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PRACTICE ADVISORY[1]

TERMINATING REMOVAL PROCEEDINGS TO PURSUE NATURALIZATION BEFORE USCIS: STRATEGIES FOR CHALLENGING *MATTER OF ACOSTA HIDALGO*

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Section 318 of the Immigration and Nationality Act (INA), 8 U.S.C. § 1429, precludes the Attorney General from adjudicating a naturalization application while the applicant is in removal proceedings. However, the regulation at 8 C.F.R. § 1239.2(f) authorizes immigration judges to terminate removal proceedings to permit a noncitizen to pursue a naturalization application before the United States Citizenship and Immigration Services (USCIS) of the Department of Homeland Security (DHS). Specifically, it authorizes immigration judges to terminate removal proceedings to allow a person to pursue naturalization if two elements are met: (1) the alien establishes prima facie eligibility for naturalization; and (2) the case involves exceptionally appealing or humanitarian factors. In *Matter of Acosta Hidalgo*, 24 I&N Dec. 103 (BIA 2007), the BIA held that immigration judges lack jurisdiction to determine whether a respondent is prima facie eligible for naturalization, and that only DHS could make this determination. *Matter of Acosta Hidalgo*, 24 I&N Dec. at 106. DHS has no procedure in place to make such a determination and generally does not do so.

This practice advisory discusses 8 C.F.R. § 1239.2(f) and the BIA's interpretation of it in *Matter of Acosta Hidalgo.* It suggests legal arguments challenging the decision that practitioners may raise before the immigration courts and Board to preserve these issues. As of the date of this advisory, both the Second and Ninth Circuits have upheld *Matter of Acosta Hidalgo*. *Perriello v. Napolitano,* No. 05-2868, __ F.3d __, 2009 U.S. App. LEXIS 19595 (2d Cir. Sept. 1, 2009); *Hernandez de Anderson v. Gonzales,* 497 F.3d 927

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(9th Cir. 2007). Although *Perriello* and *Hernandez de Anderson* are binding precedent for cases which arise within the Second and Ninth Circuits, *Matter of Acosta Hidalgo* remains open to challenge in all other circuits.

What did the BIA hold in *Matter of Acosta Hidalgo*?

The Board held that immigration judges lack jurisdiction to assess whether a person is prima facie eligible for naturalization for purposes of terminating a removal proceeding under 8 C.F.R. § 1239.2(f). *Acosta Hidalgo*, 24 I&N Dec. at 106. According to the Board, only DHS may make this assessment and therefore meet the regulatory burden of proving this element. The Board further advises that DHS must provide affirmative proof of prima facie eligibility before an immigration judge may exercise the regulatory authority to terminate proceedings. Thus, under the Board's interpretation, DHS has conflicting roles in the removal proceedings: as a prosecutor; as an adjudicator of prima facie eligibility for naturalization; and finally, as a presenter of evidence.

The Board heavily relied on its prior decision in *Matter of Cruz*, 15 I&N Dec. 236 (BIA 1975). Although the Board acknowledged that, in adjudicating other relief applications, immigration judges routinely adjudicate some of the same statutory requirements as those for naturalization, *Acosta Hidalgo*, 24 I&N Dec. at 106 n.8, it somehow concluded that, because the Board and immigration judges do not have jurisdiction to ultimately decide a naturalization application, they therefore must lack jurisdiction to determine whether a person has made a prima facie showing of eligibility for naturalization. *Acosta Hidalgo*, 24 I&N Dec. at 106.

What is the impact of *Matter of Acosta Hidalgo*?

As a result of the BIA's decision, absent an affirmative communication from DHS, immigration judges are without authority to terminate removal proceedings against persons who can otherwise demonstrate both prima facie eligibility for naturalization and compelling humanitarian circumstances. In these cases, immigration judges can only adjudicate other existing applications for relief from removal. Where no alternative relief exists, they are compelled to order the non-citizen's removal no matter how strong the naturalization case or how compelling the humanitarian circumstances. From a practical standpoint, the result is that few cases will be terminated under the regulation.[2] As *Matter of Acosta-Hidalgo* demonstrates, USCIS does not have a procedure for determining prima facie naturalization eligibility - and certainly has no procedure that can be invoked by a person in removal proceedings - and USCIS has no funds to take on this additional adjudicatory role.

[2] In compelling cases, it may be possible for a representative to negotiate with DHS for resolution of the case in the exercise of the DHS trial attorney's prosecutorial discretion. *See* ICE Memo on Prosecutorial Discretion (10/24/2005), http://www.aila.org/content/fileviewer.aspx?docid=19310&linkid=145122.

Can I challenge the Board's interpretation of 8 C.F.R. § 1239.2(f)?

Yes. Challenges to the decision can be raised both before the immigration judge and/or the BIA. If not raised there, the government may argue the respondent failed to "exhaust" the issue and thus cannot challenge the BIA's interpretation before the courts of appeals on petitions for review. However, even if the issue was not raised before the immigration judge and/or BIA, some circuit courts nonetheless may review the issue under the futility exception to exhaustion. That is, a court could find that challenging the BIA's interpretation of 8 C.F.R. § 1239(f) set forth in *Matter of Acosta Hidalgo* before the immigration judge or BIA is futile, and thus not required, because immigration judges are bound by the decision and the BIA already has a position on the issue (*i.e.* the *Matter of Acosta Hidalgo* decision).

What legal arguments can I raise to challenge the Board's interpretation of 8 C.F.R. § 1239.2(f) as set forth in *Matter of Acosta Hidalgo*?

A practitioner seeking to challenge the Board's interpretation may raise the following legal arguments:

1. *Acosta-Hidalgo* violates the plain language of 8 C.F.R. § 1239.2(f).

An agency's construction of a regulation is not entitled to deference by a reviewing court where it is plainly erroneous or inconsistent with the language of the regulation. *Auer v. Robbins*, 519 U.S. 452, 461 (1997). Here, there are several reasons why the BIA's decision in *Acosta-Hidalgo* violates the plain language of 8 C.F.R. § 1239.2(f).

a. *Acosta-Hidalgo* denies the non-citizen the opportunity to meet his or her burden of establishing prima facie eligibility for naturalization.

The plain language of the regulation authorizes an immigration judge to terminate removal proceedings so that the non-citizen can pursue naturalization "when the alien has established" prima facie eligibility for naturalization. 8 C.F.R. § 1239.2(f). Thus, the regulation fixes the burden of showing prima facie eligibility on the non-citizen.

Acosta-Hidalgo violates this plain language in that it deprives the non-citizen of the ability to meet this regulatory burden independently. This decision provides that the only evidence sufficient to establish prima facie eligibility must come from DHS. Thus, the non-citizen is entirely dependant on DHS for the "affirmative communication" of eligibility. However, there is no procedure for DHS to adjudicate prima facie eligibility, and no procedure for the respondent to seek such adjudication. The BIA's construction of the regulation contorts its plain meaning by requiring that DHS decide prima facie eligibility and by forbidding the non-citizen from establishing prima facie eligibility to the satisfaction of the immigration judge.

b. *Acosta-Hidalgo* confuses the ultimate determination of eligibility with prima facie eligibility.

In *Acosta-Hidalgo,* the BIA reasoned that neither it nor an immigration judge has jurisdiction to determine a non-citizen's eligibility for naturalization. *Acosta-Hidalgo*, 24 I&N Dec. at 105-06. This reasoning violates the plain language of the regulation in that it fails to recognize the distinction between the immigration judge's jurisdiction to terminate proceedings, which includes as one element a review of a non-citizen's prima facie eligibility for naturalization, and DHS's ultimate jurisdiction over the merits of the naturalization application.

The regulation requires only a showing of facial eligibility, not a final determination of eligibility. "Prima facie" means "[a]t first sight, on the first appearance but subject to further evidence or information …. Sufficient to establish a fact or raise a presumption unless disproved or rebutted." Black's Law Dictionary, 7th edition, p. 1209 (1999). In assessing whether a person established prima facie eligibility for asylum, the Board has defined it as a "'realistic chance' that [the applicant] will be able to establish eligibility." *Matter of S—Y—G—*, 24 I&N Dec. 247 (BIA 2007). In *Matter of Acosta Hidalgo,* the BIA misunderstood the distinction and equated a determination of whether the applicant had established prima facie eligibility with an adjudication of the naturalization application. The fact that DHS can make the ultimate determination on naturalization has no bearing on the immigration judge's jurisdiction to determine a non-citizen's *prima facie* eligibility for naturalization as one element of a decision whether to terminate proceedings under 8 C.F.R. § 1239.2(f).

In a somewhat parallel situation, the Fourth Circuit Court of Appeals held that the BIA erred when it ruled that an immigration judge lacked jurisdiction to adjudicate a factual predicate to the ongoing validity of a visa petition simply because DHS has ultimate jurisdiction over the visa petition itself. The court found that the BIA failed to distinguish between the immigration judge's jurisdiction to determine the ongoing validity of a visa petition versus DHS's jurisdiction to grant or deny the visa petition. *Perez-Vargas v. Gonzales*, 478 F.3d 191 (4th Cir. 2007) (vacating *Matter of Perez-Vargas,* 23 I&N Dec. 829 (BIA 2005)); *see also Matovski v. Gonzales*, 492 F.3d 722 (6th Cir. 2007) (reaching same conclusion); *Sung v. Keisler,* 505 F.3d 372 (5th Cir. 2007) (agreeing with and adopting Fourth Circuit's reasoning).

The BIA has exhibited the same confusion here between an immigration judge's jurisdiction over a motion to terminate – which includes as an element a determination that the applicant has adduced sufficient evidence to establish prima facie eligibility – and USCIS's jurisdiction to ultimately grant or deny a naturalization application.

c. *Acosta-Hidalgo* violates the regulation by eliminating the immigration judge's discretion to terminate removal proceedings.

Under its plain language, 8 C.F.R. § 1239.2(f) gives an immigration judge discretion to terminate proceedings when a non-citizen has established prima facie eligibility for naturalization and when the case involves certain exceptional factors. The BIA's interpretation of this regulation eliminates an immigration judge's discretion, in violation of the plain language of the regulation, in every case in which DHS fails to submit prima facie evidence of naturalization. In practical terms, this will be in the vast majority, if not all, cases since DHS has no procedural mechanism in place to make such a prima facie determination. The BIA decision gives DHS, the prosecutor in the case, the unfettered authority to prevent termination simply by failing to produce affirmative evidence of prima facie eligibility for naturalization, and eliminates both the immigration judge's discretion over the issue and the opportunity of an individualized determination of the issue by an impartial adjudicator.

2. The BIA's claim in *Acosta-Hidalgo* that the Board and immigration judges lack the necessary expertise to decide prima facie naturalization eligibility is baseless.

Although acknowledging that the BIA has jurisdiction (and expertise) over citizenship claims, the BIA erroneously claims that immigration judges and the BIA have no expertise to determine whether the applicant has established prima facie eligibility for naturalization. Such determinations only require that an adjudicator interpret the law and consider the weight of the evidence in light of legal standards, something immigration judges do every day. Moreover, in other contexts, immigration judges often adjudicate many of the same statutory requirements as those for naturalization, such as good moral character and continuous physical presence. Finally, immigration judges regularly adjudicate citizenship claims which are often more complex than naturalization claims.

3. *Acosta-Hidalgo's* interpretation of the regulation conflicts with 8 U.S.C. § 1229a(a).

Under the INA, immigration judges have exclusive authority to conduct removal proceedings. 8 U.S.C. § 1229a(a). *Acosta-Hidalgo* conflicts with the plain language of the statute and Congressional intent by divesting immigration judges of their authority to conduct and terminate removal proceedings.

Have any Courts of Appeals Addressed *Matter of Acosta Hidalgo*?

The Second and Ninth Circuits have upheld *Matter of Acosta Hidalgo. Perriello v. Napolitano,* No. 05-2868, __ F.3d __, 2009 U.S. App. LEXIS 19595 (2d Cir. Sept. 1,

2009); *Hernandez de Anderson v. Gonzales*, 497 F.3d 927 (9th Cir. 2007). In *Perriello*, the BIA upheld the immigration judge's refusal to terminate removal proceedings so that Perriello could file and pursue a naturalization application before the immigration service. The BIA also affirmed the order of removal. In the court of appeals, Perriello challenged *Matter of Acosta Hidalgo.* The Second Circuit reviewed the history of amendments to the naturalization statute and suggested that the regulation was not in accord with these statutory amendments.[3] Nonetheless, it then denied the petition for review for two reasons.

First, it deferred to the BIA's interpretation of the regulation in *Matter of Acosta Hidalgo*, finding that this interpretation was neither "plainly erroneous [n]or inconsistent with the regulation." *Perriello*, 2009 U.S. App. LEXIS 19595 at *17 (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)). Second, the court relied upon 8 U.S.C. § 1429, the statutory bar to the Attorney General's consideration of naturalization applications while removal proceedings were pending. The court stated that that "[i]t would be odd if the Attorney General and the district courts were barred from considering naturalization applications while removal proceedings are pending, yet the BIA and IJs – who have no jurisdiction over such applications in any case – were not." *Id.* at *17-18. The court left open the question of whether a noncitizen could benefit from 8 C.F.R. § 1239.2(f) if the naturalization application was pending at the time that removal proceedings commenced.

The Ninth Circuit also upheld *Matter of Acosta-Hidalgo* in *Hernandez de Anderson*, specifically finding that the Board's interpretation of the regulation was not plainly erroneous and also not inconsistent with behind the regulation. *Hernandez de Anderson*, 497 F.3d at 933-35.

Perriello and *Hernandez de Anderson* are binding precedent for cases which arise within the Second and Ninth Circuits. No other court of appeals has decided the issue, however, and thus *Matter of Acosta Hidalgo* remains open to challenge in all other circuits.

[3] The court also suggested that it was up to DHS or Congress to reconcile the regulation with the statute. *Perriello*, 2009 U.S. App. LEXIS 19595, at 18.