No. 13-1011

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

L.D.G.,

Petitioner,

v.

ERIC H. HOLDER, JR., Attorney General of the United States,

Respondent

PETITION FOR REVIEW FROM THE DISMISSAL OF APPEAL ISSUED BY THE BOARD OF IMMIGRATION APPEALS

REPLY BRIEF OF PETITIONER L.D.G.

[Oral Argument Requested]

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SUMMARY OF THE ARGUMENT

The issue on appeal is whether the Immigration Judge ("IJ") has authority to adjudicate waivers of inadmissibility relating to U-Visa applications under 8 U.S.C. § 1182(d)(3) ("the Statute" or "(d)(3)"). In her opening brief, L.D.G. demonstrated that based upon the plain language of the Statute and accepted rules of statutory construction, the answer to that question is clearly yes.

Recognizing that its interpretation does not comport with the plain language of the Statute, the Government attempts to end-run the Statute by focusing on unsupported conjecture relating to other statutory and regulatory provisions. Specifically, the Government relies on 8 U.S.C. § 1182(d)(14) ("(d)(14)") and USCIS regulations to attempt to write in exclusive authority for USCIS over U-Visa waivers where no such authority exists. While USCIS is granted authority to adjudicate U-Visa waivers under (d)(14), nothing in that section, (d)(3), or the rest of the immigration statutes, indicates that such USCIS authority is exclusive or precludes jurisdiction over waivers under (d)(3) by the IJ. The Government also distances itself from the BIA's misinterpretation of this Court's precedent related to retroactivity and waivers. The Government's concession that the waiver sought by L.D.G. was not retroactive is significant because it confirms that the only issue before the Court is the statutory construction of (d)(3).[1]

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[1] The Government mistakenly also suggests that L.D.G. seeks the Court's review of the Secretary's decision to deny L.D.G.'s application for a (d)(14) waiver. *See Confidential Brief for Respondent* ("Gov't Response") at 2, 14, and 17. But L.D.G. is not appealing

The Government's argument runs counter to the plain language of the Statute and lacks support in the case law. Further, the Government's interpretation would result in an unreasonable reading of the statutes that is not entitled to deference, is contrary to the Court's precedent and the IJ's historic practice of adjudicating waivers of inadmissibility, and would result in depriving individuals in removal proceedings from receiving proper protections. For these reasons, and those discussed in L.D.G.'s opening brief, the Court should rule in favor of L.D.G.

ARGUMENT

I. The Statute Grants Jurisdiction To The IJ To Adjudicate Waivers Of Inadmissibility In The U-Visa Context

As demonstrated in L.D.G.'s[2] opening brief, the Statute bestows upon the Attorney General the jurisdiction to adjudicate waivers of inadmissibility, including waivers of inadmissibility in the U-Visa context. 8 U.S.C. § 1182(d)(3). (*See* L.D.G.'s Opening Brief at 15-16). The term "Attorney General" necessarily includes the IJ,[3] (*see* L.D.G.'s Opening Brief at 16-19), and thus,

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the Secretary's denial of the U-Visa waiver application. Rather, as stated in her opening brief (*Opening Brief and Short Appendix of Petitioner L.D.G.* ("L.D.G.'s Opening Brief") at 3), L.D.G. seeks review of the final order issued by the BIA affirming the IJ's decision that it did not have jurisdiction to independently adjudicate L.D.G.'s waiver of inadmissibility relating to her U-Visa application. (RSA 0066).

[2] As the Government noted, (Gov't Response at 20-21), if L.D.G.'s appeal is successful, she will have an opportunity to obtain a U-Visa waiver, and thereby qualify for a U-Visa, which brings her within the ambit of confidentiality under 8 U.S.C. § 1367.

[3] The use of "Attorney General" includes the IJ because: (1) the phrase, as it was used at the time of drafting, included the IJ; (2) the phrase remains in the Statute despite multiple statutory amendments since the creation of DHS in 2002; and (3) Congress has chosen not to amend the Statute despite the courts consistently interpreting the

the plain language of the Statute grants authority to the IJ to adjudicate U-Visa waivers. Indeed, the IJ's jurisdiction under the Statute is so plain that the Government ignores the Statute altogether in its analysis.

A. The Court Must Give Effect To The Plain Reading Of The Statute

When a statute's language is clear, it must be given the ordinary or plain meaning of the words used. *Chevron, U.S.A. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837, 843 (1984). No other inquiry is appropriate. *Id.* Here, as L.D.G. demonstrated in her opening brief, the plain language of the Statute grants broad jurisdictional power to the Attorney General to adjudicate (d)(3) waivers of inadmissibility. (*See* L.D.G.'s Opening Brief at 15-16). The text of the Statute bestows on the Attorney General specifically the authority to admit a noncitizen who is inadmissible. This authority clearly extends to a noncitizen, like L.D.G., seeking a waiver of inadmissibility in the U-Visa context. 8 U.S.C. § 1182(d)(3)(ii). It is undisputed that L.D.G. possessed the appropriate documentation required for a U-Visa, including evidence that she was the victim of a crime and that she subsequently assisted police, letters of support, an affidavit, and medical documentation. (R. 485). Thus, the Attorney General (through its delegate, the IJ) could have, and should have adjudicated L.D.G.'s request for a waiver of inadmissibility.

By ignoring the plain language of the Statute and instead arguing that the only entity with jurisdiction to adjudicate waivers of inadmissibility is

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term to include the IJ. (*See* L.D.G.'s Opening Brief at 16-19). The Government does not contest this interpretation of Attorney General in its Response.

USCIS, the Government essentially asks the Court to erase the phrase "Attorney General" from the Statute and replace it with the word "Secretary." This improper reading of the Statute lacks any textual support and is belied by Congress's actions since drafting the Statute. Congress has affirmatively acted to change the statutory reference from "Attorney General" to "Secretary" or "Secretary of Homeland Security" in numerous statutes – including (d)(14), on which the Government relies – but chose not to make that same change in (d)(3).[4] Had Congress intended to re-write the Statute as the Government now advocates, it would have done so when that Public Law went into effect on January 5, 2006. Instead, Congress amended other portions of the Immigration and Nationality Act ("INA") but explicitly left the phrase "Attorney General" in 8 U.S.C. § 1182(d)(3).

B. Section 1182(d)(14) Does Not Grant USCIS "Exclusive" Power To Adjudicate Waivers Of Inadmissibility In The U-Visa Context

The statutory scheme makes clear that both the Attorney General and USCIS have jurisdiction to adjudicate waivers of inadmissibility in the U-Visa context. As discussed above and in L.D.G.'s opening brief, the Statute grants the Attorney General the power to adjudicate waivers of inadmissibility in the U-Visa context. L.D.G. does not dispute that Congress also granted USCIS

[4] Specifically, in 109 Pub. L.162, Congress replaced the phrase "Attorney General" with either "Secretary" or "Secretary of Homeland Security" in no fewer than twenty separate statutory references: 8 U.S.C. § 1101(a)(15)(T); 8 U.S.C. § 1101(a)(15)(U); 8 U.S.C. § 1101(i)(1) and § 1101(2); 8 U.S.C. § 1182(d)(13); 8 U.S.C. § 1182(d)(14); 8 U.S.C. § 1255(l); 8 U.S.C. § 1255(2); 8 U.S.C. § 1255(5); 8 U.S.C. § 12255(m)(1); 8 U.S.C. § 12255(m)(3); 8 U.S.C. § 12255(m)(4); 22 U.S.C. § 7105(e)(5); 22 U.S.C. § 7105(g); 22 U.S.C. § 7105(b)(1)(E); 22 U.S.C. § 7105(c); 22 U.S.C. § 7105(e); 8 U.S.C. § 1258; and 8 U.S.C. § 1184(d)(1).

jurisdiction to adjudicate waivers in the U-Visa context under (d)(14). Indeed, L.D.G.'s argument is that there are two statutory sections under which a U-Visa applicant may seek a waiver of inadmissibility – from the IJ via (d)(3) and from USCIS via (d)(14).[5] (L.D.G.'s Opening Brief at 14-16, 19-23).

But rather than concede that both the Attorney General and USCIS have jurisdiction to adjudicate U-Visa waivers, as supported by a plain reading of the relevant statutory provisions, the Government contends that USCIS has "exclusive[]" power to adjudicate the waivers under (d)(14).[6] (Gov't Response at 13). The Government's position is wholly unsupported by the statutory language.

Nothing in (d)(14) gives "exclusive" or "sole" authority to USCIS, as urged by the Government. Rather, (d)(14) provides that the Secretary "shall determine" if a ground of inadmissibility exists and may "in the Attorney General's discretion" grant a waiver of inadmissibility "if the Secretary of Homeland Security considers it to be in the public or national interest to do so." 8 U.S.C. § 1182(d)(14). In other words, (d)(14) grants jurisdiction to USCIS to adjudicate waivers, just as (d)(3) grants jurisdiction to the Attorney

[5] The Government claims that L.D.G.'s appeal to USCIS administrative appeals unit "would suggest" a failure to exhaust administrative remedies. (Gov't Response at 21, n. 6). But the Government fails to explain how the possibility of an appeal from a (d)(14) waiver denial would relate to the claim that the IJ and BIA had jurisdiction over the (d)(3) waiver. These are separate and distinct issues. Moreover, the Government's footnote, which contains only a bare citation to the general exhaustion rules, is itself insufficient to address the issue and constitutes forfeiture. *Long v. Teachers Ret. Sys. of Illinois*, 585 F.3d 344, 349 (7th Cir. 2009); *Eichwedel v. Chandler*, 696 F.3d 660, 669-70 (7th Cir. 2012).

[6] Moreover, the Government's emphasis on (d)(14) is a red herring insofar as it suggests that L.D.G. is seeking a waiver under (d)(14). L.D.G. unquestionably sought a "waiver[] of inadmissibility under [8 U.S.C. § 1182(d)(3)]" from the IJ. (RSA 13).

General to adjudicate waivers. Given the reference to the "Attorney General's discretion," it is doubtful that (d)(14) provides for exclusive jurisdiction to USCIS even in that context. But the Government would read (d)(14) as not only granting "exclusive" power to USCIS over (d)(14) waivers, but as implicitly ousting the Attorney General's jurisdiction under (d)(3). Such a reading would be contrary to the plain language of (d)(14), contrary to the statutory scheme as a whole, and would violate long-held rules of statutory construction. (*See* L.D.G.'s Opening Brief at 19-23). Unfortunately for the Government, repeatedly stating that (d)(14) grants "exclusive" jurisdiction to USCIS does not make it so.[7]

In purported support of its "exclusive" jurisdiction argument, the Government cites to multiple statutory sections and some case law. (*See, e.g.*, Gov't Brief at 12-15). Yet the majority of the authority cited by the Government relates to U-Visa applications generally and is not specific to waivers of inadmissibility. The only additional authority cited by the Government relating to U-Visa waivers specifically is 8 C.F.R. § 212.17 (hereinafter the "Regulation"), which the Government contends supports granting "exclusive" jurisdiction to the Secretary. (Gov't Brief at 13). The Regulation does not state

[7] *See* Gov't Response at 10 ("the decision to grant the waiver [is] within the exclusive authority of the Secretary" and "[t]he ultimate responsibility for granting … the U visa waiver, remains exclusively with the Secretary"), 11 ("It Is Plain On the Face of The Statute That The U Visa And The Waiver Are Reserved Exclusively To The Discretion of the Secretary"), 13 ("The Section 212(d)(14) waiver of inadmissibility … is exclusively in the jurisdiction of the Secretary"), 17 ("the statute specifically provides that the waiver of inadmissibility for a U visa is exclusively within the discretion of the Secretary"), 18 ("the waiver of inadmissibility [is] exclusively within the domain of the Secretary"), and 20 ("a Section 212(d)(14) waiver … is entrusted exclusively to the discretion of the Secretary").

that the Secretary's jurisdiction is exclusive. *See* 8 C.F.R. § 212.17(b)(1). Furthermore, even if the Regulation did purport to convey sole authority to the Secretary (it does not), such a reading would create an impermissible contradiction between a statute and regulation since the Statute clearly grants jurisdiction to the Attorney General. A regulation cannot trump a statute, and any regulation that purports to do so would be invalid. Therefore, the Government's reading would effectively invalidate the Regulation. *See In re Watson,* 161 F.3d 593, 598 (9th Cir. 1998)(citing *Chem. Mfrs. Ass'n v. Natural Resources Def. Council, Inc.,* 470 U.S. 116, 126 (1985)).

The only way to give effect to both the Statute and (d)(14) is also the most logical, namely reading them in conjunction to grant both the Attorney General and USCIS jurisdiction to adjudicate waivers of inadmissibility in the U-Visa context. This harmonious reading of the statutes is favored because it would not render one or the other "wholly superfluous" – a disfavored outcome when interpreting statutes. *See, e.g., Connecticut Nat'l Bank v. Germain,* 503 U.S. 249, 253-54 (1992). The existence of (d)(14) does not change the plain language in, or the jurisdiction granted by, the Statute.

II. The Government Is Not Entitled To Deference Because Its Interpretation Of The Relevant Statutes And Regulations Is Unreasonable

As L.D.G. demonstrated in her opening brief, an agency's unreasonable interpretation of a statute and regulation are not entitled to deference. (*See* L.D.G.'s Opening Brief at 31-34). Nonetheless, the Government argues that

USCIS and the IJ and BIA interpretations should be afforded deference. (Gov't Response at 11). This argument fails for multiple reasons.

First, the Court need not consider the issue of deference because Congress has already spoken directly to the matter at hand by granting the IJ and BIA jurisdiction to adjudicate waivers of inadmissibility in the U-Visa context via (d)(3). By drafting (d)(3) the way it did and deciding not to change the language from "Attorney General" to "Secretary," Congress has made its intention unambiguously clear and the Court need not defer to any agency's contrary interpretation. *See Chevron*, 467 U.S. at 842-43. Where a statute is unambiguous, as here, the agency's interpretation is afforded no deference. *Id.*

Second, the Court should not give deference because the interpretations of the USCIS, IJ, and BIA are unreasonable. Where an agency's interpretation of its statute or regulations is unreasonable, it is not afforded deference.[8] *Bowen v. Georgetown Univ. Hosp.,* 488 US 204, 212-13 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate"); *see also Henry v. INS*, 8 F.3d 426, 439 (7th Cir. 1993); *Lemus-Losa v. Holder*, 576 F.3d 752, 755-56 (7th Cir. 2009). Here, the language of (d)(3) clearly permits the IJ and BIA to adjudicate waivers of inadmissibility, and there is no countervailing statute that restricts that broad grant in the context of U-Visa waivers. The Government's argument

[8] As discussed in L.D.G.'s opening brief, the BIA's and IJ's interpretation of the Regulation is not entitled to deference because such deference is only afforded to an agency's official interpretation of its own regulation. (L.D.G.'s Opening Brief at 33 (citing *Auer v. Robbins*, 519 U.S. 452, 462-63 (1997)).

that USCIS has exclusive jurisdiction based on the Regulation is unsupported by the Regulation's own plain language. (L.D.G.'s Opening Brief at 22-22). Further, the agency's interpretation forces the Regulation to trump the Statute. A reading that fails to harmonize the statutes and regulation is unreasonable as a matter of law, and is not entitled to deference. (*See infra* at 7).

Third, as L.D.G. argued in her opening brief (L.D.G. Opening Brief at 32), the BIA's and IJ's interpretation of (d)(3) in this matter is not entitled to *Chevron* deference because the Court "do[es] not extend *Chevron* deference to non-precedential Board decisions that do not rely on binding board precedent." *Arobelidze v. Holder*, 653 F.3d 513, 520 (7th Cir. 2011); *see also Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) (according deference only to the extent agency decisions have "power to persuade"). In any event, the Government cites only one published BIA decision, *Matter of Sanchez Sosa*, 25 I&N Dec. 807, 811 (BIA 2012). (*See* Gov't Response at 13, 14). But *Sanchez Sosa* is inapposite because it does not even purport to address exclusive jurisdiction over waivers and nowhere cites the language in (d)(3) that plainly grants the Attorney General jurisdiction over (d)(3) waivers.

Finally, even if this Court finds there is ambiguity in the Statute (there is not), it must consider "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987); *see also INS v. St. Cyri,* 533 U.S. 289, 320 (2001) (same). Therefore, any resulting ambiguity from the Statute should be decided in favor of L.D.G.

III. The Government Fails To Meaningfully Address Many Of L.D.G.'s Arguments And, Therefore, Concedes Them

Aside from its general failure to analyze the Statute in any meaningful way, the Government also sidesteps or fails to address many key points raised in L.D.G.'s opening brief. The Government implicitly acknowledges that there is simply no way to reconcile the Government's argument with the realities raised by L.D.G., and the Court should reverse the BIA's decision for the following additional reasons.

First, the BIA and IJ both erred in holding that L.D.G.'s request for a waiver of inadmissibility in the U-Visa context was retroactive. (*See* L.D.G.'s Opening Brief at 29-31). Contrary to the Government's suggestion, this error cannot be ignored. In determining that it did not have jurisdiction to adjudicate L.D.G.'s waiver, the IJ incorrectly held (and the BIA later affirmed) that it could not adjudicate the waiver because L.D.G. sought a *nunc pro tunc* waiver. (RSA 0065-66 (finding that "the act leading to inadmissibility occurred in the past when [L.D.G.] entered the United States without inspection" and relying on *Borrego v. Mukasey*, 539 F.3d 689 (7th Cir. 2008))). The Government expressly acknowledges that the BIA's and IJ's reasoning was without merit and disavows reliance on it. (Gov't Response at 20, n.5). The Government suggests, however, that it can cherry pick from the Board's decision in order to achieve its desired result. (*Id.* (claiming that "the Board's reasoning relying on the U-visa context in this case is sound and sufficient to sustain the agency decisions")). But the BIA and IJ decisions are based only on the flawed analysis of jurisdiction under (d)(3) and an inaccurate application of

Borrego. In reality, the Government wants the Court to ignore the BIA's and IJ's reasoning and instead affirm on new grounds, namely purported exclusive jurisdiction to USCIS under (d)(14). The Government cannot ask this Court to affirm a decision that cannot be supported on the grounds proffered by the agency. *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943); *Shu Han Liu v. Holder*, 718 F.3d 706, 709-10 (7th Cir. 2013) (noting repeated *Chenery* violations in the immigration context).

Second, the grant of jurisdictional power over waivers of inadmissibility in the U-Visa context is consistent with the authority bestowed upon, and utilized by, the IJ in other, similar contexts. (L.D.G.'s Opening Brief at 23-27).[9] The Government once again downplays the significance of L.D.G.'s argument claiming "[t]hat there are other waivers of inadmissibility available in other contexts which may involve the Attorney General, consular officers, or the Secretary of State, does not provide a basis for departure from the plain meaning of Section 212(d)(14)." (Gov't Brief at 18). Not only is the Government's statement inaccurate (because as explained above, (d)(14) does not provide a basis for exclusive jurisdiction), it also dismisses a historic pattern of immigration court consideration of waivers. The Government itself

[9] In fact, the IJ already considers other types of waivers that could be sought in connection with a U-Visa application. (*See* L.D.G.'s Opening Brief at 35-36 (noting waivers for inadmissibility for being present without admission (8 U.S.C. § 1182(a)(6)(A)), present after removal order (8 U.S.C. § 1182(a)(9)(A)), present after period of unlawful presence (8 U.S.C. § 1182(a)(9)(B)), or unlawful reentry after removal (8 U.S.C. § 1182(A)(9)(C)). The Government's position here (that the IJ has no jurisdiction with respect to waivers in the U-Visa context) must be rejected because it would create the unnecessarily harsh result of depriving applicants for several types of waivers in connection with U-Visa applications, not just those seeking a waiver of inadmissibility on the basis of prior criminal convictions like L.D.G.

stresses the importance of considering an agency's interpretation of its regulations and relevant statutes, but then ignores the same logic when it is faced with the fact that the IJ traditionally adjudicates waivers in an array of contexts and should be allowed to do the same here.

Third, recognizing that the IJ has jurisdiction to adjudicate waivers of inadmissibility in the U-Visa context is necessary to ensure procedural and due process protections required for non-citizens in removal proceedings. (*See* L.D.G.'s Opening Brief at 34-36). This point is vitally significant to non-citizens in removal proceedings. But the Government ignores it completely presumably because it recognizes that the Government's interpretation would deprive such individuals of fair process and would produce "harsh results" Congress could not have intended. (L.D.G.'s Opening Brief at 36 (quoting *Hernandez v. Ashcroft*, 345 F.3d 824, 840 (9th Cir. 2003))). Upholding the IJ's jurisdiction to adjudicate waivers would ensure non-citizens in removal proceedings receive the requisite impartial adjudicator, the right to present evidence and cross-examine witnesses, and the opportunity to present arguments through counsel, before being ordered removed. 8 U.S.C. § 1229a(b)(4)(B). Noncitizens, such as L.D.G., are already in removal proceedings pending before the IJ; the adjudication of waivers would impose a minimal burden while helping to ensure a fair hearing. The Government does not, and cannot, dispute this important issue.

CONCLUSION

Nothing in the Government's response refutes the fact that the Attorney General – whose delegates include the IJ and BIA - has statutory authority to adjudicate waivers of inadmissibility relating to U-Visa applications under (d)(3). The Government's claim that USCIS has "exclusive" jurisdiction over U-Visa waivers is belied by the plain language of (d)(3) and (d)(14), and by Congressional action which reallocated authority in some contexts but did not purport to reallocate authority in the (d)(3) context.

Even if the statutes were ambiguous, the interpretation of the agency would be unreasonable because it impermissibly creates a conflict between a regulation and a statute, is contrary to the IJ's historical practice of adjudicating waivers of inadmissibility, and would result in the deprivation of due process protections. L.D.G. respectfully requests this Court rule in her favor, vacate the BIA's decision that L.D.G. is subject to removal, reverse the opinion of the BIA, and remand this matter back to the IJ for a full and fair adjudication of L.D.G.'s waiver of inadmissibility.

Dated: October 1, 2013

Respectfully submitted,

/s/ Megan E. Thibert-Ind

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This Brief complies with the type-volume limitation of Rule 28.1(e) of the Federal Rules of Appellate Procedure because, according to the "word count" function of Microsoft Word 2010, the Brief contains 3,615 words, excluding the parts of the Brief exempted from the word count by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure.

I hereby certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 12-point font and Bookman Old Style type style.

Dated: October 1, 2013

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CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2013, I electronically filed the foregoing Reply Brief of Petitioner L.D.G. with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system.

Dated: October 1, 2013

/s/ *Megan E. Thibert-Ind*
One of L.D.G's Attorneys

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