07-1187-ag

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RAVIDATH LAWRENCE RAGBIR,

Petitioner,

v.

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

Respondent.

ON PETITION FOR REVIEW FROM THE BOARD OF IMMIGRATION APPEALS

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER'S REQUEST FOR PANEL REHEARING AND REHEARING *EN BANC*

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INTRODUCTION

The Court should grant Mr. Ragbir's request for rehearing and rehearing *en banc* pursuant to Fed. R. App. P. 35 and 40 because this case involves an improper expansion of the futility doctrine. Normally, the Court invokes the futility doctrine when it declines to remand because there are *de minimis* errors by the agency below. See Cao He Lin v. U.S. Dep't of Justice, 428 F.3d 391, 401 (2005). However, in the case at hand, the Court is declining to remand pursuant to the futility doctrine where there has been an intervening change in the law since the case was before the agency.

While this case was pending before this Court, the Supreme Court decided Nijhawan v. Holder, 129 S. Ct. 2294 (2009). Nijhawan not only changed the standard for determining removability for aggravated felony offenses involving fraud as defined in INA § 101(a)(43)(M)(i), 8 U.S.C. § 1101(a)(43)(M)(i), but the decision also changed the type of evidence that can be considered in making such a determination. As an organization involved in the briefing of Nijhawan before the Supreme Court, and whose members now represent noncitizens who are litigating their cases under the new standard before the agency, *amicus curiae* respectfully request that this Court rehear this case.

As with many petitioners who are affected by this change in law, Mr. Ragbir sought remand not only for the Board of Immigration Appeals to consider his

removability under the new standard under Nijhawan in the first instance, but also for the opportunity to submit sentencing documents that were not previously relevant to the aggravated felony inquiry, which are now relevant to the aggravated felony inquiry in light of Nijhawan. Pet. Br. at 42-50 and Reply Br. at 25-30. The Court considered *de novo* Mr. Ragbir's arguments relating to his removabilty under Nijhawan, which were never considered by the Board, declined to remand pursuant to the futility doctrine and dismissed his petition for review.

The Panel's invocation of the futility doctrine to engage in *de novo* review of issues not considered by the Board conflicts with such Supreme Court decisions as SEC v. Chenery, 318 U.S. 80, 88 (1943), INS v. Ventura, 537 U.S. 12, 16 (2002), and Gonzales v. Thomas, 547 U.S. 183, 185 (2006). This Court's decision in Cao He Lin v. U.S. Dep't of Justice, 428 F.3d 391 (2005), does not authorize such *de novo* review. Finally, by utilizing the futility doctrine to preclude remand when there has been a change in law, Mr. Ragbir and aliens like him are being denied the fair opportunity and due process to address the new issues before the agency that the change in law brings.

STATEMENT OF INTEREST

The American Immigration Lawyers Association ("AILA") is a national association with more than 11,000 members throughout the United States,

including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before the Department of Homeland Security and before the Executive Office for Immigration Review (immigration courts), as well as before the United States District Courts, Courts of Appeals, and the Supreme Court of the United States.

DISCUSSION

I. THE DECISIONS OF THE SUPREME COURT AND THIS COURT DO NOT PERMIT THIS COURT TO RENDER A DECISION BASED UPON A LEGAL STANDARD AND EVIDENCE NOT CONSIDERED BY THE AGENCY BELOW.

The Board's decision ordering Mr. Ragbir removed did not utilize the Supreme Court's "circumstance specific analysis" and did not consider the Pre-Sentence Investigation Report ("PSR"). J.A. at 2-6. However, in denying Mr. Ragbir's petition for review, this Court utilized the Supreme Court's "circumstance specific analysis" and considered the PSR. Decision at 6-7, n. 5. In

NLRB v. Kentucky River Cmty. Care, Inc., 532 U.S. 706, 721 (2001), the Supreme Court held that "we may not enforce an agency's order by applying a legal standard the agency did not adopt." This Court has applied Kentucky in immigration cases, such as Matadin v. Mukasey, 546 F.3d 85, 92-93 (2d Cir. 2008) and Jigme Wangchuck v. DHS, 448 F.3d 524, 531-533 (2d Cir. 2006).

In SEC v. Chenery, 318 U.S. 80, 88 (1943), the Supreme Court held that, "[i]f an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment." The Supreme Court invoked Chenery in INS v. Ventura, 537 U.S. 12, 16 (2002), where the Supreme Court vacated a Ninth Circuit decision granting asylum based upon a changed circumstances claim that had not been considered by the Board and directed that the matter be remanded to the Board for consideration of the claim in the first instance.

Four years later, in Gonzales v. Thomas, 547 U.S. 183, 185 (2006), the Supreme Court vacated a second Ninth Circuit asylum decision based upon Chenery because the Ninth Circuit found that the Board failed to address a claim based upon social group and then granted relief upon that same social group claim the Board did not address. Both Ventura and Thomas expressly reject courts of

appeals considering matters *de novo* and stress that except for "rare circumstances," courts of appeals should remand to the agency for "additional investigation or explanation" in such circumstances. Ventura at 16; Thomas at 185. This Court has stated that under Ventura and Thomas, "a reviewing court should ordinarily remand rather than pass upon a matter that . . . has not yet been considered by the BIA." Shi Liang Lin v. U.S. Dep't of Justice, 494 F.3d 296, 313 n.15 (2d Cir. 2007) (*en banc*). Thus, the Court's failure to remand conflicts with Chenery, Ventura, and Gonzales.

II. CAO HE LIN DOES NOT INDICATE THAT THE FUTILITY DOCTRINE CAN BE UTILIZED WHERE THE COURT IS CONSIDERING A DIFFERENT STANDARD OF LAW AND EVIDENCE FROM THE AGENCY BELOW.

The futility doctrine does not authorize a *de novo* review of the evidence as the Court did in Mr. Ragbir's case. The Court's decision quotes Cao He Lin v. U.S. Dep't of Justice, 428 F.3d 391 (2005), for the proposition that "'we are not required to remand where there is no realistic possibility that, *absent the errors*, the IJ or BIA would have reached a different conclusion.'" Decision at 9 (quoting Cao He Lin at 401) (emphasis added). As the quote used by the Court indicates, Cao He Lin involves Immigration Judge and Board of Immigration Appeals errors. In the case at hand, the Court engaged in *de novo* review of the record to consider

evidence and arguments not considered by the Board because it was raised for the first time due to a change in the law. It should be noted that this Court's decision in Cao He Lin cited to Chenery and stated, "[t]o assume a hypothetical basis for the IJ's determination, even one based in the record, would usurp her role." 428 F.3d at 400. Thus, this Court's futility doctrine was never intended to be expanded to a case like Mr. Ragbir's case.

III. NIJHAWAN AND DUE PROCESS REQUIRE REMAND FOR MR. RAGBIR TO HAVE THE FAIR OPPORTUNITY TO ADDRESS THE NEW STANDARD AND PRESENT REBUTTAL EVIDENCE BEFORE ANY FINDING OF REMOVABILITY CAN BE MADE AGAINST HIM.

Aliens in the position of Mr. Ragbir should be entitled to remand pursuant to Nijhawan. In Nijhawan, the alien focused on defending the case on the basis that the standard should be the categorical approach. Mr. Nijhawan does not appear to have disputed that he was removable under the standard adopted by the Supreme Court because the decision specifically states that Mr. Nijhawan did not cite to any conflicting evidence. 129 S. Ct. at 2303. For aliens like Mr. Ragbir, who do claim that there is conflicting evidence, there should be remand.[1] See,

[1]Mr. Ragbir cited to the PSR in the record and argued that according to the PSR "the restitution order appears to have been based on the existence of a stipulation of loss that included loss from unindicted amounts." Pet. Br. at 40, n.17. Mr. Ragbir sought remand to submit the sentencing transcripts and other evidence to clarify the inclusion of unindicted losses in the restitution order. Pet.

e.g., Matter of Babaisakov, 24 I. & N. Dec. 306, 323 (BIA 2007) (the Board remanded for consideration of evidence outside of the record of conviction after deciding to permit an ordinary evidentiary inquiry into whether the loss associated with the fraudulent conduct encompassed by the conviction exceeds $10,000).

Nijhawan held that, in the context of determining the particular circumstances in which a crime was committed, an immigration judge is permitted to review a broader range of documents as long as an alien is given a "fair opportunity" to dispute the pertinent claim, and as long as the "clear and convincing" standard is met. 129 S. Ct. at 2303. By denying Mr. Ragbir's request for remand, he has been denied this fair opportunity that is required by Nijhawan. Such a denial of a fair opportunity to be heard under the new standard should be a violation of due process. See, e.g., Burger v. Gonzales, 498 F.3d 131, 134-35 (2d Cir. 2007) (finding that the Board's use of administratively noticed facts without providing the alien an opportunity to respond violates due process).

Br. at 49-50. In finding Mr. Ragbir removable, the Court cited to the PSR, while fully acknowledging that it was not considered by the Board. Decision at 6, n.5. AILA takes no position on the merits of the Petitioner's claims that he did not cause a loss of more than $10,000.

CONCLUSION

Based upon the foregoing, *Amicus* requests that Mr. Ragbir's petition for panel rehearing and rehearing *en banc* be granted.

Dated: New York, New York
October 1, 2010

Respectfully submitted,

American Immigration
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CERTIFICATE OF SERVICE

I, Matthew L. Guadagno, solemly swear under penalty of perjury:

1. I am employed in the office of Bretz and Coven, LLP.

2. On the 1st day of October 2010, I served two copies of the within

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER'S REQUEST FOR PANEL REHEARING AND REHEARING EN BANC

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Dated: New York, New York
October 1, 2010

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Matthew L. Guadagno

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