UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FERNANDO TORRES RUIZ,

Petitioner,

v.

ERIC H. HOLDER, JR.,
UNITED STATES ATTORNEY GENERAL,

Respondent.

Docket No: 12-1741-ag

Alien No: A087 443 510

MEMORANDUM OF LAW ON BEHALF OF *AMICUS CURIAE* AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN OPPOSITION TO THE MOTION TO DISMISS

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.[1] 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

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[1] No party's counsel authored this brief in whole or in part; no party or party's counsel, nor any person besides *Amicus* and counsel, made a monetary contribution intended to fund preparing or submitting this brief. Fed.R.App.P. 29(c)(5).

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 and Board of Immigration Appeals), as well as before the United States District Courts, Courts of Appeals, and the Supreme Court of the United States.

As one of the preeminent organizations in the immigration litigation field, AILA has a significant interest in jurisdictional issues relating to petitions for review.

DISCUSSION

I. IN LIGHT OF THE IMPORTANCE OF THE JURISDICTIONAL ISSUE INVOLVED IN THE CASE AT HAND, THE COURT IS RESPECTFULLY REQUESTED TO RENDER A PRECEDENT DECISION IN THIS MATTER.

AILA respectfully requests that in deciding the motion to dismiss, the Court render a precedent decision. The case at hand presents an issue of first impression for this Circuit: whether a decision of the Board that remands to the Immigration Judge for background checks pursuant to 8 C.F.R. § 1003.47(h) is a final order that a petition for review may be filed from. The case at hand involves a question of jurisdiction. Petitioners need to know when to file their petitions for review. There should not be any ambiguities in the law about when a petition for review

should be filed.

The Court should issue a precedent decision in this matter because this issue appears to be likely to reoccur. Last year, this Court dismissed a petition for review that was filed from a Board decision remanding for background checks by a non-precedential summary order. Sardar v. Holder, Dkt. No 11-012-ag (2d Cir. Dec. 6, 2011). The Seventh and Ninth Circuits have held that petitions for review can be filed from a BIA decision remanding for background checks. Viracacha v. Mukasey, 518 F.3d 511 (7th Cir.2008); Junming Li v. Holder, 656 F.3d 898 (9th Cir. 2011). The Third Circuit has held in separate decisions that the petition for review can be filed from either the BIA decision remanding for background checks or the Immigration Judge's decision. Yusupov v. Att'y Gen., 518 F.3d 185 (3d Cir. 2008); Vakker v. Att'y Gen., 519 F.3d 143 (3d Cir.2008).[2]

II. INSTEAD OF TRYING TO APPLY THE FACTS OF ALIBASIC OR CHUPINA TO THE CASE AT HAND, THE COURT SHOULD APPLY THE STANDARD FROM LAZO TO CONCLUDE THAT THE BOARD'S ORDER REMANDING TO THE IMMIGRATION JUDGE FOR BACKGROUND CHECKS IS A FINAL ORDER.

[2]In Vakker, the Government's litigation position was the opposite of the position that has been presented in the case at hand. Vakker has the "reverse" facts of the case at hand. In Vakker, there was a remand for background checks and the petition for review was filed from the Immigration Judge's decision, and not the Board decision remanding for background checks. In Vakker, the Government sought dismissal and argued that the petition for review should have been filed from the Board decision.

The parties cite to two conflicting cases. The petitioner relies upon Alibasic v. Mukasey, 547 F.3d 78 (2d Cir. 2008), which held that when the Board dismisses an appeal of a denial of asylum, withholding, and Convention Against Torture (CAT), but remands to an Immigration Judge to consider voluntary departure, a petition for review may be filed from the BIA's dismissal of the appeal. The respondent relies upon Chupina v. Holder, 570 F.3d 99 (2d Cir. 2009), which held that when the BIA denies asylum, but remands for consideration of withholding and relief under the CAT, the Court does not have jurisdiction of the BIA decision denying asylum. The Court further held that if Chupina was granted withholding and did not wish to file an appeal to the BIA, a petition for review could be filed with the Second Circuit from the Immigration Judge's decision challenging the prior asylum denial.

At first blush, it appears that this case should come down to whether the Court should apply Alibasic or Chupina. However, both decisions are factually distinguishable from the case at hand since neither case involves a remand from the Board for background checks. Despite their differences, both decisions have something in common. Both decisions apply the reasoning of Lazo v. Gonzales, 462 F.3d 53 (2d Cir. 2007) to reach different outcomes.

In Lazo, this Court held that "the statutory requirement of an order of

removal is satisfied when ... the IJ either orders removal or concludes that an alien is removable." 462 F.3d at 54. Based upon Lazo, the Court in Albasic looked to whether the finding of removability "still stands," in order to determine whether or not the case was final. 547 F.3d at 83. The Court in Alibasic concluded that when the Board remands for consideration of voluntary departure, the finding of removability still stands, so that the denial of asylum is reviewable.

Despite the fact that there was a different result from Alibasic, the Court's decision in Chupina also followed Lazo. 570 F.3d 104-105. In applying the facts of Chupina to Lazo, this Court held that a decision of the Board that denied asylum, but remanded for consideration of withholding of removal and relief under the Convention Against Torture (CAT) did not have a finding of removability that stood because issuing an order of removability is inherent with withholding and CAT relief. 570 F.3d 104-105.

In order to apply Lazo to the case at hand, the Court must analyze what occurs when the Board remands for background checks. In Matter of M-D-, 24 I. & N. Dec. 138, 141 (BIA 2007), the Board held that when "a case is remanded to an Immigration Judge for the appropriate background checks pursuant to 8 C.F.R. § 1003.47(h), the Immigration Judge reacquires jurisdiction over the proceedings . . . [and] since no final order exists and a remand has traditionally been treated as

effective for all purposes, the Immigration Judge has authority to consider additional evidence *if it is material, was not previously available, and could not have been discovered or presented at the former hearing*." (Emphasis added). Based upon Matter of M-D-, for anything substantive to occur before the Immigration Judge when a case is remanded for background checks, the standard for a motion to reopen must be met. See 8 C.F.R. § 1003.23(b). A decision to reopen or reconsider is considered separate and distinct from a decision denying an appeal. Stone v. INS, 514 US 386 (1995).[3]

The decisions of the Seventh Circuit and Third Circuit that have found that a petition for review may be filed from a Board order remanding for background checks should be deemed persuasive authority based upon their reasoning. In holding that when there is a remand for background checks, a petition for review may be filed from the Board's order, the Seventh Circuit looked to its decision in Zharen v. Gonzales, 487 F.3d 1039 (7th Cir. 2007). Zharen is very similar to this Court's decision Alibasic. In Zharen, the Seventh Circuit held that when the Board dismisses an appeal, but remands for voluntary departure, a petition for review may be filed from the Board's decision. In Yusupov, the Third Circuit

[3]Thus, when the Board remanded the petitioner's case to the Immigration Judge for background checks, the prior finding of removability still stood.

decision concluded that a petition for review could be filed from a Board order remanding for background checks based upon Lazo, which this Court relied upon in Alibasic and Chupina.

III. THE FACT THAT THE BOARD HAS HELD THAT AN IMMIGRATION JUDGE'S DECISION THAT IS RENDERED AFTER A REMAND FOR BACKGROUND CHECKS IS A FINAL ADMINISTRATIVE ORDER, DOES NOT MEAN THAT THE IMMIGRATION JUDGE'S ORDER IS A FINAL ORDER OF REMOVAL FOR PURPOSES OF INA § 242(a)(1).

In Matter of Alcantara, 23 I. & N. Dec. 882, 885 (BIA 2006), the Board held that when a case is remanded to the Immigration Judge for background checks and the Immigration Judge issues an order granting relief, that order becomes the "final administrative order in the case." Just because the Board has stated that the Immigration Judge's decision constitutes the "final administrative order" does not mean that the Immigration Judge's decision is a "final order of removal" for purposes of INA § 242(a)(1). Determining whether or not a decision is a final order of removal is done by applying the standard in Lazo. Finality for purposes of INA § 242(a)(1) is pure question of law that should be subject to *de novo* review. Moreover, an agency cannot promulgate regulations that limit federal jurisdiction. See Naghi v. INS, 219 F.3d 1166 (10th Cir. 2000) (regulation setting 120 day deadline to file action in District Court was invalid).

CONCLUSION

Based upon the foregoing, AILA respectfully requests the Court to address the jurisdictional questions presented in a precedent decision following merits briefing in this matter, and not to rule dispositively on the case at this juncture.

Dated: New York, New York
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Respectfully submitted,

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