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THE SECOND CIRCUIT AMENDS SHABAJ V. HOLDER: WHAT HAPPENED TO FOOTNOTE 4? HAS THE POTENTIAL AVAILABILITY OF JUDICIAL REVIEW OF USCIS DECISIONS BEEN ALTERED?

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On April 25, 2013, the U.S. Court of Appeals for the Second Circuit released an amended opinion in *Shabaj v. Holder*, docket number 12-703. The prior opinion in *Shabaj* was the subject of a previous post on this blog. To summarize, Shabaj held that a claimed error by the USCIS Administrative Appeals Office (AAO) in analyzing whether an applicant for a waiver of inadmissibility under INA §212(i) had shown extreme hardship could not be reviewed by a district court, because the jurisdiction provided by 8 U.S.C. §1252(a)(2)(D) to review constitutional claims and questions of law is only available on a petition for review to a court of appeals. (This is a very brief summary of a more complex issue; for additional details, readers are referred to the above-linked previous blog post.)

The only changes in the amended *Shabaj* opinion are in the footnotes, but one of those changes has particularly interesting implications. Although the amended opinion adds a new footnote 3 addressing why a statutory reference to the Attorney General applies to the Secretary of Homeland Security (and makes a slight formatting change at footnote 2), the particularly interesting part is the change in what was formerly footnote 4 and is now footnote 5.

In the old footnote 4, the Court of Appeals sought to explain why Shabaj could not have simply filed a petition for review invoking its §1252(a)(2)(D) jurisdiction under his particular circumstances, but suggested that others under similar circumstances could do so:

> *Indeed, this Court denied Shabaj's petition for review of his removal order*

> *over two years ago. See Shabaj, 602 F.3d at 106. 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.*

As explained in my previous post on the original *Shabaj* opinion, the procedure for judicial review that this footnote seemed to point to would be interesting but not unprecedented:

> *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.*

In its amended opinion, however, the Court of Appeals has removed the language that was previously in footnote 4. In its place, the Court of Appeals wrote in the new footnote 5:

> *The government contends that a petitioner could never file a "petition for*

> *review" of a CIS hardship determination because petitions for review are only available for challenges to orders of removal, and CIS determinations are not made as part of removal proceedings. However, we need not decide whether a petitioner could file a "petition for review" of a CIS hardship determination directly with this court because, in this case, Shabaj filed his legal challenge in the district court, which indisputably lacked jurisdiction under § 1252.*

The question that arises is whether this amendment of the *Shabaj* decision has any effect on the jurisdictional possibilities that may exist in the Second Circuit for judicial review of USCIS waiver determinations.

Certainly, the new *Shaba*j footnote 5 does not purport to preclude the sort of petition for review that the original *Shabaj* footnote 4 endorsed. Rather, the Court of Appeals has explicitly chosen not to address the issue of whether such a petition for review is possible, while noting that the government, as one might expect, contends that it is not. Thus, it still remains possible for others, under appropriate circumstances as described in my previous blog post, to argue for judicial review of a USCIS determination that is in some sense either incorporated into an order of removal, as in *Orquera*, or constitutes a refusal to reopen an order of removal, such that the USCIS denial is "the functional equivalent of a removal order," *Kanacevic v. INS*, 448 F.3d 129, 134-135 (2d Cir. 2006). The Court of Appeals would then need to face the issue that it avoided as unnecessary in its amended *Shabaj* opinion.

Also interestingly, the new footnote 5 does not preclude the possibility that Mr. Shabaj or someone else in a similar position could have reopened his removal proceedings, in the way that the old footnote 4 seemed to assert such reopening was necessarily impossible. Assume, for example, that Mr. Shabaj or someone else who had entered under the Visa Waiver Program had not actually waived his right to review in the way that the statute and regulations suggest he should have been required to. Like the petitioner in *Galluzzo v. Holder*, 633 F.3d 111 (2d Cir. 2011), whom the Second Circuit held could not simply be assumed to have waived his rights to removal proceedings, such a petitioner would properly be able to attack his removal order despite his Visa Waiver Program entry.

Perhaps for this reason, the Second Circuit declined, in its amended opinion, to necessarily rule out the possibility of such judicial review; it said in the new

footnote 5 merely that, regardless of whether or not Mr. Shabaj could have filed a petition for review directly with the Court of Appeals, he had not in fact done so. While that might raise the question of whether Mr. Shabaj's lawsuit in the district court should have been considered as a petition for review filed in the incorrect venue and transferable to the Court of Appeals in the interest of justice under 28 U.S.C. §1631, it is possible that such relief was not requested or considered, perhaps because the lawsuit evidently was not filed within 30 days of the final administrative order as a petition for review would need to have been (the original and amended opinions both indicate that Shabaj's appeal to the USCIS AAO was dismissed on May 2, 2011, and his lawsuit filed on July 14, 2011).

Thus, while the amended *Shabaj* decision has deleted language which seemed to give the blessing of the Court of Appeals to a creative strategy for seeking judicial review of certain USCIS decisions, it has not precluded such a strategy. In addition, it may implicitly have acknowledged that some Visa Waiver Program entrants, in circumstances similar to Mr. Shabaj's, could in fact reopen their removal proceedings and seek relief in that way.