CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

# SEC V. JARKESY AND LOPER BRIGHT V. RAIMONDO: HOW THE SUPREME COURT'S DISMANTLING OF THE ADMINISTRATIVE STATE IMPACTS IMMIGRATION LAW

*Posted on July 1, 2024 by Cyrus Mehta*

**By Cyrus D. Mehta and Kaitlyn Box***

The conservative Supreme Court majority recently issued two decisions that will have a major impact on the administrative state by transferring power from administrative agencies to the courts. We discuss both these cases and their impact on immigration law.

**SEC v. Jarkesy**

On June 27, 2024 the Supreme Court issued its decision in *Securities and Exchange Commission v. Jarkesy*. As discussed in our previous blog, *Jarkesy* involved an investment advisor who was charged with violations of securities law and challenged the SEC's enforcement action on the grounds that he was deprived of his constitutional right to a jury trial, that "Congress unconstitutionally delegated legislative power to the SEC by failing to provide it with an intelligible principle by which to exercise the delegated power", and that restrictions on the removal of Administrative Law Judges (ALJs) violate Article II. It was feared that the outcome of *Jarkesy* could significantly impact the immigration court system, as the authority of Immigration Judges (IJs) could be challenged using the same arguments advanced by *Jarkesy*.

The Supreme Court ultimately held that defendants are entitled to jury trials when the SEC seeks civil penalties against them for securities fraud. However, this holding appears unlikely to impede the ability of IJs to hear cases. In its opinion, the Supreme Court addressed concerns that its holding could reach

beyond SEC administrative enforcement proceedings that replicate common law fraud. Citing *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U. S. 320 (1909), a case that involved the imposition of a monetary penalty on a steamship company accused of transporting immigrants afflicted with "loathsome or dangerous contagious diseases" to the United States, the Supreme Court clarified that Congress has the power to regulate immigration and even impose monetary fines for violations without triggering the right to a jury trial under the plenary power doctrine. Justice Robert's majority opinion cited this case as on of the category of cases concerning public rights, including immigration law, which do not include a jury trial. This discussion seems to exclude most, if not all, immigration-related matters from the Supreme Court's holding in *Jarkesy*. On the other hand, one provision resembling common law fraud is the document fraud provision at INA 274C. An individual who is subject to an INA 274C hearing before an ALJ may wish to try to invoke *Jarkesy* to invalidate the hearing because it is a violation of their Seventh Amendment right to a jury trial. Similarly, if there is an discrimination hearing under INA 274B based on an employee's complaint, an employer may seek to invoke its right to a jury trial.

Since the Supreme Court did not review an appointments clause violation involving an ALJ, *Jarkesy* may not have impacted the *Space X* and *Walmart* lawsuits that have thus far successfully invalidate proceedings before the Office of the Chief Administrative Hearing Officer, which handles cases involving unfair employment practices, document fraud and noncompliance record keeping requirements. These will be dealt with at a later time in another case. However, the Supreme Court's holding in *Jarkesy* could impact immigration lawyers who have an EB-5 practice, as they can be subjected to SEC enforcement actions. As discussed in a prior blog, the SEC has initiated enforcement actions against immigration lawyers who it claimed had offered investments without registering as a broker or received commissions from their clients' investments. The SEC often imposes monetary sanctions on immigration lawyers found to have committed a securities violation. Thus, Jarkesy could provide immigration lawyers accused of securities fraud a means of challenging the enforcement proceedings brought against them by the SEC on the grounds that they are entitled to a jury trial.

Although *Jarkesy* only struck down as unconstitutional the lack of a civil jury trial for civil penalties under securities law, Justice Sotomayor in her dissent identified at least two dozen agencies that impose civil penalties in

administrative proceedings including CFPB, CFTC, EPA, FCC, FDA, FMC, FMSHRC, FRA, DOJ, DOT, FERC, HHS, HUD, MSPB, OSHA, Treasury, USDA, and USPS.

**Loper Bright Enterprises v. Raimondo**

Another recent Supreme Court decision may, on the other hand, have wide reaching impacts on immigration. In its June 28, 2024 decision in *Loper Bright Enterprises v. Raimondo*, the Supreme Court abolished the long-standing Chevron doctrine. Under this doctrine, courts were required to defer to the government agency's interpretation of an ambiguous statute. Chief Justice John Roberts, writing for the majority, stated that "*Chevron* is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires", but made clear that prior cases decided under the *Chevron* framework are not automatically overruled. It is likely that courts will revert to *Skidmore* deference, the lower-level framework that preceded *Chevron*, which asserts that the level of deference an agency's decision merits depends on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore v. Swift & Co*., 323 U. S. 134 (1944).

In a previous blog, we discussed the possible impacts of the elimination of *Chevron* deference, including the idea that it may open the door for challenges to a number of unfavorable immigration policies. For example, 20 CFR 656, which requires employers to place outdated print advertisements in Sunday newspapers as part of the labor certification recruitment process could now be vulnerable to challenges. INA §212(a)(5) states only that a noncitizen is deemed "inadmissible unless the Secretary of Labor" certifies, inter alia, that "there are not sufficient workers who are able, willing, qualified…and available at the time of application", and imposes no requirement on employers to conduct recruitment to establish a lack of U.S. workers. Post *Chevron* deference, courts may be more reluctant to defer to DOL's interpretation of INA § 212(a)(5) as set forth in 20 CFR 656, which requires compliance with onerous recruitment steps including the placement of print ads. Moreover, the Supreme Court also issued *Corner Post v. Board of Governors of the Federal Reserve System* further widening the window to challenge regulations beyond the 6-year statute of limitations until the plaintiff is injured b final agency action.

USCIS' "final merits determination", the second component of a two-part test

for determining whether an applicant has satisfied the criteria for extraordinary ability, outstanding researcher and professor, and exceptional ability immigrant visa petitions may now be more ripe for legal challenges, as well. This requirement arose from USCIS' interpretation of dicta referencing a "final merits determination" in the Ninth Circuit's opinion in *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010). However, the Ninth Circuit's holding in *Kazarian* does not actually impose a final merits determination, nor does this requirement appear anywhere in the relevant regulatory criteria. It may now be possible to attack unfavorable interpretations such as the BIA's restrictive definition of "particular social group" under *Matter of M-E-V-G* , or the BIA's narrow interpretation of INA §203(h)(3) under *Matter of Wang*, which precludes many derivative beneficiaries of visa petitions who did not get protection under the Child Status Protection Act (CSPA) from retaining their parents' priority dates. The Supreme Court affirmed *Matter of Wang* purely under *Chevron* deference in *Scialabba v. Osorio*.

On the other hand, the future of other, beneficial immigration policies is rendered uncertain without *Chevron* deference. F-1 OPT is an exercise of DHS' discretion and not explicitly authorized by statute. F-1 OPT has already been challenged, and was upheld by the First Circuit in 2022 in *WashTech v. U.S.* under *Chevron* deference. Deferred Action for Childhood Arrivals (DACA), a discretionary benefit that has been the subject of numerous legal challenges, could also be vulnerable without *Chevron*. Even if *Chevron* no longer helps, there is a statutory basis for the USCIS to issue work authorization to noncitizens under INA § 274A(h)(3) and to set time and other conditions for nonimmigrants under INA § 214(a)(1).

The demise of *Chevron* also brings about the fall of *Brand X*. As discussed in our prior blog, the Supreme Court in *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967 (2005) 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. *Brand X* has been a double edged sword – although allowed agencies to interpret statutes in a way that was detrimental to immigration, it also allowed for the possibility of creative beneficial interpretations notwithstanding contradictory circuit court precedent. *Brand X* could have been harnessed to allow derivative family members to be counted together with principal applicants in the employment-based (EB) and family based (FB) visa preference categories under INA § 203(d),

as the plain text of §203(d) does not require separate counting of derivatives. Although *Wang v. Blinken*, No. 20-5076 (D.C. Cir. 2021) held that derivative family members must be counted separately in the EB-5 context, Brand X could have allowed an immigrant-friendly presidential administration to issue a policy memorandum overruling the case everywhere else.

*Brand X* has also been employed to the detriment of immigrants. In his concurrence in *Loper Bright v. Raimondo*, Justice Gorsuch pointed to *De Niz Robles v. Lynch*, 803 F. 3d 1165 (CA10 2015), in which the BIA had invoked *Chevron* to "overrule a judicial precedent on which many immigrants had relied" in the 10th Circuit. That precedent was *Padilla–Caldera v. Gonzales*, 426 F. 3d 1294 (CA10 2005), which held that a noncitizen subject to the permanent bar could nonetheless adjust pursuant to INA § 245(i). According to Justice Gorsuch, who clearly dislikes *Brand X*:

> *"The agency then sought to apply its new interpretation retroactively to punish those immigrants—including Alfonzo De Niz Robles, who had relied on that judicial precedent as authority to remain in this country with his U. S. wife and four children…Our court ruled that this retrospective application of the BIA's new interpretation of the law violated Mr. De Niz Robles's due process rights…But as a lower court, we could treat only the symptom, not the disease. So Chevron permitted the agency going forward to overrule a judicial decision about the best reading of the law with its own different 'reasonable' one and in that way deny relief to countless future immigrants."*

Its problematic aspects aside, *Brand X* was a tool for reversing unfavorable circuit court decisions, but has now fallen along with *Chevron*. 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). Also 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. With the fall of *Chevron*, *Arrabally* might also be vulnerable although it remains to be seen whether a state or organization, which tries to challenge *Arrabally* and other immigration policies may get standing to sue. In *United States v. Texas*, the Supreme Court held that Texas and Louisiana had no standing to challenge the Biden administration's enforcement priorities. Writing for the majority, Justice Kavanaugh said: "The States have brought an extraordinarily unusual lawsuit. They want a federal court to order the Executive Branch to alter its arrest policies so as to make more arrests. Federal courts have not traditionally entertained that kind of lawsuit; indeed, the States cite no precedent for a lawsuit like this." In the face of *United States v. Texas*, it could be harder for states to argue that they have standing to challenge *Arrabally* or other policies.

While many are fearing that the undoing of Chevron will unleash an environmental, consumer, food and drug safety free for all, AILA is viewing the decision in a more positive light. AILA's president Kelly Stump responded to *Loper Bright* as follows:

> *"The Loper Bright and Relentless cases had nothing to do with immigration law and policy, but SCOTUS overturning the longstanding Chevron doctrine will have a significant impact on many immigration adjudications. This now means that an agency's interpretation of the INA doesn't automatically prevail, which could level the playing field for immigrants and their families and employers. In removal cases, those seeking review of immigration judges' or Board of Immigration Appeals decisions should now have more opportunity to do so. Employers seeking to obtain a favorable interpretation of a statute granting H-1B or L visa classification to a noncitizen worker may also benefit. We note possible negative consequences as well, as the decision has severely handicapped the executive branch's power to modernize our immigration system through policy updates or regulations. Valuable immigration benefits created by regulations may be threatened if not clearly based on statutory language. With this ruling, SCOTUS is punting the rule making process back to Congress. We hope Congress takes the initiative to come together in a bipartisan fashion to legislate sensible solutions that make*

> *our immigration system reflective of our modern-day realities."*

Notwithstanding Stump's upbeat view, not everybody will benefit from the fall of *Chevron*. The most vulnerable being DACA recipients whose cases is being heard at the Fifth Circuit Court of Appeals, and Stump too acknowledges that "valuable immigration benefits created by regulations may be threatened if not clearly based in statutory language. " If the Fifth Circuit and then the Supreme Court find DACA unlawful, Congress will need to step in to save DACA recipients. This remains wishful thinking as Congress has never been able to pass meaningful immigration reform in recent times. *Chevron* provided the bulwark for an immigrant friendly administration to pass meaningful immigration reform through executive action thus providing ameliorative relief to hundreds of thousands of nonimmigrants. Some programs involving parole have a statutory basis under INA 212(d)(5) and will continue but other programs without explicit statutory language may be susceptible to challenge. Without *Chevron* and Congress stepping up, the rug has been pulled under the feet of vulnerable noncitizens.

***Kaitlyn Box is a Senior Associate at Cyrus D. Mehta & Partners PLLC.**