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MUSINGS ON BRAND X AS A FORCE FOR GOOD AHEAD OF THE SUPREME COURT'S RULING ON CHEVRON DEFERENCE

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The Supreme Court on January 17, 2024 heard arguments in two cases – *Relentless, Inc. v. Department of Commerce* and *Loper Bright Enterprises v. Raimondo* - that may determine whether courts will continue to give deference to a federal agency's interpretation of an ambiguous federal statute as held in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

Chevron deference also applies to ambiguous provisions under the INA. It is currently disfavored by the conservative majority in the Supreme Court because it gives too much power to a federal agency to decide what the law is. It is also disfavored because deciding whether a statute is ambiguous, and thus becomes subject to deference, is also a subjective determination based on the administration's political ideology at any given moment in time. There is thus a great likelihood that *Chevron* will either be overturned or narrowed. As Brian Green and Stephen Yale-Loehr have astutely observed in their blog on Think Immigration:

> *Not all immigration practitioners and their clients will feel the impact if Chevron is narrowed or overruled. There will be winners and losers, and some unintended consequences may occur in limiting previously afforded deference to federal agency decision making. For example, in removal cases, Chevron deference hurts those seeking review of immigration judge or Board of Immigration Appeals decisions. It can also hurt employers seeking to obtain a favorable interpretation of a statute granting H-1B or L visa classification to a noncitizen worker. However, Chevron deference*

> *can help when the immigration agency seeks to give employment authorization benefits, such as with the Deferred Action for Childhood Arrivals program or with F-1 optional practical training.*

If the Supreme Court retains but limits *Chevron*, efforts will be made to argue that *Chevron* deference should not apply in BIA adjudications. Many case decisions have held that BIA adjudications receive *Chevron* deference, but there may be room to argue for a reversal of that precedent, depending on how the Court rules in *Relentless* and *Loper*.

If the Supreme Court's holdings in *Relentless* and *Loper Bright* deprive agencies of the ability to interpret ambiguous statutes without explicit Congressional authorization, other precedent beyond *Chevron* could be eviscerated as well. In *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967 (2005), the Supreme Court held that an agency's interpretation of an ambiguous statute may still be afforded deference even if a circuit court has interpreted the statute in a conflicting way. The Court's holding in *Brand X* is a double edged sword – it can empower agencies to interpret statutes in a way that will be detrimental to immigrants, or in a beneficial way, even in light of problematic circuit court precedent. One example of an agency using *Brand X* to the benefit of an immigrant may be found in *Matter of Douglas*, 26 I&N Dec. 197 (BIA 2013), discussed at length by David Isaacson in a prior blog. *Matter of Douglas* involved an individual, Mr. Douglas, who was born in Jamaica and seeking to establish citizenship under former INA §321(a). His mother had naturalized in 1988, and subsequently gained legal custody of Mr. Douglas when his parents divorced.

Case law in the Third Circuit required that an applicant under former INA §321(a)(3) demonstrate that his custodial parent naturalized after legal separation from the other parent. *See Jordon v. Att'y Gen*., 424 F.3d 320, 330 (3d Cir. 2005) (quoting *Bagot v. Ashcroft*, 398 F.3d 252, 257 (3d Cir. 2005)). The BIA, however, had previously held that one may demonstrate citizenship under former INA §321(a) regardless of whether his parent gained legal custody before or after naturalizing. *See Matter of Baires*, 24 I&N Dec. 467 (BIA 2008). Relying on *Brand X*, the Board of Immigration Appeals chose to follow its own precedent and hold that Mr. Douglas was a U.S. citizen, circuit court case law notwithstanding.

Isaacson's blog also points to other instances where the BIA previously rejected Court of Appeals case law that it thought to be incorrect in favor of a more immigrant-friendly approach but not as explicitly as in *Matter of Douglas*. 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). Isaacson also astutely points to 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.

Brand X can also provide hope when even the Supreme Court may have ostensibly shut the door. If a court's decision is based on deference to an agency's interpretation of a statute, a subsequent administration may interpret the statute differently notwithstanding the court's decision. In *Scialabba v. Cuellar de Osorio*, the Supreme Court ruled that the BIA's previous interpretation of the Child Status Protection Act (CSPA), as set out in *Matter of Wang*, 25 I&N Dec. 28 (BIA 2009), was a reasonable interpretation of an ambiguous statute. In particular, the Court deferred to the BIA's narrow interpretation of INA §203(h)(3), 8 U.S.C. §1153(h)(3), severely limiting which derivative beneficiaries of visa petitions could retain their parents' priority dates. This is a disappointing decision, but the details of the opinions in *Cuellar de Osorio* do leave room for some hope. When a statue is ambiguous in that way, *Brand X* makes clear that the BIA could reverse its position. So too could the Attorney General go against *Matter of Wang* and adopt a broader interpretation of INA §203(h)(3). If *Brand X* falls by the wayside like *Chevron*, there will be no room for a future administration to reinterpret this CSPA provision that could provide ameliorative relief for hundreds of thousands of children.

The demise of *Brand X* would deprive a future administration that might be

bolder and kinder on immigration, a potentially important tool to implement immigration reform in the face of Congressional polarization and inaction. As we have noted in prior blogs, *Brand X* could be used by that administration to, for example, count derivative family members together with the principal applicant in both the employment-based (EB) and family based (FB) visa preference categories under INA § 203(d). There is nothing in §203(d) that requires the separate counting of derivatives even though the administration has been separately counting them since the enactment of this provision. Although the Court of Appeals for the D.C. Circuit held that derivative family members must be counted separately in the EB-5 context in *Wang v. Blinken*, No. 20-5076 (D.C. Cir. 2021), *Brand X* could provide the Biden administration with a way to nonetheless change this interpretation by deeming INA 203(d) ambiguous and issuing a rule or policy memo overruling *Wang v. Blinken* everywhere in the country except in the D.C. Circuit. Other Court of Appeals decisions have similarly limited the Biden administration's ability to use *Brand X* to the advantage of immigrants.

Matter of Castro-Tum, a Trump era decision holding that Immigration Judges (IJs) and the Board of Immigration Appeals (BIA) do not have the authority to administratively close cases was rejected by several Circuit Court decisions and ultimately overturned it its entirely by Attorney General Garland's 2021 decision in *Matter of Cruz-Valdez*. Nevertheless, the Second Circuit upheld the BIA's decision not to grant administrative closure under *Matter of Castro-Tum* in *Garcia v. Garland*, a 2023 decision, despite the fact that the Biden administration had already, through Garland's decision, reinstated the prior rule under *Matter of Avetisyan*, which permitted IJs and the BIA to administratively close removal proceedings, even if a party opposes. Although the Second Circuit's decision was disappointing, the case leaves open some interesting possibilities. In *Garcia v. Garland* the Second Circuit held that that agency's interpretation on administrative closure was valid because *Matter of Castro-Tum* was valid and applicable at the time of the agency's decision. Thus, if an IJ or the BIA grant administrative closure in reliance on *Matter of Cruz-Valdez*, that decision should be upheld even if a less immigrant-friendly administration overrules the decision in future. The same logic could apply to other Biden administration policies should they be challenged in future. Further, the decision in *Garcia v. Garland* asserts that principle that different administrations may reinterpret ambiguous statutory provisions.

Of course, if *Loper Bright Enterprises* and *Relentless* overrule *Chevron*, *Brand X* too will fall along with its potential for be a force for good for immigrants. There is a possibility that *Chevron* may be narrowed rather than completely overruled. Green and Steve Yale Loehr suggest that the Supreme Court may cabin *Chevron* as it did for *Auer* deference. The Supreme Court in *Kisor v. Wilkie* provided no new radical test of how it would view an agency's interpretation of its own regulation. It essentially "cabined the scope" of *Auer* deference, and set forth a three-step approach under *Kisor*. Under this test, the court must determine (i) that the regulation is "genuinely ambiguous" — the court should reach this conclusion after exhausting all the "traditional tools" of construction; (ii) if the regulation is genuinely ambiguous, whether the agency's interpretation is reasonable; and (iii) even if it is a reasonable interpretation, whether it meets the "minimum threshold" to grant *Auer* deference, requiring the court to conduct an "independent inquiry" into whether (a) it is an authoritative or official position of the agency; (b) it reflects the agency's substantive expertise; and (c) the agency's interpretation of the rule reflects "its fair and considered judgment."

If the Supreme Court similarly narrows *Chevron* as it did with *Auer* deference, then *Brand X* will also be narrowed and survive. But if *Chevron* falls, so will *Brand X* rendering it harder for a future immigrant friendly administration to implement broad based immigration reform.

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