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United States District Court, N.D. California.

Jose Manuel ORTIZ et al., Plaintiff,

v.

Doris M. MEISSNER, Commissioner, Immigration  
and Naturalization Service, Defendant.

No. C-96-2272 MJJ, C-96-3583 MJJ. | April 6,  
1998.

## Opinion

### ORDER GRANTING PLAINTIFFS' MOTION FOR RECONSIDERATION AND FOR SUMMARY JUDGMENT

JENKINS, District J.

\*1 Plaintiffs are a group of aliens who have submitted applications for legalization in the United States pursuant to 8 U.S.C. § 1160(a) and 8 U.S.C. § 1255a. Pursuant to these provisions, applicants may obtain a temporary work authorization (i.e. work permit) pending a “final determination” of their applications. Each of the plaintiffs in this action obtained such temporary work permits while the INS was considering their applications. The INS subsequently denied plaintiffs’ applications for adjustment of status, and will no longer extend their work permits. To date, no final deportation order has been issued and plaintiffs remain in this country.

Plaintiffs commenced this action seeking injunctive relief requiring the defendant, the Commissioner of the Immigrations and Naturalization Service (“INS”), to provide them temporary work permits pending final judicial review of the INS’ denial of their respective applications.<sup>1</sup> Plaintiffs argue that the “denial” of the application is not “final” until judicial review is exhausted or abandoned. Because the INS has denied their applications, but no final order of deportation has been issued which would trigger the judicial review process, plaintiffs are in a state of “limbo” wherein they are not legally required to leave the country, yet they are precluded from legally working.

<sup>1</sup> An applicant whose application for legalization is denied may seek administrative and judicial review of the determination. Judicial review is not available until an order of deportation is issued. *See* 8 U.S.C. §§ 1160(e)(3)(A); 1255a(f)(4)(A).

Judge Armstrong previously considered plaintiffs’ arguments in connection with their motion for preliminary injunction. Judge Armstrong denied the preliminary injunction, finding that a “final” determination of the application for legalization is rendered when the INS *initially* determines the application. As such, Judge Armstrong concluded that temporary work permits were not mandated during the pendency of an administrative appeal or judicial review.

In response to a Court Order to Show Cause why the action should not be dismissed, plaintiffs requested leave to file a motion for reconsideration, arguing that the INS’ past practice concerning work permits was inconsistent with the INS’ position articulated to that point in the litigation. Specifically, plaintiffs argued that contrary to the INS’ position that work permits were not issued after the INS initially denies an application for legalization, the INS had in fact granted some plaintiffs in this case extensions of their work permits after their legalization applications were initially denied. Plaintiffs argued that since the INS extended authorization during the appellate period, it was “arbitrary for the agency to restrict employment during periods where judicial review has not been exhausted or abandoned.”

Defendant conceded that its prior position that “final determination” means the initial determination is erroneous. Defendant now argues that a “final determination” includes the period for administrative review, but not the period for judicial review. Because of the inconsistency in the defendant’s positions, Judge Armstrong granted plaintiffs motion for leave to file a motion for reconsideration. Because the parties agree that there are no factual issues in dispute, plaintiffs filed a motion for summary judgment along with their motion for reconsideration.

## II. LEGAL STANDARDS

### A. Summary Judgment

\*2 Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment is proper if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). In this case, the parties concede that there are no material facts in dispute and that this action requires resolution of a purely legal issue. Joint Case Management Statement, Pg. 3.

### B. Review of Agency Interpretation of a Statute

Moreover, the parties also agree that a single Supreme Court case governs this Court's review of the INS' construction of the relevant statutes. In *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), the Court directed a two-step review process:

First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction of the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

*Chevron*, 467 U.S. at 842–43. (footnotes omitted). Thus, an agency's construction is normally accorded significant deference. However, “[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view.” *INS v. Cardoza-Fonseca*, 480 U.S. 421, 447 n. 30, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987) (quoting *Watt v. Alaska*, 451 U.S. 259, 273, 101 S.Ct. 1673, 68 L.Ed.2d 80 (1981)).

### III. DISCUSSION

Plaintiffs argue that the construction of the relevant statutes is clear and that, in light of the INS' shifting interpretation of those statutes, their interpretation should be given little deference pursuant to *Cardoza-Fonseca*.

Sections 1160(d)(2) and 1255a(e)(2)<sup>2</sup> both specify that employment authorization continues until a “final determination on the application has been made in accordance with this section.” Section 1160 and section 1255a both provide for administrative and judicial review of the INS' initial determination. Plaintiffs argue that this language is unambiguous and that absent some restrictive language in the statute indicating that the temporary work permits were intended to be granted for less than the entire review process, plaintiffs are entitled to the remedy they seek.

<sup>2</sup> For the purposes of this motion, these two sections are treated identically. All plaintiffs except one filed their applications under 8 U.S.C. 1160(a). This section permits aliens who are in the United States illegally to apply for legalization of their status as special agricultural workers. The rest of the plaintiffs filed under 8 U.S.C. § 1255a which provides for legalization as permanent residents providing they have been continuously residing in this country since January 1, 1982. Both statutes contain identical language regarding final determination and both statutes provide for administrative and judicial review.

The INS argues that the a determination is final after the administrative review. At the hearing on this motion, counsel for the INS argued that the plain meaning of the statute supported its interpretation. Upon request, however, counsel was not able to direct the court to any language in the statute supporting its interpretation. *Chevron*, 467 U.S. at 842–43.

\*<sup>3</sup> Having failed to direct this Court to the specific statutory language supporting its interpretation, the INS argues in its papers that its construction is a plausible reading of the statute and that this Court ought to defer to their interpretation. *Chevron*, 467 U.S. at 842–43. The INS posits that this Court ought to defer to its interpretation because “a final determination” on an alien's eligibility can be made in accordance with the subsections preceding section 1160(d)(2). Thereafter, and pursuant to 1160(e)(2), the agency administratively reviews its initial determination rendered pursuant to those subsections. Finally, defendant cites to a number of INS regulations which provide that applicants receive a “final notice of ineligibility” following administrative review. 8 C.F.R. § 103.3(a)(3)(I). Putting aside the fact that defendant's inconsistent interpretation of what constituted a “final determination” removes that deference it was once owed, this Court finds that the INS' is a tenuous reading of the statute because it fails to account for section 1160(e)(3), which clearly provides for judicial review. Quite simply, the INS' interpretation of the statute would give effect to section 1160(e)(2) while completely ignoring section 1160(e)(3).

Defendant also argues that plaintiffs' interpretation of the statute would lead to an absurd result. Specifically, counsel argues that if plaintiffs' construction of the statute is adopted, aliens whose applications for legalization have been denied at every level of INS review would nevertheless be entitled to work permits pending an outcome of judicial review, which, since it is tied to an order of deportation, could take months or years to occur. Defendant argues that this potential delay conflicts with one goal of the statute which is to provide a speedy determination and review process. Defendant is correct

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that judicial review is tied to a deportation order and that such an order might not be issued for a long period of time. Defendant also concedes, however, the decision to institute deportation proceeding and obtain a deportation order is entirely within its own discretion. The INS could institute deportation proceedings the day after an aliens' administrative appeal has been denied. This process would significantly reduce the amount of time that an alien must wait in order to be afforded the judicial review each is clearly entitled to.

Moreover, defendant fails to adequately address plaintiffs' argument that the statute clearly references the entire section and that judicial review is unambiguously contemplated by the section. Quite simply, defendant has appeared to draw an arbitrary line between administrative and judicial review. Defendant attempts to avoid this conclusion by arguing that applicants are not able to present new evidence upon judicial review and that since judicial review does not occur unless and until a final deportation order is issued it is unlikely that Congress intended to provide temporary work permits throughout that process. Those arguments are beside the point. Defendant fails to persuasively address the plain language of the statute which clearly states that applicants "*shall* be granted authorization" to work in the United States "until a final determination on the application is made *in accordance with this section.*" 8 U.S.C. 1160(e)(2) (emphasis added). Moreover, defendant has failed to adequately explain why section 1160(e)(3), which provides for judicial review, should be read out of that section.

**\*4** Because the INS' interpretation of the relevant statutes are granted little deference due its inconsistent construction of them and because the construction it provides the Court does not comport with a plain language reading of the statute this Court hereby GRANTS plaintiffs' motion for reconsideration and for summary judgment.<sup>3</sup>

<sup>3</sup> In their motion, plaintiffs also argue that a number of INS regulations will be in conflict with a ruling favorable to plaintiffs. Therefore, plaintiffs have requested that the Court order the regulations repealed as being unlawful in the event that the Court rules in plaintiffs' favor on the motion for reconsideration and for summary judgment. The regulations at issue essentially codify the INS' position on this motion. While there would clearly seem to be a conflict if this Court grants plaintiffs' motion for reconsideration and for summary judgment with the Regulations, plaintiffs' request is not properly before this Court. As a motion for reconsideration, this matter is confined to issues previously considered. This was not one. Therefore, if this Court rules in plaintiffs favor and if the Regulations at issue are subsequently enforced against them, plaintiffs should then return to this Court for a future determination of the propriety of those regulations.

IT IS SO ORDERED.