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BOARD OF IMMIGRATION APPEALS IN MATTER OF AGUILAR HERNANDEZ PROVIDES GLIMPSE OF HOW STATUTES AND REGULATIONS WILL BE INTERPRETED WITHOUT DEFERENCE TO GOVERNMENT

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On January 31, 2024, the Board of Immigration Appeals (BIA) issued a decision in *Matter of Aguilar Hernandez*.

Mr. Aguilar Hernandez, a noncitizen from Mexico, had been served a Notice to Appear (NTA) in 2019 that did not list the date and time of his individual hearing. He objected that this NTA was defective at both his individual hearing and moved to terminate the removal proceedings against him, but the Immigration Judge denied his motion. In October 2022, Mr. Aguilar Hernandez again moved to terminate the removal proceedings due to the defective NTA. The Department of Homeland Security objected, arguing that the IJ had the discretion to allow it to cure the defective NTA rather than terminating removal proceedings. DHS filed a Form I-261 containing the date and time of the next hearing, and also listing the date and time of the original hearing, and served this form on Mr. Aguilar Hernandez. Over Mr. Aguilar Hernandez's objections, the IJ denied his motion to terminate once again, without issuing a decision concerning DHS' submission of the Form I-261. Mr. Aguilar Hernandez then appealed to the BIA.

The BIA held that "DHS cannot remedy a notice to appear that lacks the date and time of the initial hearing before the Immigration Judge by filing a Form I-261 because this remedy is contrary to the plain text of 8 C.F.R. § 1003.30 and inconsistent with the Supreme Court's decision in *Niz-Chavez*." In *Niz-Chavez v. Garland*, 593 U.S. 155, 160-62 (2021), the Supreme Court held that DHS cannot

cure a defective NTA by issuing a hearing notice that contains the date and time of the initial hearing in removal proceedings. The BIA also cited to *Pereira v. Sessions*, 138 S. Ct. 2015 (2018), in which the Supreme Court held that the "stop-time rule" at INA 240A(d)(1) is not triggered by an NTA that does not contain the time and place of a hearing in removal proceedings. The BIA reasoned that "The plain text of 8 C.F.R. § 1003.30 does not support DHS' argument, because it does not allow amendment of the date and time on the notice to appear by using a Form I-261. *See*, *e.g.*, *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (requiring agencies to follow the plain language of a regulation)." The BIA noted that the Supreme Court had held that INA 239(a)(1) requires one "single document" in *Niz-Chavez*, and rejected the idea that DHS could provide adequate notice by issuing multiple successive documents containing the relevant information. *See Niz-Chavez*, 593 U.S. at 160-61.

Matter of Aguilar Hernandez is a victory for noncitizens seeking to terminate removal proceedings on the basis of a defective NTA, but it is interesting for another reason, as well – it represents one of the rare instances in which the BIA has cited *Kisor v. Wilkie*. As prior blogs have noted (here, here, and here) *Kisor v. Wilkie* laid out a three-step test for how it would view an agency's interpretation of its own genuinely ambiguous regulation.. 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." In *Kisor*, the Supreme Court narrowed the previous standard set forth in *Auer v. Robbins*, which held that courts would give deference to an agency's interpretation of its own ambiguous regulation. In *Aguilar Hernandez* it does not appear that the BIA thought that 8 C.F.R. § 1003.30 was ambiguous, and so it did not even need to defer to the government's interpretation of this regulation even under the narrower standard as set forth in *Kisor v. Wilkie*. The plain language of 8 C.F.R. § 1003.30 did not support an expansive reading that would allow the government to cure a defective NTA by amending it through the submission of an I-261. An I-261

under 8 C.F.R. § 1003.30 only allows the government to add or substitute charges in an NTA or to add or substitute factual allegations.

The requirement that the government interprets the plain meaning of the regulation is part of a trend. The "*Auer* deference" standard as modified by *Kisor v. Wilkie* is quite similar to "Chevron deference", which holds that courts will give deference to a federal agency's interpretation of an ambiguous federal statute. *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). However, when a statute is not ambiguous, the court does not need to even rely on *Chevron* deference and can side step the analysis all together. While requiring an agency to adhere to the plain meaning of a statute or regulation helped the respondent in *Aguilar Hernandez,* it may not always come to the aid of plaintiffs. For instance, the DC Circuit Court of Appeals in *Wang v. Blinken* held that it was clear that INA 203(d) required the counting of both the principal and derivative beneficiaries in the employment-based fifth preference. Indeed, the Court in *Wang v. Blinken* also rejected the government's argument that it was entitled to *Chevron* deference in interpreting INA 203(d) by counting derivatives as INA 203(d) was not ambiguous in the first place.

Two upcoming Supreme Court cases - *Relentless, Inc. v. Department of Commerce* and *Loper Bright Enterprises v. Raimondo* – may narrow Chevron or even eviscerate it altogether. If the Supreme Court's holdings in *Relentless* and *Loper Bright* deprive agencies of the ability to interpret ambiguous statutes without explicit Congressional authorization, it may result in both good and bad outcomes in the immigration context. According to the Think Immigration Blog: "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."

At present, courts also rely on the "major questions" doctrine in *West Virginia v. EPA*, 142 S. Ct. 2587 (2022) to side step *Chevron* deference even if a statute is ambiguous. Here the Supreme Court held that "in certain extraordinary cases" where it is unclear whether an agency action was authorized by Congress, "given both separation of powers principles and a practical understanding of legislative intent, the agency must point to 'clear congressional authorization'

for the authority it claims". Such extraordinary cases where the "major questions" doctrine is invoked have vast economic and political significance. The dissent in *Washington Alliance of Technology Workers v. the U.S. Department of Homeland Security* ("*Washtech v. DHS*"), for example, argued that the issue of whether DHS' 2016 OPT Rule exceeds its statutory authority was a "major question". Similarly, in a footnote, the court in *Texas v. USA* cited *West Virginia v. EPA* in holding that DHS had no Congressional authority to implement the DACA program. The standard articulated in *West Virginia v. EPA requires agencies to assert clear Congressional authorization when implementing a new policy of major significance, while Chevron imposes an* almost opposite *standard by saying* that if the court cannot identify clear congressional authority disapproving what the agency proposes to do, the court should uphold the agency action if it is reasonable. *The Supreme Court's decisions in Relentless* and *Loper Bright* could help to resolve this discrepancy. If *Chevron* deference is eliminated, courts need not even need to go into the "major questions" doctrine.

Matter of Aguilar Hernandez gives us a taste of how courts will interpret INA provisions and regulations in a post *Chevron* world although it remains to be seen whether the end result will always be beneficial.

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