No. 98-16471, 98-16472
DC #CV-96-2272, 96-3583

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSE MANUEL ORTIZ, et al.,

Pllaintiffs/Appellees,

v.

COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE,

Defendant/Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CALIFORNIA

REPLY BRIEF FOR APPELLANT

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 98-16471, 98-16472
DC# CV-96-2272, 96-3583

JOSE MANUEL ORTIZ, et al.,

Plaintiffs/Appellees,

v.

DORIS MEISSNER,

Commissioner, Immigration and Naturalization Service,

Defendant/Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

REPLY BRIEF FOR APPELLANT

I. THE DISTRICT COURT LACKED JURISDICTION OVER PLAINTIFFS' COMPLAINT

The district court improperly exercised jurisdiction over plaintiffs' complaint. Under the broad provisions regarding review of claims related to the legalization programs, 8 U.S.C. §§ 1160(e)(1) and 1255a(f)(1), the district court improperly exercised jurisdiction under 8 U.S.C. § 1329 and 28 U.S.C. § 1331. The language in those subsections is identical:

> There shall be *no* administrative or judicial review of a determination respecting an

> application for adjustment of status under this section *except in accordance with this section*.

8 U.S.C. § 1160(e)(1); 8 U.S.C. § 1255a(f)(1) (emphasis added). The section goes on to provide that judicial review may only be had in the context of review of a final deportation order. 8 U.S.C. §§ 1160(e)(2) and 1255a(f)(3). As plaintiffs have not yet become subject to a final deportation order, their claims were not properly reviewed by the district court. The district court's exercise of jurisdiction under 8 U.S.C. § 1329 and 28 U.S.C. § 1331 was not proper, given that the statute provides for *no* judicial review *except* as provided in the legalization statute.

Contrary to plaintiffs' assertion, the decision to grant or deny them temporary work authorization *was* integrally related to the substantive denial of their legalization applications. While plaintiffs are correct in asserting that the initial determination of their eligibility for temporary work authorization was made prior to the final adjudication of their legalization applications, the determination that plaintiffs were no longer eligible for employment authorization occurred subsequent to (and in conjunction with) the substantive denial of their applications at the administrative appellate review stage.

In McNary v. Haitian Refugee Center, Inc., et al., 498 U.S. 479 (1991) ("McNary"), the Supreme Court held that a district court may entertain "collateral challenges" to agency action.

Id. at 492. What plaintiffs have failed to recognize is that a "collateral challenge" refers to a challenge to how the agency, here the Immigration and Naturalization Service ("INS"), implements the legalization application process and does not involve eligibility rules or determinations. Indeed, McNary involved challenges by applicants for Special Agricultural Worker ("SAW") status to certain discrete procedures used in the processing of their legalization applications. Id. at 487. The Supreme Court made clear that a court would have jurisdiction, notwithstanding the limited judicial review provisions in 8 U.S.C. § 1160(e), over such challenges to the "practices and procedures in administering the SAW program," because they do not involve challenges to the merits of a determination on a specific application. Id. at 493-94. The complaints included allegations:

> That INS procedures did not allow SAW applicants to be apprised of or to be given an opportunity to challenge adverse evidence on which denials were predicated, that applicants were denied the opportunity to present witnesses on their own behalf, that non-English speaking Haitian applicants were unable to communicate effectively with LO's because competent interpreters were not provided, and that no verbatim recording of the interview was made . . . .

Id. at 487-88. The Supreme Court found that the district court had jurisdiction because the complaint "attack[ed] the manner in which the entire program is being implemented." Id. at 488. Here, plaintiffs' challenge is not to the procedures created by the INS to implement the legalization program, but rather to its

substantive decision regarding a substantive right that turns on eligibility, one that, because it does turn on eligibility, is clearly amenable to judicial review in the context of the review that is permitted by the statute.

Plaintiffs point out that the Supreme Court's decision in Reno v. Catholic Social Servs., Inc., et al., 509 U.S. 43 (1993) ("CSS") also supports their argument that the district court had jurisdiction to review their claims. The language in plaintiffs' own brief, however, contradicts that argument. Plaintiffs state that in CSS, the Supreme Court "reject[ed] the INS's argument that 8 U.S.C. Section 1255a(f)(1) precludes district court jurisdiction to review a challenge to agency action *that is made without reference to or relying on the denial of an individual application*." Pl. Brief, p. 6 (citing CSS, at 56) (emphasis added). The decision to revoke employment authorization is clearly made *with reference to and in reliance on* the denial of an individual application. Accordingly, it is a decision that may not be reviewed by the district court.

The decision in Naranjo-Aguilera v. INS, 30 F.3d 1106 (9th Cir. 1994) also contradicts plaintiffs' argument. Naranjo-Aguilera explained that CSS forecloses district court jurisdiction over INS's regulations and policies interpreting IRCA's substantive eligibility criteria. Id. at 1113. The INS's policy of terminating work authorization on a final administrative denial is based on its interpretation and

application of the substantive eligibility criteria and, indeed, is based on the denial of the application. Therefore, under Naranjo-Aguilera and CSS, the district court lacked jurisdiction to hear the challenge.

Plaintiffs assert that "[a]n alien is not required to establish substantive eligibility for legalization to receive temporary employment authorization." Pl. Brief, p. 8. Plaintiffs are not correct. In the beginning of the legalization application process, aliens are accorded temporary work authorization upon submission of a nonfrivolous or prima facie application. 8 U.S.C. §§ 1160(d)(2), 1255a(e)(2). In other words, the initial grant of work authorization depends on the agency's *preliminary* determination of substantive eligibility -- that the application on its face has some merit. Ultimately, if the alien is found not substantively eligible for legalization - i.e., his application is denied - then he will also be found to be no longer eligible for work authorization, because that right expires upon "final determination" respecting an application. 8 U.S.C. §§ 1160(d)(2), 1255a(e)(2).

Plaintiffs argue that defendant has taken inconsistent positions: first, that plaintiffs were ultimately denied temporary work authorization because their applications were "no longer considered pending" and second, that their work authorization "was revoked because they were found ineligible for legalization." Pl. Brief, pp. 9-10. Plaintiffs contend that, if defendant's "new" position is that their work authorization was

revoked "because their applications were determined to be unmeritorious, the proceedings should be remanded to the District Court with orders that an evidentiary hearing be conducted so that the INS can present evidence of the actual basis for its revocation of plaintiffs' employment authorization." Pl. Brief, p. 10. Plaintiffs have attempted to complicate what is simple. Plaintiffs' temporary work authorization was revoked because their legalization applications were finally denied. Naturally, that their legalization applications were denied *also means* that their applications were *no longer pending* and that their applications were ultimately found to be *unmeritorious*. There is nothing new in defendant's position, and there is no need for further inquiry regarding the reason that plaintiffs' work authorization was revoked.

II. DEFENDANT'S CONSTRUCTION OF THE STATUTE IS NOT INCONSISTENT WITH THE PLAIN LANGUAGE OF THE STATUTE, AS THE STATUTE IS AMBIGUOUS WITH RESPECT TO THE MEANING OF "FINAL DETERMINATION"

Plaintiffs' argument that the plain language of the statute makes it clear that "final determination" occurs at judicial review is without merit. The district court erred in not according defendant's interpretation of the statute, which is permissible and reasonable, substantial deference. Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 843 (1984). Plaintiffs correctly note that an inquiry into the meaning of a statute must first determine whether the language "unambiguously expressed [the] intent of Congress." Chevron, at

842-843. If not, the inquiry then is whether the agency's interpretation is "based on a permissible construction of the statute." Id. The particular provisions in question here *do not* unambiguously express the intent of Congress and are therefore open to interpretation by the agency which, as long as reasonable, must survive judicial scrutiny. Id. The language reads:

> The Attorney General shall provide that in the case of an alien who presents a nonfrivolous application for adjustment of status under subsection (a) of this section during the application period, and *until a final determination on the application has been made in accordance with this section,* the alien-
>
> (A) may not be excluded or deported, and
> (B) shall be granted authorization to engage in employment in the United States . . . .

8 U.S.C. § 1160(d)(2).[1] It cannot be *plainly* concluded from reading this language that "final determination" means judicial review. What is plain from the language of the statute is that "final determination" was not defined. Plaintiffs maintain that Congress would have indicated in the language of the statute if a final determination occurred at the administrative review stage. Pl. Brief, p. 15. Defendant, on the other hand, maintains that if Congress had intended final determination to refer to the judicial review state, it could and would have done so much more

[1] Similar language appears in 8 U.S.C. § 1255a(e)(2). The phrase "prima facie" replaces the word "nonfrivolous" found in section 1160(d)(2).

clearly. By arguing that Congress would have more directly stated in the language of the statute if it intended final determination to mean administrative review, plaintiffs here are conceding that "Congress has not directly addressed the precise question at issue." Chevron, 467 U.S. at 843.

As the statute reads now, the last word before the phrase "in accordance with this section" is "made." The INS's interpretation of the language -- that "in accordance with" modifies the word "made" -- is a reasonable one. The section as a whole includes requirements that an alien must meet in order to prevail in seeking legalization. How a determination on an application is *made* -- whether it is granted or denied -- will be based on whether these requirements have been met. Furthermore, courts of appeals do not "make" determinations -- they review them.

The only intent by Congress that is unambiguous is that employment authorization expires upon final determination of a legalization application. The mere inclusion of the phrase "in accordance with this section" does not provide the unambiguous definition of "final determination" that the district court erroneously inferred.

III. DEFENDANT'S INTERPRETATION OF THE STATUTE WAS ENTITLED TO SUBSTANTIAL DEFERENCE

Plaintiffs maintain their position that, because defendant had initially represented to the court a different interpretation of the statute, defendant's interpretation loses the deference it

would ordinarily be due under Chevron. Plaintiffs argue that there is no evidence that the initial position taken was a mistaken one. The evidence is, however, what the INS had actually *done* with respect to these plaintiffs' employment authorization, which plaintiffs themselves brought to the attention of the district court. DN 16. The INS had revoked plaintiffs' employment authorization upon the administrative appellate decision denying their applications. When counsel recognized that she had mistakenly represented the INS's practice to the district court, she corrected this mistake. The INS did not *change* its position — its practice with each of these plaintiffs was to grant them work authorization through the administrative appeal of their legalization applications. Because this had been its practice, clearly, its interpretation of the statute had also been, all along, that "final determination" refers to the final administrative denial on appeal.

Plaintiffs assert that defendant's interpretation of the statute is unreasonable, arbitrary and contrary to clear congressional intent. Pl. Brief, p. 18 (citing Chevron, 467 U.S. at 842, n.9). Plaintiffs counter defendant's arguments regarding the word "determination"[2] by pointing out that "the one time the term 'final determination' is used, it references the entire review process . . . ." Pl. Brief, p. 19. Plaintiffs are

[2] Found at Def's Brief, pp. 23-25.

mistaken, however. The term "final determination" references the *entire section*, not just the *entire review process*. 8 U.S.C. §§ 1160(d)(2), 1255a(e)(2) (providing for work authorization "until a final determination on the application has been made *in accordance with this section*"). The *entire section* includes more than the provisions regarding administrative and judicial review. This particular argument being advanced by plaintiffs yields the conclusion that it is plaintiffs' and not defendant's interpretation that is unreasonable and arbitrary.

Plaintiffs' contention that defendant's interpretation is contrary to clear congressional intent also fails. Defendant agrees that "a principal goal of the [Immigration Reform and Control Act of 1986] ("IRCA") was to deter illegal employment." Pl. Brief, p. 19 (citing McNary, 498 U.S. at 890-91). Plaintiffs then assert that "Congress obviously contemplated that plaintiffs would remain in the United States after an INS denial to exercise their appellate right." Pl. Brief, p. 20. Congress did provide for a right to judicial review of a legalization denial. By linking it *only* to review of a final deportation order, however, Congress intended that such aliens would face deportation proceedings after adjudication of their legalization applications. Congress was faced with a dilemma, however. Congress wanted aliens to come forward to apply for legalization, hoping to significantly diminish the "shadow population" of aliens living in this country illegally. McNary, 498 U.S. at

480-81. If aliens feared immediate deportation proceedings upon a legalization denial, they would not take advantage of this benefit. Id. Thus, Congress included the confidentiality provisions which prohibit use of information furnished in legalization applications for the purpose of instituting deportation proceedings. 8 U.S.C. §§ 1160(6)(A), 1255a(5)(A).

The question then remained, if proceedings could not begin automatically after a denial of legalization (except in the unlikely event that the INS obtained independent information about an illegal alien), how would Congress avoid the problem of aliens who were denied legalization returning to the "shadow population" from which they came to apply for legalization? See McNary, 498 U.S. at 481-82. Certainly, if such aliens continued to enjoy the legal right to work in the United States, they would have no incentive to either leave the United States or come forward to be placed in proceedings. Congress recognized this dilemma and fashioned a statute under which their employment authorization would terminate after administrative review, thus discouraging illegal aliens from continuing to reside in the United States. If these aliens wanted to be able to work legally after their legalization denials, they would have to surrender themselves for the initiation of proceedings, and then they could apply for work authorization in the context of those proceedings. Then, ultimately, they would obtain the judicial review of both their deportation order and legalization denial to which they were entitled. See CSS, 509 U.S. at 55 n.16.

Plaintiffs fail to address the Supreme Court's explication of the legalization scheme in either CSS or McNary. In CSS and McNary, the Supreme Court provided a detailed analysis of how the legalization program works. Defendant's interpretation of the statute finds support in the Supreme Court's analysis. Plaintiffs have not explained why the Supreme Court's interpretation is incorrect and why this Court should not follow it. Furthermore, the district court's interpretation of the statute clearly contradicts this scheme and yields a result that could not have been intended by Congress, and thus it is clearly erroneous. Plaintiffs assert that "[b]y restricting judicial review of a denied legalization application to the review of a deportation order Congress evidenced its understanding that the INS would seek to deport an alien who was denied legalization." Pl. Brief, p. 22. Plaintiffs and the district court clearly ignored the *express* language of the statute which forbids the INS from initiating proceedings against aliens based on the denial of their legalization applications. 8 U.S.C. §§ 1160(6)(A), 1255a(5)(A). CSS, 509 U.S. at 54-55, McNary, 498 U.S. at 484-85. Congress contemplated that revoking the work authorization of denied legalization applicants would force them either to leave the country, or to surrender themselves for proceedings so that they could obtain both the judicial review to which they are entitled (but only in conjunction with a deportation order) and seek the legal right to work once again. What Congress clearly did not intend was that denied legalization applicants would

return to their illegal status while enjoying the legal right to work in the United States indefinitely.

CONCLUSION

For the foregoing reasons, defendant seeks the following relief. Should the Court find that the district court lacked jurisdiction, this Court should reverse the decision of the district court, vacate the district court's orders, and remand to the district court with instructions to dismiss the complaint for lack of jurisdiction. In the event the Court finds that the district court had jurisdiction, the Court should reverse the decision of the district court and vacate the injunction.

Respectfully submitted,

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BRIEF FORMAT CERTIFICATION

Pursuant to Rule 32(e) of the Rules of this Court, I hereby certify that Appellant's Brief is monospaced, has 10.5 or fewer characters per inch, and does not exceed 20 pages.

Thankful T. Vanderstar

THANKFUL T. VANDERSTAR
United States Department of Justice

November 20, 1998

CERTIFICATE OF SERVICE

I hereby certify that on November 20, 1998, two copies of appellant's reply brief were served on counsel for appellees by deposit in the established Department of Justice mail collection location in sufficient time for same-day collection and transmittal to the U.S. Postal Service for first-class mailing to:

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