RETURN TO HOMEPAGE

No. 03-73811

IN the united states court of appeals
For the ninth circuit

Benjamin cabrerA
A75 710 964,
Londy cabrera
a75 710 965,

Petitioners,

v.

john ashcroft, attorney general,

respondent

---

petitioners' Opening brief

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STATEMENT OF JURISDICTION

The Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") created a new judicial review provision codified at 8 U.S.C. § 1252. See, IIRIRA § 306 (c)(1), Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996), as amended by Act of Oct. 11, 1996, Pub. L. No. 102-04, 110 Stat. 3656. In interpreting IIRIRA's jurisdictional limitations, restrictions on jurisdiction should be construed narrowly. Hernandez v. Ashcroft, 345 F.3d 824, 845 (9th Cir. 2003), citing Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 482 (1999). Courts have recognized the "strong presumption in favor of judicial review of administrative action." INS v. St. Cyr, 533 U.S. 289, 298 (2001). There is a longstanding principal that ambiguous removal provisions should be construed in favor of the alien. Reno v. American-Arab Anti-Discrimination Comm., 524 U.S. at 482. Section 1252(a)(2)(B)(i) removed jurisdiction to review "any judgment regarding the granting of relief under section 1229c"[cancellation of removal for nonpermanent residents]." This Court has interpreted § 1252(a)(2)(B)(i) to eliminate jurisdiction to review "discretionary decisions involved in the cancellation of removal context." Romero-Torres v. Ashcroft, 327 F.3d 887, 890 (9th Cir. 2003). However, when the Board "acts where it has no legal authority to

do so, it does not make a discretionary decision, and such a determination is not protected from judicial review." Hernandez, 345 F.3d at 847. Likewise, Courts retain jurisdiction to review whether a particular decision is *ultra vires* of the statute in question. Spencer Enterprises, Inc. v. United States, 345 F.3d 683, 689 (9th Cir. 2003).

This Court retains jurisdiction to review constitutional claims, "even when those claims address a discretionary decision." Ramirez-Perez v. Ashcroft, 336 F.3d 1001, 1004(9th Cir. 2003); See also Jimenez-Angeles v. Ashcroft, 291 F.3d 594, 599 (9th Cir. 2002). In addition, this Court retains jurisdiction to determine whether it has jurisdiction. See, Murillo-Salmeron v. INS, 327 F.3d 898, 901 (9th Cir. 2003).

STATEMENT OF FACTS

Petitioners, Benjamin Cabrera and Londy Hidalgo-Cabrera, seek review of the order of the Board of Immigration Appeals ("Board"), dated September 22, 2003, which reversed the Immigration Judge's decision to grant them the relief of cancellation of removal pursuant to Immigration and Nationality Act §240A(b), also codified at 8 U.S.C. §1229b(b).

The Cabrera's are a married couple. A.R. 111, 359. Mr. Cabrera is a native and citizen of Mexico, who first came to the United States in 1984, when he was approximately sixteen (16) years old. He left the United States only once, and only briefly, to visit his parents in Mexico 1989. A.R. 133-134, 354. Mrs. Cabrera,

born in Guatemala, has resided continuously in the United States since 1988, when she was twenty (20) years old. A.R. 357. She briefly visited Guatemala only once in 1995 to see her ailing mother. A.R. 110.

The former Immigration and Naturalization Service ("the Service") issued Notices to Appear ("NTA") to both Mr. and Mrs. Cabrera, [1] placing them in removal proceedings. A.R. 402, 632. At their first hearing before the Immigration Judge ("IJ") in Los Angeles, Mr. and Mrs. Cabrera conceded removability and stated their intention to apply for the relief of cancellation of removal. A.R. 99, 100. Mr. and Mrs. Cabrera appeared for a subsequent hearing on the merits of their applications. A.R. 108.

Extensive testimony and documentary evidence was presented to the IJ in support of these applications for cancellation of removal. Mr. and Mrs. Cabrera have two (2) United States citizen children. In addition, Mr. Cabrera's parents are both lawful permanent residents of the United States. A.R. 136. Mrs. Cabrera's mother is a lawful permanent resident as well. A.R. 113.

At the time of the hearing the Cabrera's daughters, Diana and Jocelyn, were 10 and 8 years old, respectively. A.R. 360. The gifted nature of both children was discussed in detail at the merit hearing. Diana was described as "extremely gifted," "talented," having "extraordinary abilities," "a wonderful student," "exceptional," and "a rare student." A.R. 154 – 153. She scored in the 99th

percentile on her standardized tests, and was accepted to a Johns Hopkins - sponsored summer program offering intensive instruction in math and science. T. R. 58. The program continues for four consecutive summers, and Diana has participated in both 2002 and 2003. A.R. 10, 118.

Mr. and Mrs. Cabrera's younger daughter, Jocelyn, is also academically gifted. She scored in the 75th percentile on her standardized tests. A.R. 156. Her principal, Ms. Chavez, testified at the merit hearing that Jocelyn's score is excellent for a child of her young age and that, "we expect the same kind of development for Jocelyn that we have from Diana." Id. Unfortunately, Jocelyn has been seriously impacted by the threat of her family's removal from the United States. She has experienced stress-related bladder control problems, and her teachers have recommended family counseling to help her deal with her stress and fears. A.R. 156-157.

Mr. and Mrs. Cabrera have participated in their children's education to an extensive and significant degree. A.R. 158. Ms. Chavez testified that the couple are "probably the most outstanding parents that we've had at our school at the time that I've been there." Id. They have been involved as volunteers at the school, represented the school at the district level, and have participated in the school government. Id. Ms. Chavez attributes Diana and Jocelyn's academic success in large part to their parent's emphasis on the value of education, and considerable

involvement with their schooling. Id.

Diana and Jocelyn have visited their parent's birth countries only once, nine years ago. The children accompanied their mother to Guatemala in 1995 for one month, a trip that Jocelyn doesn't even remember. A.R. 125. Diana testified that on their return trip from Guatemala, they were in Tijuana for two days. A.R. 165. Both girls have been educated entirely in English. A.R. 167. Diana is aware that her parents would be removed to different countries, and stated that her parent's removal would be "very, very hard because I love my parents, and I wouldn't like to be separated from them." Id.

The entire family has a close relationship with their relatives here in the United States. A.R. 114. Mrs. Cabrera's mother is a lawful permanent resident, her two brothers are U.S. citizens, and all live nearby. A.R. 113, 362, 365-366. Mr. Cabrera's parents are both lawful permanent residents living in Southern California. A.R. 136, 363-364. He has nine brothers and sisters who also live in the area. Id. Diana stated that she has many cousins who she sees often on Sundays. A.R. 166.

Mr. Cabrera helps to care for his mother, who has serious problems with diabetes. A.R. 137, 214-234. Her condition requires insulin injections along with diet restrictions. A.R. 138. She stays with the family several days a week, and Mr. Cabrera supports her, along with his siblings. A.R. 135, 137. Due to her diabetes, she recently underwent surgery to amputate three toes. A.R. 137, 214-217. She

stayed with Mr. and Mrs. Cabrera for three weeks during her recovery. A.R. 138. At the conclusion of their merit hearing, the IJ found that Mr. and Mrs. Cabrera had established eligibility for cancellation of removal, and he exercised his discretion to grant their applications. A.R. 78. The Service appealed, and on September 22, 2003, the Board vacated the IJ's decision, on the basis that the diminution of educational opportunities that the Cabrera's oldest child, Diana, would experience does not rise to the level of exceptional and extremely unusual hardship. A.R. 3. A petition for review of the Board's decision was timely filed with this court on October 21, 2003.

STATEMENT OF ISSUES

I. Whether The Board Acted Contrary To Law By Rendering A Decision Which Failed To Consider The Hardship Factors Cumulatively.

II. Whether The Board's Disregard Of Applicable Case Law Denied Petitioners' Constitutional Right To Due Process Of Law.

III. Whether The Board Lacks The Authority To Issue An Order Of Removal In The First Instance.

IV. Whether The Board Has The Authority To Issue An Order Of Voluntary Departure In The First Instance Where The Immigration Judge Did Not Issue Such Order In The Proceedings.

STANDARD OF REVIEW

This Court reviews constitutional claims de novo. Colmenar v. INS, 210 F.3d 967, 971 (9th Cir. 2000). Where the Board reviews the decision of the immigration judge de novo, this Court reviews the Board's decision, and not the decision of the IJ. Cordon-Garcia v. INS, 204 F.3d 985, 991 (9th Cir. 2000). This Court reviews a Board decision that is contrary to law de novo. Medina-Morales v. Ashcroft, 362 F.3d 1263, 1272 (9th Cir. 2004); citing Hernandez, 345 F.3d at 832, 845-48. An agency's interpretation or application of a statute is a question of law reviewed de novo. Lafarga v. INS, 170 F.3d 1213, 1215 (9th Cir. 1999).

ARGUMENTS

I. The Board acted contrary to law by rendering a decision which failed to consider the hardship factors cumulatively.

Cancellation of removal for nonpermanent residents is a form of relief created by IIRIRA and codified at 8 U.S.C. § 1229b. Cancellation made significant changes to the former suspension of deportation provision. 8 U.S.C. § 1254(a)(1) (repealed 1996) For instance, it raised the standard of hardship from "extreme" to "exceptional and extremely unusual hardship;" hardship to the applicant could no longer be considered; and it also raised the continuous physical presence requirement from seven years, to ten.

To be eligible for the relief of cancellation of removal, an applicant must establish that:

1) He or she has been continuously physically present in the

United States for at least 10 years prior to the date of the application;

2) Has been a person of good moral character;

3) Has not been convicted of certain specified offenses;

4) And that the applicant's removal would cause exceptional and extremely unusual hardship to the applicant's spouse, child, or parent who is a citizen of lawful permanent resident of the United States.

8 U.S.C. §1229b(b)(1)(A)-(D).

To date, the Board has issued only three precedent decisions regarding cancellation of removal. Those decisions are Matter of Monreal, 23 I&N Dec. 56 (BIA 2001), Matter of Andazola, 23 I&N Dec 319 (BIA 2002), and Matter of Recinas, 23 I&N Dec 467 (BIA 2002). Despite the paucity of precedent decisions, this court has acknowledged that, "a long history of [Board] and court construction accompanies the current [exceptional and extremely unusual] hardship standard and its earlier incarnations." Ramirez-Perez v. Ashcroft, 336 F.3d 1001, 1005 (9th Cir. 2003). As with its decisions regarding the former suspension of deportation relief, the Board has held that in analyzing the hardship removal would cause to the qualifying relative(s), consideration should be given to the age, health, and circumstances of the qualifying family member(s), including how a lower standard of living or adverse country conditions in the country of return might affect those

relatives. Monreal, at 20.

The Board has repeatedly emphasized that these hardship factors should be considered **in the aggregate.** The mandate that hardship factors must be considered in their aggregate has long been a part of case law. See, Matter of Monreal, 23 I & N Dec. 56 (BIA 2001) (Citing to Matter of Kao and Lin, 23 I & N Dec. 45 (BIA 2001), Matter of Pilch, 21 I & N Dec. 627 (BIA 1996), and Matter of Anderson, 16 I & N Dec. 596 (BIA 1978), for the proposition that, "as with extreme hardship, all hardship factors should be considered in the aggregate when assessing exceptional and extremely unusual hardship.") This directive was confirmed in Recinas, which stated that, "Part of [the hardship] analysis **requires** the assessment of hardship factors **in their totality**, often termed a '**cumulative'** analysis." Recinas, at 15 (emphasis added).

Despite this directive, the Board's decision in Mr. and Mrs. Cabrera's case focused exclusively on the educational achievements of their eldest daughter, Diana. In assessing the hardship to Diana should her parents be forced to leave the U.S., the Board utilized the following boilerplate language:

> We have held that the fact that educational opportunities for a child are better in the United States than in an alien's homeland does not satisfy the extreme hardship standard relevant to suspension of deportation let alone the higher exceptional and extremely unusual hardship standard applicable to cancellation of removal…[We have noted] that to equate diminished educational opportunities with exceptional and extremely unusual hardship would result in the grant of cancellation of removal to virtually all cases involving respondents from developing countries with qualifying small

children. A.R. 3 (citations omitted).

The Board failed to consider the numerous additional relevant factors presented in this case through both documentary evidence and the testimony presented at Mr. and Mrs. Cabrera's merit hearing. These additional factors were considered by the IJ, and formed part of his well-reasoned and thorough decision to grant cancellation of removal. Recognizing his duty to evaluate all pertinent hardship factors in the aggregate, the IJ explained that:

> "The Court has carefully considered the testimony of both respondents, of their 10-year-old United States citizen daughter, Diana, and of Ms. Anna Louise Chavez, the principal of the elementary school in the Los Angeles area, which the two daughters of respondents currently attend. Also, before reaching its decision in the instant proceedings, the Court has carefully considered the following documentary evidence in the files of the respondents: Exhibits 1, the Notices to Appear; Exhibits 2, the cancellation applications of the respondents and the documents offered in initial support thereof; and Exhibits 3, the additional and supplemental materials offered by the respondents in support of their relief claims, including educational records relative to their two United States citizen children, and other documents related to their lives in the United States, their presence in the United States, and their other family connections in the United States." A.R. 81-82.

In contrast, the Board overlooked these significant relevant factors by its exclusive focus on the educational achievements and needs of Diana. First, the Board fails to acknowledge that Mr. and Mrs. Cabrera will be removed to separate countries. Thus Diana and Jocelyn will not only have to leave their home country, but they may also be separated from at least one of their parents. A.R. 85. Diana and

Jocelyn have visited Guatemala and Mexico only once, and very briefly, almost eight years ago. A.R. 84. However this fact, as well as the impact that conditions in Mexico and Guatemala would have on both girls, (as substantiated by numerous documents regarding both countries), was not considered by the Board. A.R. 236 - 307.

An additional hardship factor is the fact that Jocelyn has experienced extreme anxiety regarding her parent's situation resulting in a recurrent loss of bladder control. A.R. 85. The Board's decision essentially overlooks Jocelyn altogether. The single reference to her existence is at the end of the panel's decision, where they state that, "while we recognize that the respondent's **children** will suffer some hardship resulting from their parent's removal, we find that it does not rise to the level of exceptional and extremely unusual hardship." A.R. 3 (emphasis added). Obviously, the panel failed to meaningfully analyze the hardship that Jocelyn may experience if her parents are removed from the U.S.

Moreover, the Board makes no mention of the fact that Diana and Jocelyn have a close relationship to their grandparents, aunts and uncles who reside lawfully in the United States. A.R. 84, 86-87. This is a factor which has been considered significant in prior Board precedent decisions regarding cancellation of removal.

In Matter of Recinas, the Board explained that:

> Unlike the situation in Monreal and Andazola, all of the respondent's family, including her siblings, reside lawfully in the United States. We find this significant because they are unlikely to be subject to immigration enforcement and will probably remain in the United States indefinitely. The respondent's

> family members are very close and have been instrumental in helping her raise her children and obtain the necessary funds to establish her business. The loss of this support would further increase the hardship that she, and therefore her United States citizen children, would suffer if they are compelled to return to Mexico, where no support structure exists. Matter of Recinas, at p. 12-13.

Likewise, this Court has recognized the existence of family ties in the United States as "the most important factor in determining hardship." See Gutierrez-Ceneno v. INS, 99 F.3d 1529, 1533 (9th Cir. 1996), Contreras- Buenfil v. INS, 712 F.2d 401, 403 (9th Cir. 1983). Despite this long-standing principle, the Board's decision entirely overlooks the fact that Mr. and Mrs. Cabrera have five (5) qualifying relatives for hardship purposes. A.R. 89. The hardship that the three lawful permanent resident parents of Mr. and Mrs. Cabrera would suffer if they were separated from both their children and grandchildren was not considered by the Board.

Mr. and Mrs. Cabrera also provide care for his lawful permanent resident mother who suffers from diabetes and has undergone surgery for this condition. A.R. 87. The hardship to Mr. Cabrera's mother was not analyzed in the Board's decision. The Board's own precedent decisions require that they consider all of the above factors for their cumulative impact. However, it is evident from the Board's decision that only one factor was considered in reversing the IJ. The Board's decision was thus contrary to law.

When the Board acts contrary to its own precedent, its decision cannot be

considered discretionary. See, Hernandez v. Ashcroft, 345 F.3d 824 (9th Cir. 2003); See also, Medina-Morales v. Ashcroft, 362 F.3d 1263 (9th Cir. 2004). In Hernandez, this Court said that the Board has no discretion to make a decision that is contrary to the law. Because the denial was made in reliance on an impermissible basis, the Court looked beyond the discretionary label, and stated that "a nonprecedential decision by the BIA in defiance of its own precedential case law simply cannot be classified as discretionary." Hernandez, 345 F.3d at 845 – 847.

The Court went on to explain that:

> The regulations themselves limit the BIA's discretion to operating within the law…We emphasize that we are not applying an abuse of discretion standard; if a decision is not within the power of the BIA, it cannot be construed as discretionary…As we have explained before, "[t]he BIA must exercise its discretion 'within the constraints of law.'" …When the BIA acts where it has no legal authority to do so, it does not make a discretionary decision…and such a determination is not protected from judicial review. Hernandez, 345 F.3d at 845-847 (internal citations omitted).

Following Hernandez, this Court also held that it had jurisdiction to review the Board's discertionary denial of the alien's motion to reopen removal proceedings in Medina-Morales v. Ashcroft, 362 F.3d 1263 (9th Cir. 2004). In Medina-Morales, the Board denied a motion to reopen based on the weak relationship the alien had with his stepfather. This denial was in clear conflict with the Board's precedent

decisions, which stated that the strength of the relationship should **not** be considered in evaluating an application for adjustment of status based on the stepparent's petition for his or her stepchild. Therefore, the Court found that the Board acted contrary to law. Moreover, the decision stated that, "because the basis of our jurisdiction is the fact that the [Board] acted beyond the bounds of its discretion by relying on the strength of the stepparent-stepchild relationship in contradiction to its own case law, the merits of the question require little additional scrutiny." Medina-Morales, 362 F.3d at 1272-1273.

As discussed above, the Board's precedent decisions have consistently held that the relevant hardship factors are to be considered **in the aggregate**, and for their **cumulative impact**. Because it clearly failed follow its own precedent, the Board's reversal of the IJ was contrary to law. Moreover, as in the cases of Hernandez and Medina-Morales, determining that the Board acted contrary to law in this case requires "little scrutiny" of Mr. and Mrs. Cabrera's hardship claim. See, Medina-Morales, 362 F.3d at 1273.

II. The Board's disregard of applicable case law denied Petitioners' right to due process of law.

The Fifth Amendment due process clause applies to non-citizens in removal proceedings. Reno v. Flores, 507 U.S. 292, 306 (1993); See also Campos-Sanchez v. INS, 164 F.3d 448, 450 (9th Cir. 1999). The right to due process includes the right to a full and fair hearing. Getachew v. INS, 25 F.3d 841, 845 (9th Cir. 1994); See also Yamataya v. Fisher, 189 U.S. 86, 101 (1903). Due process of law also

requires the evaluation of each case on its own merits to determine whether the alien's factual support and concrete evidence are sufficient. Sarvia-Quintanilla v. INS, 767 F.2d 1387, 1392 (9th Cir. 1985); See also Larita-Martinez v. INS, 220 F.3d 1092, 1095 (9th Cir. 2000).

Recently, this Court stated that, "if the BIA interpreted 'exceptional and extremely unusual hardship' to mean that no hardship showing would ever be sufficient, its interpretation would be so divorced from Congress' mandate as to violate the Constitution." Ramirez-Perez v. Ashcroft, 336 F.3d 1001, 1005 (9th Cir. 2003). In fact, by refusing to consider hardship factors in their aggregate, the Board **can** effectively eliminate the relief of cancellation of removal entirely.

Logically, only an extremely minimal number of applicants would be able to establish the requisite hardship on the basis of one factor alone. In Recinas, the Board stated that, "the hardship standard is **not** so restrictive that only a handful of applicants, such as those who have a qualifying relative with a serious medical condition, will qualify for relief." Recinas, supra at 9 (emphasis added). This is consistent with Congressional intent, as Congress has authorized the Executive Office for Immigration Review ("EOIR") to approve up to 4,000 cancellation of removal applications per year.[2] See 8 U.S.C. § 1229b(e).

As a predicate to obtaining relief for a violation of procedural due process rights in immigration proceedings, a non-citizen must show that the violation caused

prejudice to his or her case. This standard is met under circumstances in which an alien's rights are violated in such a way as to affect **potentially** the outcome of their deportation proceedings. United States v. Cerda-Pena, 799 F.2d 1374, 1379 (9th Cir. 1986). In assessing prejudice in this context, the Court does not need to determine with certainty whether the outcome would have been different, but rather must decide whether the violation potentially affected the outcome of the proceedings. Ramirez-Alejandre v. Ashcroft, 320 F.3d 858, 872 (9th Cir. 2003). A petitioner "must only show that he had a 'plausible' ground for relief from deportation." U.S. v. Ubaldo-Figueroa, 347 F.3d 718, 726 (9th Cir. 2003), citing U. S. v. Arrieta, 224 F.3d 1076, 1080 (9th Cir. 2000).

Mr. and Mrs. Cabrera were prejudiced by the Board's actions. The Board's reversal of the IJ's decision deprived them of the opportunity to live and work in the U.S. and remain together with their United States citizen daughters and with their permanent resident parents. Moreover, an analysis of prejudice on the facts presented does not require the Court to determine whether the hardship standard has been met. When the Board fails to adhere to its own precedent, the outcome of the proceedings are at least potentially affected. On the facts presented in this petition, the failure to assess all the hardship factors in the aggregate essentially eliminated the Cabreras' opportunity to establish the requisite hardship to their family members, and to qualify for cancellation of removal.

III. The Board's order of removal exceeds its authority. The

Immigration and Nationality Act does not provide the Board with authority to order removal in the first instance.

The Court has requested the parties in this petition for review to address the issue of whether the court lacks jurisdiction over the petition because, following the reasoning of Noriega-Lopez v. Ashcroft, 335 F.3d 874 (9th Cir. 2003), there may be no valid, final order of removal.

In Noriega-Lopez, the petitioner was a long-time permanent resident of the United States who was convicted of the sale of heroin. The former INS instituted removal proceedings against the petitioner, charging him with removability as an aggravated felon and controlled substance violator. However, at the initial hearing the Immigration Judge found that the INS could not meets its burden of establishing by clear and convincing evidence that the petitioner had been convicted, and terminated the proceedings. Noriega-Lopez, 335 F.3d at 876. The INS appealed, requesting that the Board reverse the IJ's termination and remand for further proceedings. Id. The Board determined that the evidence of conviction proffered by the INS was sufficient, and reversed the IJ. However, the Board then proceeded to order Mr. Noriega-Lopez removed to Mexico. Id.

The Court held that the Board acted beyond its statutory and regulatory authority in ordering Mr. Noreiga-Lopez removed. It explained that the Immigration and Nationality Act "does not contemplate that the BIA may issue a final order to removal in the absence of such an order by the IJ." Id. at 883. Rather, "the BIA's

authority is limited to affirming orders of removal previously issued by the IJ, or where the IJ refused to issue such an order on the INS's application for one, reversing the IJ's ruling terminating proceedings and remanding." Id. at 884.

The reasoning of Noriega-Lopez applies equally here. The current INA "spells out with fine cut precision the manner in which the Attorney General is to exercise his authority to order aliens removed administratively." Id. at 882.

Where the language of a statute is clear on its face, there is no need to inquire into Congressional intent. INS v. Phinpathya, 464 U.S. 183 (1984). Courts assume that Congress expresses its intentions in the words it uses, Mills Music, Inc. v. Snyder, 469 U.S. 153, 164 (1985); Moorhead v. United States, 774 F.2d 936, 941 (9th Cir. 1985), and that these words take their ordinary, contemporary, common meaning, unless otherwise defined. Purba v. INS, 884 F.2d 516, 517 (9th Cir. 1989), citing Perrin v. United States, 44 U.S. 37, 42 (1979). It is a fundamental principle of statutory constriction that the Courts should apply the plain meaning of the statute unless there is indication that Congress intended something different. Perrin v. United States, 44 U.S. 37, 42 (1979).

The procedures for ordering aliens removed from the United States are spelled out in 8 U.S.C. § 1229(a), entitled "Removal Proceedings." This section states that "an **immigration judge** shall conduct proceedings for deciding the inadmissibility or deportability of an alien." 8 U.S.C. § 1229(a)(1) (emphasis added). Furthermore, the statute provides that, "a proceeding under this section shall be the **sole and**

exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States." 8 U.S.C. § 1229(a)(3) (emphasis added).

The term "order of deportation" is defined in 8 U.S.C. §1101(a)(47)(A) to mean

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"the order of the special inquiry officer , or other such administrative officer to whom the Attorney General has delegated the responsibility for determining whether an alien is deportable, concluding that the alien is deportable, or ordering deportation." In light of the provisions found at 8 U.S.C. § 1229(a), it is clear that the IJ is the officer who is responsible for ordering deportation.

As explained in Noriega-Lopez, this conclusion finds further support in the terms of 8 U.S.C. § 1101(a)(47)(B). That section provides that an order of deportation becomes final "upon the earlier of (i) a determination by the Board of Immigration Appeals affirming such order; or (ii) the expiration of the period in which the alien is permitted to seek review of such order by the Board of Immigration Appeals." Thus, the Board is given the power to **affirm** orders of deportation, not to enter such orders in the first instance. This authority is vested exclusively with the Immigration Judge.

"The present statute specifies in no uncertain terms that it is IJs who are to issue administrative orders of removal in the first instance. There is no indication in the statute that the BIA may do so." Id. at 884. As explained above, this holding relies

on the clear terms of the statute. These terms apply equally to situations where removability has been established, and the IJ has granted relief.

Here, the Immigration Judge did not issue an order of removal. Therefore, the Board acted beyond its statutory authority when it entered an order of removal in Mr. and Mrs. Cabrera's case.

IV. The Board's order of voluntary departure exceeds its authority as neither the law nor the regulations provide the Board with authority to order voluntary departure where there has been no prior order by an Immigration Judge or the District Director.

After vacating the decision of the Immigration Judge, the Board entered an order of voluntary departure. An alternate order of removal was also entered, with Mexico and Guatemala designated as the countries of removal. A.R. 3. However, the INA and the regulations state that orders granting voluntary departure will be issued **solely** by the District Director or the Immigration Judge. The Board thus acted beyond the scope of their authority.

The provisions regarding voluntary departure are found at 8 USC § 1229c. This section states that the Attorney General may permit an alien to voluntarily depart the United States at the alien's own expense if the **Immigration Judge** enters an order granting voluntary departure in lieu of removal and finds that the following four requirements are met:

1. The alien must have been physically present in the United States for at least one year prior to the service of the Notice to Appear (NTA).
2. The alien must be found to have had good moral character for at least five

years prior to the granting of voluntary departure.
3. The alien must not be deportable under the aggravated felony section (1227 (a)(2)(A)(iii)) or the security-related grounds in 1227(a)(4).
4. The alien must establish, by clear and convincing evidence, that he or she has the means to depart the United States, and intends to do so. 8 U.S.C. § 1229c(b)(1)(A)-(D).

In addition to these four requirements, the INA establishes two situations where voluntary departure may be granted. The first is prior to the completion of removal proceedings. At that time, voluntary departure can be either granted by the **IJ** or by stipulation from "**Service Counsel.**" 8 U.S.C. § 1229c(a); see also, 8 C.F.R. §1240.26(b). The second scenario is when voluntary departure is ordered at the conclusion of the removal proceedings. 8 U.S.C. § 1229c(b), see also, 8 C.F.R. § 1240.26(c). The regulations provide that an **IJ** may grant voluntary departure at this time if the alien meets the four requirements listed in 8 U.S.C. § 1229c(b)(1) (A)-(D). The regulations also require the IJ to enter an alternate order of removal. 8 C.F.R. §1240.26(d).

Thus, neither the Immigration and Nationality Act, nor the implementing regulations grant the Board authority to enter an order of voluntary departure in the first instance. In fact, the **only** time the regulations provide for the Board "issuing" orders of voluntary departure is where such orders are **reinstated** in proceedings which have been reopened prior to the expiration of the original period of voluntary departure. See, 8 C.F.R. §1240.26(f), (g). Orders of voluntary departure by the Immigration Judge which expired during the course of an administrative appeal

may also be **reinstated** by the Board, according to Matter of Chouliaris, 16 I & N Dec. 168 (BIA 1977).

The regulations dealing specifically with the "powers of the Board" also fail to provide the Board with authority to order voluntary departure where there has been no prior order by the IJ or the District Director. See generally, 8 C.F.R. §1003.1 (d). Indeed, these regulations restrict the Board's authority with respect to voluntary departure orders in important ways. The regulations state that the Board lacks jurisdiction to review appeals regarding "the length of a period of voluntary departure granted by an Immigration Judge." 8 C.F.R. § 1003.1(b)(2),(3).

Of even greater significance here is the limitation on the Board's ability to engage in fact-finding. 8 C.F.R. § 1003.1(d)(3)(iv) provides that, "Except for taking administrative notice of commonly known facts such as current events or the contents of official documents, **the Board will not engage in factfinding in the course of deciding appeals.**" (Emphasis added). If further fact-finding is needed, the Board is directed to remand the case to the IJ. 8 C.F.R. § 1003.1(d)(3)(iv). As noted above, 8 U.S.C. § 1229c(b)(1) and 8 C.F. R. §1240.26(c)(1) **require** that four particular findings be made prior to the order of voluntary departure. Those requirements deal with physical presence, good moral character, lack of certain specified removability grounds, and finally, proof by clear and convincing evidence that the individual is able and intends to depart the United States. Here, these four required findings were not made by the IJ. In light of the clear prohibition on fact-

finding contained in 8 C.F.R. § 1003.1(d)(3)(iv), the Board has no authority to make such particularized findings of fact on appeal.

It may be argued that the Board is implicitly vested with the authority to issue orders of voluntary departure in the first instance pursuant to 8 C.F.R. 1003.1(d)(ii). This section states that the "Board may take any action consistent with their authorities under the Act and the regulations as is appropriate and necessary for the disposition of the case." However, in light of the detailed provisions regarding voluntary departure found in 8 U.S.C. § 1229c and 8 C.F.R. § 1240.26, action "consistent with [the Board's] authorities" would be to remand to the IJ, and not to issue an order of voluntary departure in the first instance. The Board's order of voluntary departure, with an alternate order of removal, is thus "a legal nullity." See, Noriega-Lopez, 335 F.3d at 884.

This issue is not a mere technicality, but is rather of great importance to those who find themselves in removal proceedings. Although voluntary departure is commonly referred to as a type of "relief" from removal and a "privilege," there are significant reasons why an individual in removal proceedings may **not** desire such an order in their case. See 8 U.S.C. §§ 1229c(b)(3), 1229c(c) and Shaar v. INS, 141 F.3d 953 (9th Cir. 1998), regarding the consequences which attach when a non-

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citizen fails to depart by the voluntary departure date.

CONCLUSION

Because the Board's decision was contrary to law, because the Board's decision violated Petitioners' constitutional rights to due process of law, and because the Board acted beyond its authority, Petitioners respectfully request that this Court grant the petition for review, reverse the decision of the Board and remand for a proper consideration of Petitioners' case.

Dated: August 5, 2004 Respectfully submitted,

_____

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Certificate of Compliance

Pursuant to Federal Rules of Appellate Procedure (FRAP) 32(e)(4), the undersigned submits this Certificate of Compliance. The attached "Petitioner's Opening Brief" is double spaced pursuant to FRAP 32(b), and has a typeface of Times New Roman, point size 14, and is a total of 25 pages.

Dated: August 5, 2004 _____

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Statement of Related Cases

Pursuant to Ninth Circuit Rule 28 – 2.6, counsel for the Petitioners is not aware of any related cases currently pending before the Court.

Dated: August 5, 2004 _____

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Certificate of service

I hereby certify that on this day of August 5, 2004 two copies of the “Petitioner’s Opening Brief” and all attachments thereto were served upon Counsel for the Respondent, by placing it in a United States mailbox, first class postage paid, addressed to:

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[1]

The NTA for Mrs. Cabrera was issued in her maiden name, Londy Patricia Hidalgo Mazariegos.

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Despite this authorization, the EOIR has granted on average only 1, 268 cancellation cases each year. This statistic suggests that the Board's application of the hardship standard may not be aligned with Congressional intent in providing for this relief. See, Excerpts of Letter from Senator Dianne Feinstein to Asa Hutchinson, Under Secretary for Border and Transportation Security at the

Department of Homeland Security, published in 81 Interpreter Releases 792-793 (June 21, 2004) (Senator Feinstein states that "these statistics are troubling because I believe that if Congress authorized a form of relief under the immigration laws, then its use should be maximized." The Senator also described the Board's practice of overturning cancellation grants by IJs on appeal as "especially worrisome.")

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"Special Inquiry Officer" refers to an Immigration Judge. The two terms have historically been used interchangeably. See former 8 C.F.R. § 1.1(l) (1996).

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See also, Voluntary Departure or Removal: Is There Any Difference? By Curtis Pierce and John Eric Marot, 78 Interpreter Releases 1889.