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MATTER OF DOUGLAS: THE BIA CONFIRMS THAT BRAND X CAN SOMETIMES BE A FORCE FOR GOOD

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On October 17, 2013, its first day back to normal operations after the end of the recent federal government shutdown, the Board of Immigration Appeals (BIA) issued a precedential opinion, *Matter of Douglas*, 26 I&N Dec. 197 (BIA 2013). At first glance, *Matter of Douglas* is about an interesting but obscure aspect of a section of the Immigration and Nationality Act (INA) that was repealed more than a decade ago. But perhaps more importantly, *Matter of Douglas* is also an example of the BIA using its authority to go against Court of Appeals precedent decisions under *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967 (2005) ("*Brand X*"), to the benefit of an immigrant and potential U.S. citizen rather than to the detriment of the immigrant.At issue in *Matter of Douglas* was former section 321(a) of the INA, repealed effective February 2001 by the Child Citizenship Act of 2000, which in relevant part replaced INA §321(a) with the simpler rule of current INA §320. As *Matter of Douglas* explained, former §321(a)

> *provided that citizenship was automatically acquired by a child born outside the United States of alien parents under the following conditions:*
>
> > *(1) The naturalization of both parents; or*
> > *(2) The naturalization of the surviving parent if one of the parents, is deceased; or*
> > *(3) The naturalization of the parent having legal custody of the child when there has been a legal separation of the parents or the naturalization of the mother if the child was born out of wedlock and the paternity of the child has not been*

> *established by legitimation; and if*
> *(4) Such naturalization takes place while such child is under the age of eighteen years; and*
> *(5) Such child is residing in the United States pursuant to a lawful admission for permanent residence at the time of the naturalization of the parent last naturalized under clause (1) of this subsection, or the parent naturalized under clause (2) or (3) of the subsection, or thereafter begins to reside permanently in the United States while under the age of eighteen years.*

Matter of Douglas, 26 I&N Dec. in 198 (emphasis in original).The question in *Matter of Douglas* was the relevance of the order in which the conditions of former INA §321(a) were satisfied. As the BIA explained, Mr. Douglas

> *was born in Jamaica on January 29, 1976, to his married parents, each of whom was a native and citizen of Jamaica. On December 14, 1981, entered the United States as a lawful permanent resident. 's mother was naturalized on April 13, 1988. His parents were divorced on July 25, 1990. became 18 years old in 1994.*

Matter of Douglas, 26 I&N Dec. at 198. That is, Mr. Douglas's mother became "the parent having legal custody of the child when there has been a legal separation of the parents" under former INA §321(a)(3) only after she was naturalized, having been naturalized in 1988 and divorced in 1990. Both of these events, however, happened while Mr. Douglas was a lawful permanent resident and before he reached the age of 18, in compliance with former INA §321(a)(4)-(5).In its earlier decision in *Matter of Baires*, 24 I&N Dec. 467 (BIA 2008), the BIA had held that "A child who has satisfied the statutory conditions of former section 321(a) of the Immigration and Nationality Act . . . before the age of 18 years has acquired United States citizenship, regardless of whether the naturalized parent acquired legal custody of the child before or after the naturalization." *Matter of Baires*, 24 I&N Dec. at 467. Under this rule, Mr. Douglas would be a U.S. citizen. Case law of the U.S. Court of Appeals for the Third Circuit, however, as the BIA acknowledged, required that one seeking to show acquisition of citizenship under former INA §321(a)(3) demonstrate "that

his was *naturalized after a legal separation* from his ," rather than before such a separation. *Jordon v. Att'y Gen.*, 424 F.3d 320, 330 (3d Cir. 2005)(alterations in original) (quoting *Bagot v. Ashcroft*, 398 F.3d 252, 257 (3d Cir. 2005)). In *Matter of Baires*, the BIA had noted the Third Circuit case law, but had indicated that "we are not bound by the Third Circuit decisions on which the Immigration Judge relied because this case is within the jurisdiction of the Fifth Circuit." 24 I&N Dec. at 469. The proceedings in *Matter of Douglas*, however, had taken place within the jurisdiction of the Third Circuit, and so the BIA had to decide whether to follow *Matter of Baires* or the Third Circuit's decisions in *Jordon* and *Bagot*.

The BIA chose to follow *Matter of Baires*, rather than *Jordon* and *Bagot*, and so found Mr. Douglas to be a U.S. citizen and terminated his removal proceedings. Under *Brand X*, as the BIA explained, an administrative agency such as the BIA can sometimes be entitled to "*Chevron*deference" pursuant to *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) regarding its interpretation of a statute, even when there has been a prior court interpretation of the statute going the other way, so long as that court did not find that the statute unambiguously supported its interpretation. Believing that its interpretation in *Baires* was a reasonable interpretation of the statute, and that *Jordon* and *Bagot* had not interpreted the statute to be unambiguous, the BIA concluded that under *Brand X* it could and would follow *Baires*, rather that *Jordon*and *Bagot*, even in the Third Circuit.

It appears that this may be the first time that the BIA has explicitly relied on *Brand X* to rule in favor of the immigrant respondent. The BIA has, to be sure, previously rejected Court of Appeals case law that it thought to be incorrect in favor of a more immigrant-friendly approach. In *Matter of F-P-R-*, 24 I&N Dec. 681 (BIA 2008), for example, the BIA declined to follow the Second Circuit's decision in *Joaquin-Porras v. Gonzales*, 435 F.3d 172 (2d Cir 2006), and held that the one-year period in which a timely application for asylum may be made runs from the applicant's literal "last arrival" even when that last arrival followed a relatively brief trip outside the United States pursuant to advance parole granted by immigration authorities (which the Second Circuit had held would not restart the one-year clock). The proceedings underlying *Matter of F-P-R-*, however, appear to have taken place in the Ninth Circuit, not the Second, *see* 24 I&N Dec. at 682 (referring to "the absence of any controlling decisions on the issue from either the United States Court of Appeals for the Ninth Circuit or the Board"), and so the BIA did not have to determine whether it would follow

Joaquin-Porras within the Second Circuit. Here, in contrast, the BIA held that it would not follow *Jordon* and *Bagot* even within the Circuit that had decided them. And while there was a footnote in the BIA's acclaimed decision in*Matter of Arrabally and Yerrabelly*, 25 I&N Dec. 771 (BIA 2012) (regarding travel on advance parole by one who has accrued unlawful presence) that could be read as pointing in this direction, the BIA in *Arrabally* made much of the fact that it was addressing an aspect of the law that the petitioner in the Third Circuit's previous decision in *Cheruku v. Att'y Gen.*, 662 F.3d 198 (3d Cir. 2011), had not challenged, *see* *Matter of Arrabally*, 25 I&N Dec. at 775 n.6. It appears that *Matter of Douglas* may be the first BIA decision to go flatly against a contrary Circuit precedent under *Brand X* and do so to the benefit of the immigrant respondent.

The possibility of using *Brand X* as a force for good has been raised before, notably by Gary Endelman and Cyrus D. Mehta in their articles on "The Tyranny of Priority Dates" and "Comprehensive Immigration Reform Through Executive Fiat", as well as their post on this blog which explained how the BIA's decision in *Matter of Zeleniak*, 26 I&N Dec. 158 (BIA 2013), implementing the Supreme Court's striking down of Section 3 of the Defense of Marriage Act in *United States v. Windsor*, 133 S. Ct. 2675 (2013), effectively overruled the Ninth Circuit's earlier decision in *Adams v. Howerton*, 637 F.3d 1036 (9th Cir. 1982) in regard to recognition of same-sex marriages for immigration purposes. Like *Matter of F-P-R-*, however, *Matter of Zeleniak* had not explicitly relied on *Brand X*. In this regard, *Matter of Douglas* is a significant step forward.Of course, *Brand X* is not always a force for good. Less than a year ago, for example, the BIA decided in *Matter of M-H-*, 26 I&N Dec. 46 (BIA 2012), that it would disregard the Third Circuit's decision in *Alaka v. Att'y Gen.*, 456 F.3d 88 (3d Cir. 2006), and follow its own prior decision in *Matter of N-A-M-*, 24 I&N Dec. 336 (BIA 2007), so as to consider even some crimes that are not aggravated felonies as "particularly serious crimes" which can bar withholding of removal. The merits of *Matter of M-H-* (which this author considers dubious) are beyond the scope of this blog post, but it is only one example of the fact that the BIA can seek to rely on *Brand X* to strip applicants for relief of protection that a Court of Appeals has given them. Also within the last year, the BIA invoked *Brand X* in *Matter of Cortes Medina*, 26 I&N Dec. 79 (BIA 2013), to find that violation of California Penal Code 314(1), regarding indecent exposure, was categorically a crime involving moral turpitude, despite the contrary decision of the Court of Appeals for the Ninth

Circuit in *Nunez v. Holder*, 594 F.3d 1124 (9th Cir. 2010). Nor are these the only examples; an exhaustive list of all instances in which *Brand X* has been invoked by the BIA to the advantage of the Department of Homeland Security and the disadvantage of an immigrant would unnecessarily lengthen this blog post.Now that the BIA has acknowledged in *Matter of Douglas* that *Brand X* is not a one-way ratchet and can also work in favor of immigrants, however, it is important for practitioners to keep *Brand X* in mind when they are faced with unfavorable Court of Appeals case law interpreting an ambiguous immigration statute. Especially where existing BIA case law in other circuits is more favorable, an unfavorable Court of Appeals decision in a particular circuit need not be the last word.