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JUDICIAL REVIEW OF BCIS DECISIONS: WILL THERE BE ANY?

by David B. Pakula and Lawrence P. Lataif*

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)¹ significantly restricted federal court review of decisions made during the process of removing aliens who have violated U.S. laws. By limiting judicial review, the IIRIRA simplified and expedited the removal of these aliens. It is not clear from the legislation, however, whether Congress also intended for the IIRIRA to limit judicial review of immigration decisions affecting aliens who are not being removed, but are merely seeking to live and work lawfully in the U.S. A debate over this issue has been raging in the federal courts since the IIRIRA's enactment in 1996.

After the September 11, 2001, terrorist attacks, judicial review of non-removal immigration decisions has taken on added significance. Historically, judicial review has served as an invaluable safeguard against arbitrary decision-making by federal administrative agencies, including the INS. In the post-9/11 environment of zero tolerance, judicial review is needed more than ever before to prevent and correct abuses of discretion by immigration officials.

The issue of whether the IIRIRA's jurisdiction-limiting provisions apply to non-removal adjudications is crucial for millions of law-abiding foreign nationals, many of whom have established families, friends, and careers in the U.S. According to a trend found in some recent judicial interpretations of the IIRIRA, the ultimate recourse of judicial review for these aliens is eroding incrementally, but rapidly. While not all courts have ruled against judicial review,

¹ Pub. L. No. 104-208, 110 Stat. 3009. For a summary of the IIRIRA's provisions, see 73 Interpreter Releases 1317 (Oct. 7, 1996).

discretionary immigration decisions outside the removal context may be on the brink of being totally shielded from judicial review.

This article addresses judicial review of immigration decisions made prior to the commencement of removal proceedings—the type of decisions that are now made by the Bureau of Citizenship and Immigration Services (BCIS).² The article examines the relevant history of judicial review and the current state of the law. It also discusses where the current anti-review trend is leading and what legal theories, not previously discussed in the reported judicial decisions, may be available to arrest the trend.

While perhaps lacking the media appeal of hot-button issues such as special registration requirements, stripping federal courts of jurisdiction to review BCIS adjudications could be the stealth weapon that devastates the rights of aliens more than all of the post-9/11 changes in laws and procedures.

JUDICIAL REVIEW OF IMMIGRATION DECISIONS BEFORE THE IIRIRA

Before 1996, INA § 106, titled “Judicial review of orders of deportation and exclusion,” governed federal court review of decisions made during deportation and exclusion proceedings. The overall effect of § 106 was to streamline the review process. INA § 106(a) granted exclusive jurisdiction to the U.S. Courts of Appeals to review final orders of deportation. Section 106(b) provided that habeas corpus was the exclusive vehicle for review of final orders of exclusion.

² On March 1, 2003, the INS’s administrative, service, and enforcement functions were transferred to the new Department of Homeland Security (DHS). Under the DHS, border protection, inspection, investigation, and enforcement will be handled by the Bureau of Customs and Border Protection (CBP) and the Bureau of Immigration and Customs Enforcement (BICE). The BICE assumed the INS’s enforcement functions, as required by the Homeland Security Act, Pub. L. No. 107–296, 116 Stat. 2135, codified primarily at 6 USC § 101 et seq. See 80 Interpreter Releases 305 (Mar. 3, 2003) (reporting on and reproducing final rule facilitating the transfer); 68 Fed. Reg. 9824–46 (Feb. 28, 2003) (implementing the transfer). For a section-by-section summary of the HSA’s immigration provisions, see 79 Interpreter Releases 1733 (Nov. 25, 2002). Under the HSA, services and benefits will be administered by the Bureau of Citizenship and Immigration Services (BCIS). The BCIS has assumed all immigration service functions previously performed by the INS, including the adjudication of immigrant visa petitions, naturalization petitions, asylum and refugee applications, and adjudications performed at INS Service Centers.

INS decisions made during the process of deportation were generally reviewed in a single court of appeals proceeding following entry of the final order of deportation.³ Section 106(c) provided that an order of deportation or exclusion was not reviewable “if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations.”

From 1963 to 1983, the U.S. Supreme Court issued three major decisions interpreting the meaning and scope of § 106. In *Foti v. INS*,⁴ decided in 1963, the Court held that an Immigration Judge’s (IJ’s) denial of discretionary relief from deportation was reviewable in the circuit court under § 106. The Court reasoned that consolidated review of all decisions made during the course of deportation proceedings was consistent with the fundamental purpose behind § 106 of preventing piecemeal review, by “successive dilatory appeals to various federal courts,” of deportation decisions.⁵ The Court rejected the notion that § 106(a) gave the courts of appeals jurisdiction to review only the final order of deportation and allowed the district courts to review individual deportation decisions leading up to the final order.⁶

In 1968, in *Chen Fan Kwok v. INS*,⁷ the Court held that the INS District Director’s administrative denial of a stay of deportation, which occurred after the conclusion of deportation proceedings, was reviewable in the district court rather than in the court of appeals. The Court found that the district director’s decision did not fall within the scope of § 106(a), because it was not a “final order of deportation” and was not entered during the course of deportation proceedings.⁸ Thus, the Court narrowly interpreted § 106(a) to require review by a court of appeals only of decisions made by the IJ and the Board of Immigration Appeals (BIA) during the course of deportation proceedings.

Finally, in *INS v. Chadha*,⁹ a 1983 decision, the Court held that court of appeals jurisdiction existed under § 106(a) to review the constitutionality of a “one-house veto” procedure by which the House of Representatives overrode an IJ’s granting of discretionary relief from deportation. After the House disapproved the suspension of deportation, the deportation hearing was reconvened and a final order of deportation was entered, from which the alien appealed to the

³ See *Foti v. INS*, 375 U.S. 217 (1963).

⁴ *Id.*

⁵ 375 U.S. at 224–26.

⁶ *Id.*

⁷ 392 U.S. 206 (1968).

⁸ *Id.* at 213.

⁹ 462 U.S. 919 (1983).

court of appeals. In holding that the court of appeals had jurisdiction, the Supreme Court distinguished *Cheng Fan Kwok*, in which the alien did not attack the deportation order itself. The Court held that the phrase, "final order of deportation," as used in § 106(a), "includes all matters on which the validity of the final order is contingent, rather than only those determinations actually made at the hearing."¹⁰

Before the enactment of the IIRIRA in 1996, the Supreme Court did not address the issue of federal court jurisdiction to review immigration decisions made before the commencement of deportation proceedings. Lower federal courts held that pre-deportation proceeding decisions were beyond the scope of court of appeals review under § 106(a), as defined in *Foti*, *Chadha*, and *Chen Fan Kwok*.¹¹ The district courts had subject matter jurisdiction to review such decisions according to the standards set forth in the Administrative Procedure Act (APA).¹²

The majority of courts held, however, that the exhaustion of administrative remedies doctrine, as codified in § 106(c), prevented district courts from reviewing certain pre-deportation decisions that were renewable in deportation proceedings. For example, INS regulations specifically provided (and still provide) that a district director's denial of an application for asylum or adjustment of status was renewable in deportation proceedings, as a form of relief from deportation (now referred to as "removal").¹³ According to the majority view, in order to exhaust the available administrative remedies following the district director's denial of asylum or adjustment of status, an alien was required to wait until deportation proceedings were commenced. Then, the alien was required to reapply for asylum or adjustment of status during the deportation proceedings, as a form of relief from deportation, and appeal the IJ's denial of relief to the BIA. Upon denial of relief by the BIA, the alien could then

seek review of the BIA's denial of asylum or adjustment of status in the court of appeals under § 106(a).¹⁴

On the other hand, it was well established that district courts could review the district director's pre-deportation denials of requests for benefits that were not renewable during deportation proceedings as a basis for relief. For example, the INS's denials of nonimmigrant visa petitions or extensions of stay were not (and still are not) authorized by the INA or INS regulations to be renewed during deportation (or removal) proceedings as a basis for relief. Accordingly, an alien was not required to await deportation proceedings to exhaust administrative remedies,¹⁵ and could obtain immediate review of such determinations in the district courts.¹⁶

JUDICIAL REVIEW OF IMMIGRATION DECISIONS UNDER THE IIRIRA

The IIRIRA repealed INA § 106, and replaced it with INA § 242. Entitled "Judicial review of orders of removal," § 242 retains the overall concept of streamlining judicial review of removal decisions. INA § 242(a) provides that exclusive jurisdiction to review final orders of removal remains in the courts of appeals. Section 242(e) retains habeas corpus review of decisions regarding summary removal (analogous to "exclusion" under pre-IIRIRA law). The *Foti* concept of preventing piecemeal review of non-final deportation decisions is codified in the new § 242(b)(9). This provision, which the Supreme Court has called a "zipper

¹⁰ *Id.* at 938.

¹¹ See *Fatehi v. INS*, 729 F.2d 1086 (6th Cir. 1984); *Ghorbani v. INS*, 686 F.2d 784 (9th Cir. 1982); *Butterfield v. INS*, 409 F.2d 170 (D.C. Cir. 1969).

¹² 5 USC § 701 et seq. The APA does not provide a basis for exercising subject matter jurisdiction. Pre-IIRIRA cases relied on INA § 279 as conferring subject matter jurisdiction on the district courts to review the INS's pre-deportation proceeding immigration decisions. The IIRIRA amended INA § 279 to limit its applicability to suits brought by the government. In *Sabhari v. Reno*, 197 F.3d 938, 941-43 (8th Cir. 1999), the court held that 28 USC § 1331 provides an alternative jurisdictional basis.

¹³ See 8 CFR §§ 208.4(a)(3) and 240.33 (asylum), 245.2(a)(5)(ii) (adjustment of status).

¹⁴ See *Cardoso v. Reno*, 216 F.3d 512 (5th Cir. 2000); *Howell v. INS*, 72 F.3d 288 (2^d Cir. 1995), summarized in 73 Interpreter Releases 71 (Jan. 6, 1996); *Randall v. Meese*, 854 F.2d 472 (D.C. Cir. 1988), summarized in 66 Interpreter Releases 266 (Mar. 9, 1989); *Kashani v. Nelson*, 793 F.2d 818 (7th Cir. 1986); *Massignani v. INS*, 438 F.2d 1276 (7th Cir. 1971). But see *Jaa v. INS*, 779 F.2d 569 (9th Cir. 1986).

¹⁵ See *Fatehi*, 729 F.2d 1086, *Ghorbani*, 686 F.2d 784, *Butterfield*, 409 F.2d 170.

¹⁶ See e.g., *Lauvik v. INS*, 910 F.2d 658 (9th Cir. 1990), digested in 67 Interpreter Releases 952, 956 (Aug. 27, 1990); *Louisiana Philharmonic Orchestra v. INS*, 44 F. Supp. 2d 800 (E.D. La. 1999), summarized in 76 Interpreter Releases 1260, 1263 (Aug. 23, 1999); *Buletini v. INS*, 860 F. Supp. 1222 (E.D. Mich. 1994), summarized in 71 Interpreter Releases 1477 (Nov. 1994); *Masonry Masters, Inc. v. Thornburgh*, 742 F. Supp. 682 (D.D.C. 1990); *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095 (S.D.N.Y. 1989); *Bodeaux v. INS*, 668 F. Supp. 1452 (D. Kan. 1987); *London Typographers, Inc. v. Sava*, 628 F. Supp. 570 (S.D.N.Y. 1986).

clause,"¹⁷ provides that review of "all questions of law and fact" arising from removal proceedings "shall be available only in judicial review [by a U.S. court of appeals] of a final order [of removal] under this section." In addition, like its predecessor § 106(c), the new statute's § 242(d)(1) provides that a court may review a final order of removal only if "the alien has exhausted all administrative remedies available to the alien as of right."

Section 242 contains new restrictions on judicial review of removal orders, however, that are aimed at further simplifying and expediting the removal of aliens. Habeas corpus review of summary removal decisions is severely restricted under §§ 242(a)(2)(A) and 242(e). Section 242(f) prohibits federal district courts from granting class-wide injunctive relief against the operation of INA §§ 231-241,¹⁸ and imposes a more difficult "clear and convincing" standard on aliens seeking injunctive relief in individual removal cases. Section 242(g) eliminates district court jurisdiction to review the government's discretionary decisions "to commence proceedings, adjudicate cases, or execute removal orders against any alien."¹⁹

Section 242(a), which sets forth the general provision for review of final orders of removal in the circuit courts, contains additional limitations on judicial review. Section 242(a)(2)(C) eliminates judicial review of final orders of removal against an alien found to be removable by reason of having committed certain criminal offenses. Section 242(a)(2)(B), titled "Denials of discretionary relief," precludes judicial review of discretionary forms of relief, including waivers of inadmissibility under INA § 212(h) and (i), cancellation of removal, voluntary departure and adjustment of status. Section 242(a)(2)(B)(ii) bars judicial review of "any other decision or action of the Attorney General the authority for which is specified under this subchapter to be in the discretion of the Attorney General," other than asylum.

The IIRIRA introduced several additional jurisdiction-limiting provisions that are not set forth in § 242, but are scattered throughout the INA, for example: INA § 236(e), eliminating judicial review of discretionary decisions regarding detention or release; INA § 240B(e) and (f), limiting judicial review of the government's decisions regarding

¹⁷ *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 483 (1999) (*AADC*). For an analysis of *AADC*, see 76 Interpreter Releases 313 (Mar. 1, 1999).

¹⁸ The group of statutory sections referenced in § 242(f) is titled "Inspection, Apprehension, Examination, Exclusion, and Removal," and as the title suggests, deals with immigration enforcement functions.

¹⁹ See *AADC*, 525 U.S. at 485.

voluntary departure; INA § 212(a)(9)(B)(v), (d)(12), (h), and (i), barring judicial review of various waivers of inadmissibility; INA § 208(a)(3) and (b)(2)(D), limiting judicial review of certain asylum decisions.

The overall theme that emerges from this patchwork of jurisdiction-limiting provisions is clear: the IIRIRA plainly restricts federal court jurisdiction in the area of immigration enforcement. The government has taken the position, however, that the IIRIRA also strips federal courts of jurisdiction to review immigration benefits adjudications now made by the BCIS that are wholly unrelated to enforcement. Specifically, the scope of three provisions—INA §§ 242(g), 242(a)(2)(B)(i) and 242(a)(2)(B)(ii)—has been the subject of extensive litigation since the enactment of the provisions in 1996, over the issue of whether federal courts have the power to review non-removal BCIS-type adjudications.

JUDICIAL INTERPRETATIONS OF INA § 242(g)

INA § 242(g), titled "Exclusive jurisdiction," provides:

[e]xcept as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

The government has contended in numerous federal court cases that this provision bars judicial review of virtually all immigration decisions. According to the government's position, § 242(g) bars review of denials of nonimmigrant visa petitions and applications to adjust status to permanent residence because such decisions may form the basis for a subsequent decision by the government to remove an alien.

In 1999, however, in *Reno v. American-Arab Anti-Discrimination Committee (AADC)*, the Supreme Court construed § 242(g) narrowly, and held that it applies only to district court review of the Attorney General's decisions to "commence proceedings, adjudicate cases, or execute removal orders."²⁰ The Court rejected the notion that § 242(g) "covers the universe of deportation claims."²¹ The Court stated: "It is implausible that the mention of three discrete events along the road to deportation was a shorthand way of referring to all claims arising from deportation proceedings."²² In addition,

²⁰ 525 U.S. at 482-83.

²¹ *Id.*

²² *Id.*

the Court observed that § 242(g) begins with the phrase, "Except as otherwise provided in this section," indicating that § 242(g) only bars district court review of the decisions to commence, adjudicate and execute removal cases, but leaves intact circuit court review of these decisions.²³ Along the same lines, it is also significant that § 242(g) is titled "Exclusive jurisdiction," further suggesting that the purpose of the provision is to vest exclusive jurisdiction in the circuit court to review the three enumerated removal decisions, rather than to bar all judicial review of these decisions.

Subsequent federal court decisions, relying on *AADC*, have held that § 242(g) does not apply outside the context of removal proceedings. Echoing the language of the *AADC* decision, one district court stated that if it is implausible that § 242(g) applies to all claims arising in deportation proceedings, "it is even less plausible that the mention of these [three] discrete events was a shorthand way of referring to all claims brought in [non-removal] immigration matters."²⁴ Other courts have reasoned that if § 242(g) were broadly construed to apply to pre-removal decisions, it would be virtually impossible to obtain federal court review of any INS decision. Almost every alien who brings a claim in federal court does so because he or she feels threatened with removal. The fact that an alien brings a suit in federal court seeking review of a pre-removal proceeding adjudication, perhaps with the ultimate goal of avoiding removal, however, should not provide a basis for invoking § 242(g).²⁵

Following this sound reasoning, several federal courts, post-*AADC*, have held that § 242(g) does not bar federal district court review of pre-removal decisions on matters such as visa petitions or adjustment of status applications.²⁶ Thus, the clear weight of authority establishes that § 242(g) does not

strip district courts of jurisdiction to review BCIS adjudications.

JUDICIAL INTERPRETATIONS OF INA § 242(a)(2)(B)(i) AND THE EXHAUSTION OF ADMINISTRATIVE REMEDIES DOCTRINE

Section 242(a)(2)(B), titled "Denials of discretionary relief," provides:

Notwithstanding any other provision of law, no court shall have jurisdiction to review—(i) any judgment regarding the granting of relief under [INA §§ 212(h), 212(i), 240A, 240B, or 245], or (ii) any other decision or action of the Attorney General the authority for which is specified under [INA § 201–294] to be in the discretion of the Attorney General, other than the granting of relief under [INA § 208(a)].²⁷

Section 242(a)(2)(B)(i) refers to several statutory forms of relief that can be raised both before the commencement of removal proceedings and during removal proceedings (§ 212(h) and (i) waivers of inadmissibility, voluntary departure and adjustment of status), and one form of relief that can only be raised during removal proceedings (cancellation of removal). Federal court litigation over the scope of § 242(a)(2)(B)(i) has involved the question of whether pre-removal proceeding denials of adjustment of status are reviewable in district court. District court jurisdiction to review denials of voluntary departure and § 212(h) and (i) waivers has not yet been addressed in any post-*IIRIRA* reported judicial decision. Because cancellation of removal can only be raised during removal proceedings, there is no doubt that § 242(a)(2)(B)(i) only bars circuit court review of the BIA's denial of cancellation of removal.

In the pre-removal adjustment of status cases, the decisive factor in the federal court opinions on the issue of reviewability has been the availability of additional administrative remedies, or the lack thereof. In those cases in which the alien would later be able to renew the adjustment of status denial during removal proceedings, courts have found that the exhaustion of administrative remedy doctrine bars district court review. Almost as an afterthought, these decisions have also concluded—with little or no analysis set

²³ *Id.* at 485.

²⁴ *Paunescu v. INS*, 76 F. Supp. 2d 896, 899 (E.D. Ill. 1999).

²⁵ *Fornalik v. Perryman*, 223 F.3d 523, 531 (7th Cir. 2000); *Ramos v. Ashcroft*, No. 01 C 2633, 2002 WL 193404 (N.D. Ill. Feb. 7, 2002); *Pineda-Molina v. Perryman*, No. 00 C 4007, 2001 WL 527322 (N.D. Ill. May 10, 2001).

²⁶ See *Sabhari*, 197 F.3d 938, (adjustment of status application); *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151 (D. Minn. 1999) (nonimmigrant H-1B visa petition); *Ramos*, 2002 WL 193404 (adjustment applications); *Russell v. INS*, No. 98 C 6132, 1999 WL 675255 (N.D. Ill. Aug. 24, 1999) (petition for permanent residence); *Paunescu*, 76 F. Supp. 2d 896 (failure to process adjustment application); *Fu v. Reno*, NO. CIV.A. 3:99–CV–0981L, 2000 WL 1644490 (N.D. Tex. Nov. 1, 2000) (same); *Hu v. Reno*, No. 3–99–CV–1136–BD, 2000 WL 425174 (N.D. Tex. Apr. 18, 2000) (same).

²⁷ INA § 212(h) and (i) relate to waivers of inadmissibility for aliens who have committed certain crimes and immigration violations; INA § 240A relates to cancellation of removal; INA § 240B deals with voluntary departure; INA § 245 relates to adjustment of status; and INA § 208(a) relates to asylum.

forth in the published opinions—that district court review is barred by § 242(a)(2)(B)(i).²⁸ For example, in *McBrearty v. Perryman*,²⁹ the U.S. Circuit Court of Appeals for the Seventh Circuit (the only circuit to decide this issue) held:

The suit was premature, since, as the plaintiffs acknowledge, they could obtain review of the district director's decision by the Board of Immigration Appeals if and when the immigration service institutes removal (i.e., deportation) proceedings against them. See [INA § 242 (a)(1)]; 8 CFR [§§] 240.15, 245.2(a)(5)(ii). Thus, they have failed to exhaust their administrative remedies. The suit is also barred by the door-closing statute quoted above [§ 242(a)(2)(B)(i)].³⁰

McBrearty, and other similar decisions, were not required to address squarely the issue of whether § 242(a)(2)(B)(i) applies to pre-removal proceeding adjudications. Because the aliens in these cases had failed to exhaust their administrative remedies, the result would have been the same regardless of whether § 242(a)(2)(B)(i) was given a broad or narrow interpretation.³¹ This may explain why decisions like *McBrearty* do not contain a detailed analysis of the scope of § 242(a)(2)(B)(i), which would normally include consideration of rules of statutory interpretation and legislative history.

Significantly, three district court decisions in which exceptions to the exhaustion doctrine applied held that § 242(a)(2)(B)(i) did not bar district court review of the district director's denial of adjustment of status. In one of those decisions, the court engaged in a detailed analysis of the scope of § 242(a)(2)(B)(i) and concluded that Congress did not intend for the provision to apply outside the context of removal proceedings.³² In another district court decision, the INS conceded that § 242(a)(2)(B)(i) only abolishes judicial review of adjustment of status denials by the BIA in removal

proceedings.³³ In the third district court case, the court did not address the scope of § 242(a)(2)(B)(i) but found it had jurisdiction to review a pre-removal proceeding denial of adjustment of status because the alien had raised a substantial constitutional claim.³⁴

Exceptions to the exhaustion doctrine allow immediate judicial review in situations in which there is no meaningful opportunity to pursue additional administrative remedies.³⁵ In pre-removal adjustment of status cases in which an exception to the exhaustion doctrine applies, district court review presents the only avenue for obtaining judicial review. Courts are reluctant, and rightfully so, to interpret § 242(a)(2)(B)(i) in a manner that would foreclose the sole opportunity for judicial review.

Nonetheless, exceptions to the exhaustion doctrine are found to exist in only a small minority of cases. Therefore, even under a narrow interpretation of § 242(a)(2)(B)(i) that limits its applicability to the context of removal proceedings, post-IIRIRA review of adjustment of status denials is extremely limited. The exhaustion doctrine generally bars district court review of pre-removal adjustment of status denials, and the IIRIRA—via § 242(a)(2)(B)(i)—has closed the door on court of appeals review following discretionary denials of adjustment of status in removal proceedings.

A similar analysis applies with regard to post-IIRIRA judicial review of other forms of relief enumerated in § 242(a)(2)(B)(i). Denials of voluntary departure will rarely be reviewable by federal courts. Pre-removal proceeding denials of voluntary departure can be renewed during removal proceedings,³⁶ and therefore the exhaustion doctrine generally precludes district court review. Court of appeals review of the BIA's discretionary denial of voluntary departure is barred by § 242(a)(2)(B)(i).

²⁸ See *McBrearty v. Perryman*, 212 F.3d 985 (7th Cir. 2000), summarized in 77 Interpreter Releases 1343, 1348 (Sept. 18, 2000); *Afsharzadehyadzi v. Perryman*, 214 F. Supp. 884 (N.D. Ill. 2002); *Nyaga v. Ashcroft*, 186 F. Supp. 2d 1244 (N.D. Ga. 2002), summarized in 79 Interpreter Releases 553, 554 (Apr. 15, 2002); *Sadowski v. INS*, 107 F. Supp. 2d 451 (S.D.N.Y. 2000); *Diallo v. Reno*, 61 F. Supp. 2d 1361 (N.D. Ga. 1999); *Zheng v. McElroy*, No. 98 Civ. 1772 LBS, 1998 WL 702318 (S.D.N.Y. 1998).

²⁹ 212 F.3d 985 (7th Cir. 2000).

³⁰ Id. at 987.

³¹ See *Iddir v. INS*, 301 F.3d 492, 497, n.1 (7th Cir. 2002).

³² *Mart v. Beebe*, 94 F. Supp. 2d 1120 (D. Or. 2000), summarized in 77 Interpreter Releases 1343, 1348 (Sept. 18, 2000).

³³ *Burger v. McElroy*, No. 97 Civ. 8775 (RPP), 1999 WL 203353 (S.D.N.Y. Apr. 12, 1999).

³⁴ *Boukhris v. Perryman*, No. 01 C 3516, 2002 WL 193354 (N.D. Ill. 2002).

³⁵ Failure to exhaust administrative remedies may be excused if: (1) requiring exhaustion of administrative remedies causes prejudice, due to unreasonable delay or an indefinite time frame for administrative action; (2) the agency lacks the ability or competence to resolve the issue or grant the relief requested; (3) appealing through the administrative process would be futile because the agency is biased or has predetermined the issue; or (4) where substantial constitutional questions are raised. *Iddir*, 301 F.3d at 498.

³⁶ See 8 CFR §§ 240.25(e).

Discretionary denials of waivers of inadmissibility under INA §§ 212(h) and (i), are not reviewable at all post-IIRIRA. District court review of pre-removal denials of § 212(h) and (i) waivers of inadmissibility is expressly barred by § 212(h) and (i), which both provide that “no court shall have jurisdiction to review a decision” to grant or deny a waiver. These provisions may be broad enough also to bar court of appeals review of denials of § 212(h) and (i) waivers. Nonetheless, § 242(a)(2)(B)(i) includes § 212(h) and (i) waivers in its listing of discretionary denials of relief, perhaps to make it clear that the courts of appeals are precluded from reviewing BIA discretionary denials of § 212(h) and (i) waivers in removal proceedings.

Because the exhaustion doctrine and § 212(h) and (i) are so effective at eliminating district court review, the scope of § 242(a)(2)(B)(i) will not be the determinative jurisdictional issue in the vast majority of cases. There will be some § 242(a)(2)(B)(i) cases, however, in which an exception to the exhaustion doctrine applies.³⁷ In such cases, the issue of whether § 242(a)(2)(B)(i) should be narrowly or broadly interpreted becomes crucial. Notwithstanding *McBrearty* and the majority of district court decisions following it, all of which are based primarily on the exhaustion doctrine, the issue has not been definitively resolved and remains open to debate.

JUDICIAL INTERPRETATIONS OF § 242(a)(2)(B)(ii)'s
CATCH-ALL PHRASE, “ANY OTHER
[DISCRETIONARY] DECISION OR ACTION OF THE
ATTORNEY GENERAL”

Litigation over § 242(a)(2)(B)(ii)'s catch-all phrase, “any other [discretionary] decision or action of the Attorney General [except asylum]” has involved a variety of non-removal adjudications, as well as some discretionary decisions made by the district director while removal proceedings are pending that are collateral to the removal proceedings. These types of decisions are not renewable during removal proceedings as forms of relief from removal. Therefore, district court review offers the only meaningful opportunity for judicial review.

This fact alone militates in favor of a narrow interpretation of § 242(a)(2)(B)(ii), according to which the provision only bars court of appeals review of the BIA's denials of discretionary relief from removal.³⁸ Nonetheless,

federal courts are divided on whether the provision should be given such a narrow interpretation, or whether it should be construed broadly as barring district court review of virtually all BCIS-type discretionary immigration decisions. Two U.S. courts of appeals—the Sixth³⁹ and Ninth⁴⁰ Circuits—and three U.S. district courts⁴¹ have interpreted the provision broadly.⁴² Two U.S. district courts⁴³ have interpreted § 242(a)(2)(B)(ii) narrowly, and two other U.S. district

a summary of *Matsuk*, see 78 Interpreter Releases 1351 (Aug. 20, 2001).

³⁹ *CDI Information Systems, Inc. v. Reno*, 278 F.3d 616 (6th Cir. 2002), summarized in 79 Interpreter Releases 553, 556 (Apr. 15, 2002).

⁴⁰ *Van Dinh v. Reno*, 197 F.3d 427 (9th Cir. 1999).

⁴¹ *Ana Int'l, Inc. v. Way*, 242 F. Supp. 2d 906 (D. Or. 2002); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7 (D.D.C. 2001); *Saccoh v. INS*, 24 F. Supp. 2d 406 (E.D. Pa. 1998).

⁴² Two additional district court decisions interpreted § 242(a)(2)(B)(ii) broadly and held that it bars district court habeas review of discretionary decisions made by the district director while the alien is in removal proceedings. *Avramenkov v. INS*, 99 F. Supp. 2d 210 (2000); *Curri v. Reno*, 86 F. Supp. 2d 413 (D.N.J. 2000). These cases are no longer valid, however, in view of the U.S. Supreme Court's decision in *INS v. St. Cyr*, 533 U.S. 289 (2001), in which the Court held that § 242 does not bar habeas corpus review because the term “review,” as used in § 242, does not refer to habeas review. *St. Cyr* did not specifically address § 242(a)(2)(B)(ii), and dealt with other § 242 provisions that use the term “review” when restricting federal court jurisdiction. The Court's reasoning would apply with equal force to § 242(a)(2)(B)(ii), however, so that even when broadly interpreted, the provision would not bar district court habeas review. See the recently decided *Demore v. Kim*, 123 S. Ct. 1708 (2003), in which the Supreme Court held that a provision restricting judicial review of the Attorney General's discretionary decisions regarding detention and release did not bar habeas review raising a constitutional challenge to the statutory framework that permitted the alien's detention without bail. For a report on the oral arguments in *Kim*, see 80 Interpreter Releases 123 (Jan. 27, 2003). For a transcript of the arguments, see *Demore v. Kim*, No. 01-1491, 2003 WL 147701 (Jan. 15, 2003).

⁴³ *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151 (D. Minn. 1999); *Talwar v. INS*, No. 00 Civ. 1166 JSM, 2001 WL 767018 (S.D.N.Y. July 9, 2001). A third district court, in an unreported decision, also interpreted the provision narrowly. See 80 Interpreter Releases 319 (Mar. 3, 2003), summarizing the decision of the U.S. District Court for the District of Columbia in *Evangelical Lutheran Church in America v. INS*, No. 021297 (D.D.C. Oct. 5, 2002) (order granting preliminary injunction).

³⁷ See, e.g., *Mart*, 94 F. Supp. 2d 1120; *Burger*, 1999 WL 203353; *Boukhris*, 2002 WL 193354.

³⁸ See, e.g., *Matsuk v. INS*, 247 F.3d 999 (9th Cir. 2001) (holding § 242(a)(2)(B)(ii) bars circuit court review of the BIA's discretionary denial of withholding of removal). For

courts⁴⁴ have interpreted § 242(a)(2)(B)(i) narrowly, applying an analysis similar to that used by the courts that have interpreted § 242(a)(2)(B)(ii) narrowly.

Courts on both sides of the issue have addressed the following factors when determining the scope of § 242(a)(2)(B)(ii): (1) whether the provision is plain or ambiguous; (2) whether the title of § 242, "Judicial review of orders of removal," limits the provision's scope to the context of removal proceedings; (3) the effect, if any, of other rules of statutory interpretation; (4) whether the legislative history of the IIRIRA indicates that Congress intended a broad or narrow interpretation of the provision; (5) whether the lack of additional judicial remedies affects the interpretation of the scope of the provision; and (6) whether a broad interpretation of the provision is constitutionally problematic.

CASES INTERPRETING § 242(a)(2)(B)(ii) NARROWLY

Cases interpreting § 242(a)(2)(B)(ii) narrowly have found that the title of § 242, "Judicial review orders of removal," indicates that Congress intended for § 242(a)(2)(B)(ii) only to bar court of appeals review of the BIA's removal decisions. In *Talwar v. INS*,⁴⁵ a 2001 decision of the U.S. District Court for the Southern District of New York, the court stated:

[INA § 242] is entitled "Judicial review of orders of removal," suggesting that [§ 242(a)(2)(B)(ii)] only limits judicial review of discretionary decisions in the context of removal proceedings. While it is true, as the INS asserts, that the heading of a section cannot limit the plain meaning of the text, it is also true that headings serve as useful tools in resolving doubt about ambiguities in a statute.⁴⁶

In *Shanti, Inc. v. Reno*,⁴⁷ a 1999 decision of the U.S. District Court for the District of Minnesota, the court emphasized the significance of the title of § 242 and held that the denial of an H-1B nonimmigrant petition is a collateral matter not within the scope of removal proceedings, and therefore does not fall within the purview of § 242(a)(2)(B)(ii):

Removal proceedings are defined in INA § 240[(a)(1)] as "proceedings for deciding the inadmissibility or deportability of an alien." The disposition of a visa petition has been held to be a collateral issue not within the scope of deportation, removal, or exclusion proceedings. See e.g., *Hassan v. INS*, 110 F.3d 490, 494 (7th Cir. 1997); *Pritchett v. INS*, 993 F.2d 80, 82 (5th Cir. 1993); *Conti v. INS*, 780 F.2d 698, 702 (7th Cir. 1985); *Elbez v. INS*, 767 F.2d 1313, 1314 (9th Cir. 1985); *Dastamalchi v. INS*, 660 F.2d 880, 891 (3^d Cir. 1981). The denial of the H-1B nonimmigrant visa at issue in this case is therefore a collateral issue outside the scope of removal proceedings and consequently also outside the reach of the provisions limiting judicial review set forth in [INA § 242], "Judicial review of orders of removal."⁴⁸

Cases narrowly interpreting § 242(a)(2)(B)(ii) also have found the legislative history to be a persuasive factor. These courts have concluded that if Congress sought to expand the scope of INA § 106, when replacing it with § 242, there would be some indication of such an intent in the legislative history. In its 2000 decision in *Mart v. Beebe*,⁴⁹ the U.S. District Court for the District of Oregon stated: "Nothing in the legislative history indicates that Congress intended, when it replaced INA § 106 with the new INA § 242, to expand the applicability of the new section to final INS orders not involving removal."⁵⁰ In *Talwar*, the court stated: "The legislative history of the IIRIRA refers to the effect of the amendments on removal proceedings and makes no mention of visa petitions, suggesting that Congress did not intend for the provisions of [INA § 242] to reach beyond the context of removal proceedings."⁵¹ Similarly, in *Shanti*, the court stated: "Significantly, the legislative history of IIRIRA § 306 does not refer to visa petitions nor [sic] any other procedures outside the purview of removal proceedings."⁵²

In *Mart*, an adjustment of status case in which an exception to the exhaustion doctrine applied, the court relied

⁴⁴ *Mart v. Beebe*, 94 F. Supp. 2d 1120; *Burger*, 1999 WL 203353 (in which the INS conceded that § 242(a)(2)(B)(i) only abolishes judicial review of adjustment of status denials by the BIA in removal proceedings).

⁴⁵ 2001 WL 767018.

⁴⁶ *Id.* at *3 (citations omitted).

⁴⁷ 36 F. Supp. 2d 1151.

⁴⁸ *Id.* at 1158. The pre-IIRIRA cases cited by the *Shanti* court here held that the district director's pre-deportation denial of an application for benefits was collateral to the deportation proceedings and therefore was not subject to review by the circuit court under the former INA § 106. See also *Fatehi*, 729 F.2d 1086; *Ghorbani*, 686 F.2d 784; *Butterfield*, 409 F.2d 170.

⁴⁹ 94 F. Supp. 2d 1120.

⁵⁰ *Id.* at 1124.

⁵¹ 2001 WL 767018, at *4.

⁵² 36 F. Supp. 2d at 1158.

on an analysis of additional factors not addressed in *Shanti* or *Talwar*. The court stated that a broad interpretation of § 242(a)(2)(B) would "violate the canon that limitations on jurisdiction are to be narrowly construed."⁵³ In addition, the court pointed out that a broad interpretation would have the effect of eliminating all judicial review of most non-removal adjudications—a result that could not have been contemplated by Congress:

It is true that Congress may remove jurisdiction of one court by substituting an alternative avenue of review. INA § 242 has this effect on appeals of removal orders [by vesting exclusive jurisdiction in the circuit courts to review final orders of removal]. However, the jurisdiction conferring subsections of INA § 242 expressly limit circuit court jurisdiction to review orders of removal. Therefore, if the INS were correct that INA § 242 applied to INS orders not involving removal, then IIRIRA would remove district court jurisdiction without substituting an alternative. It is doubtful that Congress intended to divest every court of jurisdiction to review final INS decisions not involving a removal order.⁵⁴

The court also stated that "[a broad] reading [of § 242(a)(2)(B)] would...be Constitutionally problematic because...an alien not subject to deportation would have no right to judicial review of any INS decision, no matter how arbitrary or unlawful that decision might be."⁵⁵

CASES INTERPRETING § 242(a)(2)(B)(ii) BROADLY

The cases interpreting § 242(a)(2)(B)(ii) broadly have dismissed the significance of the title of § 242, relying on the general rule that the title of a statutory section cannot limit the plain meaning of the text. According to these cases, the text of § 242(a)(2)(B)(ii) is itself unambiguous, and therefore the title is of no significance. In a 2002 decision, the U.S. District Court for the District of Oregon, in *Ana Int'l v. Way*,⁵⁶ stated:

the plain meaning of the statutory language in [INA § 242(a)(2)(B)(ii)] is clear and unambiguous: No court shall have jurisdiction to review any discretionary decision of the INS. The statute's language only becomes ambiguous if the Court examines the title of [INA § 242]. The title of the

statute, however, cannot create an ambiguity or limit the plain statutory language.⁵⁷

In addition, the two U.S. courts of appeals decisions that broadly construe § 242(a)(2)(B)(ii) have reasoned that, notwithstanding the title, "Judicial review of orders of removal," some of the provisions of § 242 address the district court's jurisdiction over matters that are collateral to the final order of removal. Therefore, these courts have concluded, the title of § 242 was intended to indicate the content of its provisions only in the most general manner. In the 1999 decision of the U.S. Court of Appeals for the Ninth Circuit in *Van Dinh v. Reno*,⁵⁸ the court stated:

Reviewing [INA § 242], which is both complicated and prolific, we see that it addresses a multitude of jurisdictional issues, including ones that are collateral to the review of the final order of deportation. See e.g., [INA § 242(a)(2)(B)(i)] (providing that "no court" may review certain of the Attorney General's discretionary grants of relief in, inter alia, requests for voluntary departure, cancellation of removal, and adjustment of status); [INA § 242(e)] (limiting jurisdiction to review exclusion orders, including habeas review and collateral constitutional challenges to the validity of the system); [INA § 242(g)] (barring review in transitional cases of certain discretionary decisions of the Attorney General in any court and in any type of action). We conclude that [INA § 242(a)(2)(B)(ii)] is not limited in application only to review by the circuit courts of final orders of removal.⁵⁹

In *Van Dinh*, the issue of the district court's jurisdiction arose in the unusual procedural posture of an appeal of the denial of an attorney's fee award to the plaintiffs in a *Bivens*⁶⁰ class action challenging the district director's transfer of detained aliens in removal proceedings from one facility to another. The Ninth Circuit held that § 242(a)(2)(B)(ii) removed the district court's jurisdiction over the class action, and therefore the court affirmed the denial of the fee award, the authority for which was predicated on the existence of district court jurisdiction.

⁵⁷ *Id.* at 921.

⁵⁸ 197 F.3d 427.

⁵⁹ *Id.* at 432.

⁶⁰ See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). For a practice-based discussion of *Bivens* claims in the immigration context, see Teran, "Obtaining Remedies for INS Misconduct," 96-5 Immigration Briefings (May 1996).

⁵³ 94 F. Supp. 2d at 1124.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ 242 F. Supp. 2d 906.

In 2002, the U.S. Court of Appeals for the Sixth Circuit, in *CDI Information Systems, Inc. v. Reno*,⁶¹ followed the reasoning of *Van Dinh* in a more straightforward procedural posture, holding that § 242(a)(2)(B)(ii) barred a district court from reviewing the INS's denial of a request for an extension of stay as an H-1B nonimmigrant. With regard to the title of § 242, the court concluded:

Given the scope of [INA § 242], we conclude that its title does no more than indicate the provisions in a general manner. Therefore, we hold...that [INA § 242(a)(2)(B)(ii)] is not limited to discretionary decisions made within the context of removal proceedings.⁶²

The Sixth Circuit disagreed with *Shanti*'s analysis of the legislative history of the IIRIRA. The court found that the absence of any references to non-removal adjudications in the legislative history did not alter the plain language of § 242(a)(2)(B)(ii):

the *Shanti* decision simply makes too much of congressional silence. Because Congress did not specifically enumerate H-1B visa extensions in the legislative history does not render the plain language of [INA § 242(a)(2)(B)(ii)] inoperative with respect to discretionary denials of H-1B extensions. In light of the range of discretionary decisions made by the Service, it would be unrealistic for us to require Congress to reference each variety in the legislative history before we would find it encompassed within the plain language of [INA § 242(a)(2)(B)(ii)].⁶³

STATUTORY CONTEXT: AN ESSENTIAL INGREDIENT IN AN ANALYSIS OF § 242(a)(2)(B)(ii)

The missing ingredient in all of the judicial analyses of § 242(a)(2)(B)(ii) is a thorough and accurate consideration of statutory context. The Supreme Court has stated, "[t]he meaning—or ambiguity—of certain words or phrases may only become evident when placed in context."⁶⁴ On another occasion, the Court said:

the meaning of a statute, plain or not, depends on context...."Words are not pebbles in alien

juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used."⁶⁵

In interpreting the proper scope of § 242(a)(2)(B)(ii), the context in which the provision appears is crucial. Section 242 is titled, "Judicial review of orders of removal." Subsections (a) through (g) all deal with aspects of removal proceedings, as reflected in the headings: (a) "Applicable provisions [of 28 USC, ch. 158 regarding exclusive jurisdiction in the circuit courts to review final orders of removal]"; (b) "Requirements for review of orders of removal"; (c) "Requirements for [the court]of appeals] petition"; (d) "Review of final orders [of removal]"; (e) "Judicial review of orders under [INA § 235 (b)(1), regarding summary removal]"; (f) "Limit on injunctive relief [enjoining the operation of INA §§ 231-241, dealing with 'Inspection, Apprehension, Examination, Exclusion, and Removal']"; (g) "Exclusive jurisdiction [in the circuit courts to review Attorney General's decisions to commence proceedings, adjudicate cases, or execute removal orders]."

Section 242(a) contains two paragraphs: (1) "General orders of removal," setting forth the general provision for circuit court review of final orders of removal, other than orders of summary removal of arriving aliens; and (2) "Matters not subject to judicial review." Paragraph (2) contains three subparagraphs: (A) "Review relating to [INA § 235(b)(1), summary removal]"; (B) "Denials of discretionary relief [from removal]"; and (C) "[Final] Orders [of removal] against criminal aliens."

As the headings suggest, § 242(a)(2)(A), (B), and (C) deal with removal decisions that are not subject to judicial review. Section 242(a)(2)(A) provides that "no court shall have jurisdiction to review" summary removal decisions, aside from the limited habeas corpus review authorized in subsection (e). Section 242(a)(2)(B), titled "Denials of discretionary relief," provides that "no court shall have jurisdiction to review" decisions denying § 212(h) and (i) waivers of inadmissibility, cancellation of removal, voluntary departure, and adjustment of status, and "any other [discretionary] decision" of the Attorney General, other than asylum. Section 242(a)(2)(C) provides that "no court shall have jurisdiction to review" final orders against aliens who are removable by reason of having committed certain criminal offenses. Because the court of appeals is the only court with jurisdiction to review final orders of removal, § 242(a)(2)(C) means simply that the court

⁶¹ 278 F.3d 616 (6th Cir. 2002), summarized in 79 Interpreter Releases 553, 556 (Apr. 15, 2002).

⁶² *Id.* at 620.

⁶³ *Id.*

⁶⁴ *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

⁶⁵ *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1990) (quoting *NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2^d Cir. 1941) (L. Hand, J.)).

of appeals does not have jurisdiction to review the removal of aliens who have committed the enumerated criminal offenses.

The various provisions of § 242 all deal in one way or another with eliminating or streamlining the judicial review of removal decisions. The main thrust of § 242 is to consolidate review of removal decisions in a single court of appeals proceeding, or in a single district court habeas proceeding to review summary removal orders. Section 242(f) limits claims for injunctive relief against the operation of provisions of the INA that deal with the "Inspection, Apprehension, Examination, Exclusion, and Removal" of aliens, because district court suits seeking such relief can be used by aliens to delay their removal. Along the same lines, § 242(g) eliminates district court challenges to the government's discretionary decisions to commence removal proceedings, adjudicate removal cases, and execute removal orders.

In view of the common thread connecting all of the various provisions of § 242, it is logical to conclude that § 242(a)(2)(B)(ii) was intended to refer to immigration decisions made in the context of removal proceedings. It would be anomalous for Congress to bury a provision wiping out judicial review of all non-removal immigration decisions in the midst of a statutory section addressing judicial review of removal decisions. Barring district court review of the district director's denials of visa petitions and extensions of stay, for example, would not streamline the process of removing aliens. The aliens affected by such adjudications are not even in removal proceedings, and the aliens' employers and family members whose petitions have been denied can never be put into removal proceedings.

Statutory context provides a missing link in the *Shanti* analysis. The title of § 242 is relevant because it sheds light on an ambiguity in § 242(a)(2)(B)(ii). That ambiguity is created not by § 242's title, as *Shanti* suggests, but by the context in which § 242(a)(2)(B)(ii) appears. Viewed in isolation, § 242(a)(2)(B)(ii) is susceptible to a broad interpretation, according to which all discretionary immigration decisions are shielded from judicial review. Viewed in the context of a statute governing judicial review of removal decisions, however, the provision can, and should, be interpreted narrowly as applying only to discretionary decisions made in the context of removal proceedings.

Likewise, a proper consideration of statutory context refutes the *CDI Information Systems* and *Van Dinh* analyses. These cases reason that the title of § 242 was not intended to limit the scope of its provisions to review of the final order of removal, because some of § 242's provisions limit collateral district court review. The provisions of § 242 restricting district court review are all directly related to removal

proceedings, however, with the common goal of streamlining the process of removing aliens. For example, § 242(f) limits suits to enjoin the operation of removal procedures, and § 242(g) eliminates district court review of certain removal decisions. These provisions are inextricably intertwined with the review of removal decisions and they only affect aliens who are in removal proceedings. Thus, statutory context strongly suggests a narrow interpretation of § 242(a)(2)(B)(ii) that would not strip federal courts of the power to review non-removal BCIS adjudications.

LEGISLATIVE HISTORY: THE SIGNIFICANCE OF CONGRESSIONAL SILENCE

CDI Information Systems concludes that congressional silence does not alter the plain meaning of § 242(a)(2)(B)(ii). Because the provision is ambiguous when viewed in its statutory context, however, congressional silence speaks volumes. As a matter of public policy and national politics, it is highly unlikely that Congress would enact a provision wiping out judicial review of all immigration decisions without there being a reference to such a momentous change in the law somewhere in the legislative history of the IIRIRA.

In any event, Congress was not entirely silent regarding the scope of § 242. The legislative history of the IIRIRA contains a reference to the new § 242(f), which limits suits to enjoin the operation of provisions of the INA dealing with the "Inspection, Apprehension, Examination, Exclusion, and Removal" of aliens. This is one of the provisions of § 242 that the Sixth Circuit, in *CDI Information Systems*, referred to as addressing collateral district court review.⁶⁶ The relevant passage from the legislative history of the IIRIRA states:

Section 306 [of the IIRIRA] preserves the right to appeal from a final administrative order of removal... to one of the Federal circuit courts of appeals... Section 306 also limits the authority of federal courts other than the Supreme Court to enjoin the operation of the new removal procedures established in this legislation.⁶⁷

This passage confirms that when replacing the former INA § 106 with the new § 242, Congress did not intend to expand the statute's scope to restrict review of non-removal decisions. Instead, the inclusion in § 242 of new provisions limiting collateral district court review of removal decisions was clearly intended only to restrict federal court intervention

⁶⁶ 278 F.3d at 620.

⁶⁷ H. Rep. No. 104-460(I), 104th Cong., 2^d Sess. 359, 473, quoted in *Shanti*, 36 F. Supp. 2d at 1158.

in the process of removing aliens. In other words, Congress intended for § 242 to eliminate piecemeal review of removal decisions in a more effective manner than did its predecessor, § 106.

A BROAD INTERPRETATION OF § 242(a)(2)(B)(ii) RAISES DUE PROCESS CONCERNS

A broad interpretation of § 242(a)(2)(B)(ii) would result in there being a complete absence of administrative and judicial review of many pre-removal decisions. For example, the denial of an extension of stay, like the one at issue in *CDI Information Systems*, is not administratively appealable to the Administrative Appeals Office (AAO), which reviews some BCIS decisions,⁶⁸ and is not renewable in removal proceedings as a basis for relief. It is almost inconceivable that Congress could have intended for such discretionary decisions to be shielded from all administrative and judicial review.

As the court observed in *Mart*,⁶⁹ § 242 generally removes jurisdiction over removal decisions from the district courts, and vests exclusive jurisdiction over such decisions in the courts of appeals. There is no indication, however, that § 242 was intended to shield non-removal decisions from review by any court. Such a broad jurisdictional bar would result in a deprivation of due process not only for the millions of aliens with established ties in the U.S., but also their U.S. employers and family members who petition the BCIS to allow the alien workers and relatives to work and live in the U.S.

A NOVEL APPROACH: THE DOCTRINE OF *EJUSDEM* *GENERIS*

None of the cases interpreting the scope of § 242(a)(2)(B)(ii)'s catch-all phrase, "any other [discretionary] decision or action of the Attorney General [except regarding asylum]," has fully explored the established legal tools available to analyze Congress's choice of words. Specifically, the doctrine known as *ejusdem generis* can be determinative in interpreting the scope of such catch-all phrases. Yet this doctrine is not discussed or referenced in any of the reported cases interpreting § 242(a)(2)(B)(ii). *Ejusdem generis*, which has been sanctioned by the Supreme Court and many U.S. courts of appeals since 1939, may be the key to arriving at a proper interpretation of § 242(a)(2)(B)(ii).

According to the rule of *ejusdem generis*, general terms in a statute following specific ones ordinarily are limited to matters similar to those specified.⁷⁰ As the Seventh Circuit explained:

Where general words follow the enumeration of particular classes of persons or things, the general words, under the rule or maxim of construction known as "*ejusdem generis*," will be construed as applicable only to persons or things of the same general nature or class as those enumerated, unless an intention to the contrary is clearly shown....The rule finds application and has frequently been applied where such terms as "other," "any other," "others," or "otherwise," or "other thing" follow an enumeration of particular classes, and where this occurs such words are to be read as "other such like," and are construed to include only others of the like kind or character.⁷¹

The rule applies when the following conditions exist:

- (1) the statute contains an enumeration by specific words;
- (2) the members of the enumeration constitute a class;
- (3) the class is not exhausted by the enumeration;
- (4) a general term follows the enumeration; and
- (5) there is not clearly manifested an intent that the general term be given a broader meaning than the doctrine requires.⁷²

Courts have used *ejusdem generis* as a guide to limit the scope of catch-all phrases, like the one found in § 242(a)(2)(B)(ii), that are seemingly boundless when viewed in isolation from their surrounding text. In *Garner v. Louisiana*,⁷³ a 1961 decision, the Supreme Court construed a criminal statute that, when defining the phrase, "disturbing the peace," enumerated six specific acts describing tumultuous and disruptive behavior, such as "engaging in a fistic encounter," and "using...unnecessary loud, offensive, or insulting language." The list of six acts was followed by a

⁷⁰ See *Tax Analysts v. IRS*, 117 F.3d 607, 613-14 (D.C. Cir. 1997); *Cole v. Burns Int'l Security Services*, 105 F.3d 1465, 1471 (D.C. Cir. 1997); *Santa Fe R.R. Co. v. Sec'y of the Interior*, 830 F.2d 1168, 1175 (D.C. Cir. 1987); *Clarke v. Gold Dust Corp.*, 106 F.2d 598, 602 (3^d Cir. 1939).

⁷¹ *United States v. Baranski*, 484 F.2d 556, 566 (7th Cir. 1973) (quoting 82 C.J.S. Statutes § 332b, at 658, 662 (1953)).

⁷² *Baranski*, 484 F.2d at 567 (quoting 2 J. Sutherland, Statutes and Statutory Construction § 4910, at 400-1 (Horack ed., 3d ed. 1943)).

⁷³ 368 U.S. 157 (1961).

⁶⁸ See 8 CFR § 103.1(f)(3)(iii).

⁶⁹ 94 F. Supp. 2d 1124. See *supra* text accompanying notes 54 and 55.

catch-all phrase, "or...any other act in such a manner as to unreasonably disturb or alarm the public." The catch-all phrase was used to convict African Americans for the alleged crime of sitting at lunch counters that were reserved for "whites-only" and refusing to leave. In express reliance on the doctrine of *ejusdem generis*, the Court interpreted the catch-all phrase narrowly, "in the light of the preceding sections as an effort to cover other forms of violence or loud and boisterous conduct not already listed," and overturned the convictions.⁷⁴

A number of courts of appeals decisions have relied on *ejusdem generis* to limit the scope of statutory catch-all phrases. In 1939, the Third Circuit invoked *ejusdem generis* in holding that the concluding statutory catch-all phrase "or other corporation" was restricted to corporations similar to those specifically enumerated in the statute, namely insurance companies, banking companies, and savings banks.⁷⁵ In a 1987 decision, the D.C. Circuit held that the statutory catch-all phrase "any lieu selection...right" (a type of land right subject to a registration requirement under the 1955 Recordation Act) was limited in scope in view of the preceding statutory references to land rights not attached to land in a particular location.⁷⁶ In 1997, the D.C. Circuit held that a statute's final exclusionary phrase, "any other class of workers engaged in foreign or interstate commerce," was limited by the specific terms preceding it, "seamen" and "railroad employees," and therefore it excluded only workers who are actually engaged in the movement of interstate or foreign commerce.⁷⁷ In another 1997 decision, the D.C. Circuit held that the general term "data," in a provision of the Internal Revenue Code, was limited to factual items unique to a taxpayer in view of the preceding specific items enumerated in the statute, including the taxpayer's identity, income, payments, exemptions, liabilities, and net worth.⁷⁸

With regard to the interpretation of § 242(a)(2)(B)(ii)'s catch-all phrase, "any other [discretionary] decision," all of the conditions exist for the application of *ejusdem generis*. Section 242(a)(2)(B) contains an enumeration by specific statutory references. The members of the enumeration constitute a class consisting of specific forms of discretionary relief that can be raised during removal proceedings as forms of relief from removal. Included in the class are the following: § 212(h) and (i) waivers, cancellation of removal (which can only be raised during removal proceedings), voluntary

departure, adjustment of status, and asylum.⁷⁹ The class is not exhausted by the enumeration, because there are several additional, unmentioned forms of relief that can be raised during removal proceedings as grounds for relief from removal.⁸⁰ The catch-all phrase, "any other decision or action of the Attorney General," follows the enumeration. Finally, there is no clear expression of intent for the catch-all phrase to have a broader meaning than that of the specifically enumerated items.

Applying the doctrine of *ejusdem generis*, the catch-all phrase, "any other [discretionary] decision of the Attorney General [except asylum]," in § 242(a)(2)(B)(ii) should be limited to precluding judicial review only of discretionary denials of relief that can be raised during removal proceedings as forms of relief from removal, in view of the specific enumeration of types of relief in § 242(a)(2)(B). If the Supreme Court addresses the scope of § 242(a)(2)(B)(ii), it is reasonable to expect that it will apply *ejusdem generis* in its analysis.

CONCLUSION: THE WAY THE U.S. GOVERNMENT'S DEMOCRATIC PROCESSES SHOULD WORK

Judicial review of immigration decisions serves not only to correct abuses of discretion when they occur, but also to prevent them from occurring in the first instance. The threat of federal court intervention encourages the implementation of immigration policies and procedures that are more reasonable, consistent, and fair, and individual adjudications that are less arbitrary and discriminatory. That is precisely the way the U.S. government's system of checks and balances is supposed to work.

The *CDI Information Systems* interpretation of § 242(a)(2)(B)(ii), if followed by other U.S. courts of appeals, will bypass the normal democratic processes of the U.S. government. Congress may or may not have the power, within constitutional limits, to deprive millions of foreigners of judicial review in their first encounters with U.S. democracy. If Congress were to consider stripping federal courts of all jurisdiction over immigration decisions, the public policy issues would be thoroughly aired by elected representatives. If enacted, the constitutionality of such a provision would be tested in the courts. It would be most unfortunate, however, if

⁷⁴ Id. at 168

⁷⁵ *Clarke*, 106 F.2d at 602.

⁷⁶ *Santa Fe R.R. Co.*, 830 F.2d at 1175.

⁷⁷ *Cole*, 105 F.3d at 1471.

⁷⁸ *Tax Analysts*, 117 F.3d at 613-14.

⁷⁹ The reference to asylum appears at the end of § 242(a)(2)(B)(ii) as an exception, but nonetheless is part of the list of items of discretionary relief that are set forth in § 242(a)(2)(B).

⁸⁰ See 8 CFR § 240.11; *Matsuk*, 247 F.3d 999 (holding that § 242(a)(2)(B)(ii) bars federal court of appeals review of the BIA's discretionary denial of withholding of removal).

a sweeping jurisdictional bar against judicial review of all immigration decisions came into existence through erroneous judicial interpretations of § 242(a)(2)(B)(ii). ■

1. Special Registration to End, be Replaced by Upcoming 'U.S. VISIT' Monitoring Program for All Visitors

On April 29, 2003, Secretary of Homeland Security Tom Ridge made remarks at the National Press Club that hinted at an end to the special registration program, which imposes requirements on mostly Arab and Muslim men from designated countries. According to a Department of Homeland Security (DHS)-released transcript of the remarks, Secretary Ridge said that the launch of a new system, the U.S. Visitor and Immigration Status Indication Technology System (U.S. VISIT), "will provide us with the crucial biometric information needed to end the domestic registration of people from certain countries, which has been conducted for the past several months under a system known as NSEERS [National Security Entry-Exit Registration System⁸¹]."

When Interpreter Releases asked the DHS for additional information about the termination of the special registration program, a DHS spokesperson would only say that "[t]he information for the new system will be on the web on May 29 and until then there is not much information being provided." Without setting a timetable, a DHS statement released on April 29, 2003, said that "[t]he U.S. VISIT system will replace the currently existing NSEERS program, integrate the SEVIS [Student and Exchange Visitor Information System⁸²] program, and encompass the Congressional requirements of the automated entry-exit system." The statement also noted that Secretary Ridge has held bilateral meetings with United Kingdom Home Secretary David Blunkett, Canada's Deputy

⁸¹ The NSEERS program requires special registration of mostly Arab and Muslim men from specified countries, as set forth in a series of regulations. For coverage of the most recent NSEERS regulation and advocates' reactions to the controversial program, see 80 Interpreter Releases 2 (Jan. 6, 2003). For recent State Department guidance on special registration compliance and good cause exceptions, see article #7 in this Release.

⁸² The INS issued a final rule on December 11, 2002, amending its regulations governing the retention and reporting of information on F, J, and M nonimmigrants; implementing the Student and Exchange Visitor Information System (SEVIS); establishing a process for electronic reporting by designated school officials (DSOs); and providing standards for maintaining, extending, and reinstating student status. See 79 Interpreter Releases 1813 (Dec. 16, 2002).

Prime Minister John Manley, and Mexico's Secretary of Interior Santiago Creel, "to continue progress on security initiatives of mutual interest."

In his National Press Club remarks, Secretary Ridge said that U.S. VISIT, the first phase of which is expected to be launched by the end of 2003 at international air and sea ports of entry, will use information and biometric identifiers, such as photographs, fingerprints, or iris scans, to create an "electronic check-in/check-out system for people who come to the United States to work or to study or visit." He said that U.S. VISIT will also "provide a useful tool to law enforcement to find those visitors who overstay or otherwise violate the terms of their visas." The new program, he said, is a "crucial new border security and enforcement tool" that will "capture point of entry and exit information" by visitors to the U.S. He said the system is expected to "enhance monitoring the 35-plus million visitors" who come to the U.S. annually, make it more difficult to enter the U.S. illegally, and expedite the process for those who enter the U.S. lawfully. Secretary Ridge noted that a quarter-century ago, the U.S. "stopped asking international visitors to register periodically with immigration authorities," but that "the responsibility to establish a check-in/check-out system is founded in U.S. law going back to the early 50s, most recently through the middle and late 1990s."

Among other things, Secretary Ridge also said that a multiyear strategy, the "Deep Water Acquisition Project," will allow the U.S. to "continue to push our borders further out to sea." As part of that project, President Bush asked for a 10 percent increase, the largest increase ever, in funding for the Coast Guard as part of his fiscal year 2004 budget. Included in the project is a Coast Guard award of two contracts totaling \$129 million to Northrop Grumman Corporation Systems for initial development and delivery of the "first new national security cutter," Secretary Ridge said. Since March 1, 2003, the DHS statement said, the Coast Guard has interdicted 172 Haitians, 196 Dominicans, 213 Cubans, and two Ecuadorans who were attempting to enter the U.S. without the proper documents. Secretary Ridge also noted in his remarks that the DHS deployed immigration and Customs enforcement agents to the Middle East before the recent war in Iraq began. "They went into Iraq embedded with military units and are helping to trace the source of nearly \$700 million in U.S. currency seized to date," he said.

Secretary Ridge, noting that "the 21st century world and beyond will have to deal with the threats of international terrorism for the foreseeable future, if not permanently," said that the reorganization of the U.S. government and the formation of the DHS is "a permanent reorganization predicated by the notion that it is a permanent change in the condition in which the international community operates." In