PRACTICE ADVISORY
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IMPLICATIONS OF JUDULANG V. HOLDER FOR LPRs SEEKING § 212(c) RELIEF AND FOR OTHER INDIVIDUALS CHALLENGING ARBITRARY AGENCY POLICIES

INTRODUCTION

Before December 12, 2011, immigration judges and the Board of Immigration Appeals (BIA or Board) permitted lawful permanent residents (LPRs) to apply for § 212(c) relief only if the Department of Homeland Security (DHS) charged them with a ground of deportability that had a comparable ground of inadmissibility. This rule, referred to as the “comparable grounds test,” was announced in the 2005 decisions Matter of Blake, 23 I&N Dec. 722 (BIA 2005), and Matter of Brieva, 23 I&N Dec. 766 (BIA 2005). Only one circuit court, the Second Circuit, had rejected the comparable grounds test.

On December 12, 2011, the Supreme Court unanimously rejected the Board’s rulings in Matter of Blake and Matter of Brieva. See Judulang v. Holder, No. 10-694, 565 U.S. ___, 2011 U.S. LEXIS 9018 (Dec. 12, 2011). The Court found the BIA’s comparable grounds test to be arbitrary and capricious. The decision has immediate implications for lawful permanent residents currently in removal proceedings with certain aggravated felony and other convictions preceding the enactment of AEDPA and IIRIRA in 1996, and provides grounds for seeking reopening of past removal orders involving such individuals. But beyond that context, the decision provides important new analytic tools for challenging arbitrary agency action in immigration cases more generally.

This advisory describes (1) the Court’s holding in Judulang and who is potentially affected; (2) steps that lawyers (or immigrants themselves) should take immediately in pending or already concluded removal proceedings involving such individuals; and (3) some other potential uses of the Judulang decision’s reasoning to challenge agency policy in removal cases.

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1 This Practice Advisory is intended for lawyers and is not a substitute for independent legal advice supplied by a lawyer familiar with a client’s case.

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2 The citations to Judulang used throughout this practice advisory (Op. at __) refer to the slip opinion.
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SAMPLES
A. Arbitrary and Capricious Review under the APA

The *Judulang* Court embraced application of the Administrative Procedure Act’s review of arbitrary and capricious agency action. In particular, the Court applied 5 U.S.C. § 706(2)(A), which permits the Court to set aside agency action that is “arbitrary and capricious.” As the Court explained, an agency is required to engage in “reasoned decisionmaking.” Op. at 9. A court can review whether the decision was based on “a consideration of the relevant factors” and whether “there has been a clear error of judgment.” Op. at 10. That review requires looking at the quality of the agency’s reasoning (or lack thereof). The Court concluded that the BIA had “flunked the test” by conditioning an LPR’s right to remain in the country on a “chance correspondence between statutory categories.” Op. at 10.

APA review can be a powerful tool to reign in truly arbitrary policies. In some ways, APA review is similar to equal protection review. It allows the court to look at arbitrary distinctions and strike them down. But APA review is different in important ways. APA review looks at the reasons that the agency has provided, not reasons developed after the fact by the agency’s attorneys. It requires the agency to engage in the issues, consider relevant factors, and provide a reasoned explanation for what it is doing. And as the Court explained in *Judulang*, the agency must focus on the statutory scheme and implementing its purpose. An agency cannot simply say, for example, that it has an interest in cutting cost. As the *Judulang* Court explained, “[c]ost is an important factor for agencies to consider in many contexts. But cheapness alone cannot save an arbitrary agency policy. (If it could, flipping coins would be a valid way to determine an alien’s eligibility for a waiver.)” Op. at 21.

The Court particularly objected to the way that the *Blake-Brieva* rule allowed deportation officers’ charging decisions to affect access to § 212(c) relief. It noted that the very same conviction could be charged as a crime involving moral turpitude or as an aggravated felony, and that the charging decision would dictate access to relief. The Court objected to a result where access to relief would turn on the “fortuity of an individual officials’ decision.” Op. at 15. This may have implications, for example, for other contexts where enormous authority has been devolved to individual officers (see subsection C, 3 below).

B. Arbitrary and Capricious Review under *Chevron*

*Judulang* rejected the government’s argument that it should defer to the Board’s comparable grounds policy under *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). But it nonetheless found that if it had applied *Chevron*, the agency policy would not pass step two. The Court explained that at step two the question is whether the agency policy is “‘arbitrary and capricious in substance.’” Op. at 9 n.7 (citing cases). *Judulang*’s analysis of the arbitrariness of the comparable-grounds rule is therefore useful in any case challenging the reasonableness of an agency interpretation of a statute under step two of *Chevron*.

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C. Examples of Individuals Beyond *Judulang*’s Specific Holding With Potential Challenges under the Court’s Reasoning

1. Non-LPRs barred from any discretionary relief from removal due to DHS decision to place the individual in INA § 238(b) proceedings

Under INA § 238(b), a non-LPR who is charged as having an aggravated felony conviction can be placed in administrative removal proceedings in which many forms of relief, such as cancellation of removal and adjustment, are barred. But the very same people can be placed in removal proceedings in which these forms of relief are available. Courts have rejected equal protection challenges to this distinction. But the agency practice also can be challenged as arbitrary and capricious under the reasoning of *Judulang*.

In *Judulang*, the Court offered particularly harsh words for policies that allow deportation officers’ charging decisions to determine whether relief is available. It recognized that a system that turns on the “fortuity of an individual officer’s decision” is fundamentally flawed. The Court cited Judge Learned Hand’s admonition that deportation decisions cannot be made into a “sport of chance.” Op. at 15. The agency’s practices on administrative removal are precisely such a chance system, in which one long-time immigrant may have an opportunity to seek adjustment while another will not, based solely on whether the deportation officer decided to issue an NTA or follow the procedures under INA § 238(b). Because that system is arbitrary and capricious, it cannot stand.

2. LPRs deemed ineligible for § 212(c) relief because their pre-1996 convictions were trial convictions

*Judulang* also has implications for other outstanding issues related to 212(c) eligibility. In many circuits, § 212(c) relief is restricted to LPRs who pled guilty, and not to those who may have relied on § 212(c) relief in connection with other decisions in their criminal cases, such as a decision to reject a plea and go to trial. *See, e.g.*, *Canto v. Holder*, 593 F.3d 638 (7th Cir. 2010) (discussing circuit decisions). This distinction may be challenged as arbitrary and capricious under the reasoning of *Judulang*.

In *Judulang*, the Court rejected a rule that categorically excluded a group of deportable LPRs on grounds that bore no relationship to “the alien’s fitness to remain in the country.” Op. at 12. Categorical exclusion of trial conviction cases also bears no relationship to fitness to remain. Indeed, the agency has never claimed that it bore such a relationship. Instead, trial conviction cases have been excluded from relief on the ground that *St. Cyr* does not require that they be included. *See, e.g.*, *Canto v. Holder*, 593 F.3d 638 (7th Cir. 2010). That logic is almost identical to the logic that led to the *Blake* decision. The agency had been ordered by a court to provide § 212(c) to some deportable immigrants and did not extend § 212(c) to others whom it deemed not covered by *St. Cyr*. But as the Court found in *Judulang*, agency practice cannot allow for distinctions that are arbitrary just because they grew out of an accommodation of case law. Instead, access to a critical form of relief must be based on a connection to the broader purpose of the statute and fitness to remain. Moreover, just as the comparable grounds test
lacked any connection to the text of the statute, the exclusion of trial convictions finds no basis whatsoever in the wording of § 212(c).

Practitioners should be cautioned, however, that these arguments require further development, and that the courts, particularly the ones that already have ruled adversely on this issue, may not be receptive to these arguments.

3. LPRs deemed ineligible for cancellation of removal based on a finding that their pre-1996 convictions triggered the residence requirement clock-stop rule

*Judulang* also has potential implications for issues related to eligibility for cancellation of removal under INA § 240A(a), which was enacted in IIRIRA to replace § 212(c) relief. IIRIRA provided that the seven years of residence required to be eligible to seek cancellation “shall be deemed to end . . . when the alien has committed an offense referred to in section 212(a)(2) that renders the alien inadmissible to the United States under section 212(a)(2) or removable from the United States under section 237(a)(2) . . . .” See INA § 240A(d) (1). The BIA has applied this “clock-stop” or “stop-time” rule retroactively to pre-IIRIRA offenses. *Matter of Robles*, 24 I&N Dec. 22 (BIA 2006). Some reviewing courts have applied a wooden retroactivity analysis in considering the applicability of the clock-stop rule to pre-IIRIRA offenses and have concluded that a provision based on conduct can never have a retroactive effect. On that basis, they have rejected any challenges to the BIA’s policy of applying the clock stop rule to convictions that pre-date IIRIRA. See, e.g., *Zuluaga-Martinez v. I.N.S.*, 523 F.3d 365 (2d Cir. 2008).

*Judulang* suggests a different way to challenge such applications of the clock stop rule. Whether analyzed under the APA or under step two of *Chevron*, the agency policy cannot be “arbitrary and capricious in substance.” Op. at 9 n.7. It is hard to imagine anything more arbitrary than the retroactive application of the clock-stop rule. In essence, the rule treats LPRs who entered the country on the same date, and who have the same convictions, differently based on the date the conviction took place. Thus, an LPR who committed his or her offense before 1996 when he or she may not yet have accumulated seven years of residence is barred, while another LPR who entered the country at the same time but committed his or her offense more recently after he or she accumulated seven years is not barred. Whatever logic that rule may have prospectively, when it might be said to notify a noncitizen that no relief will be available regardless of future residence, it is truly arbitrary as applied retroactively. Retroactive application means that those who had shown years of good behavior since 1996 are removed without any consideration of their “fitness to remain” while those with more recent convictions can have the “fitness” examined by an immigration judge. That rule, like the one in *Judulang*, should be found to “flunk the test” of arbitrary and capricious review.