 U.S.C. § 1187(b), we do not mean to preclude a petitioner who is otherwise eligible to reopen proceedings from attempting to reopen those proceedings in order to raise legal challenges to hardship rulings by the AAO. Under those circumstances, as permitted by § 1252(a)(2)(D), we would have jurisdiction over any "constitutional claims or questions of law" raised by petitions for review to this court.*

Shabaj v. Holder, slip op. at 6 n.4. The process that this footnote seems to contemplate, in which a Court of Appeals could review an AAO decision in a petition for review from a removal order even though the authorities that issued the removal order did not themselves have any ability to address the AAO decision, would not be unprecedented. Judicial review of an AAO decision denying an application for legalization under the Immigration Reform and Control Act of 1986 or the related LIFE Act Legalization provisions proceeds in this way, as explained in *Orquera v. Ashcroft*, 357 F.3d 413 (4th Cir. 2003): the legalization applicant must become subject to an order of removal or deportation, and then petition for review of that order,to seek judicial review of the legalization denial, even though the immigration judge and the BIA cannot

review the legalization denial during the removal proceedings. If an arriving alien whose adjustment application or related waiver application is denied by USCIS later becomes subject to an order of removal, footnote 4 of *Shabaj* suggests that they could seek review of the USCIS determination on petition for review of the removal order, analogously to the process discussed in *Orquera*.

Even if an arriving alien is already the subject of an order of removal when their adjustment application or related waiver application is denied by USCIS, it should be possible to seek judicial review of that denial despite *Shabaj*, so long as there is no order under the Visa Waiver Program (or at least no valid order, since such orders are sometimes issued in error and can then be set aside on a petition for review). As previously explained in an article by this author on our firm's website, denial of an adjustment application made by an arriving alien against whom an order of removal is already outstanding could be analogized to the denial of an asylum application by an applicant who has been ordered removed under the Visa Waiver Program. In both cases, the denial of the outstanding application enables the removal of the applicant, even though the denial is in some technical sense not a removal order. Thus, just as the Second Circuit has found jurisdiction over a petition for review of the denial of an asylum application in asylum-only proceedings because such a denial is "the functional equivalent of a removal order," *Kanacevic v. INS*, 448 F.3d 129, 134-135 (2d Cir. 2006), it should find jurisdiction over a petition for review of the denial of an adjustment application by an arriving alien against whom there is a final order of removal. Alternatively, under *Shabaj* footnote 4, it may be possible for such an arriving alien to seek reopening of the removal proceedings to pursue such an arriving-alien adjustment application, which would presumably be denied under *Matter of Yauri*, 25 I&N Dec. 103 (BIA 2009) (in which the BIA held that it would not reopen proceedings for an arriving alien to apply for adjustment before USCIS because such reopening was not necessary to allow adjustment), and then petition for review of the denial of reopening and seek review of any adjustment or waiver denial in the context of that petition.