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The Child Status Protection Act is to protect children

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Nino Arobelidze ("Nino") and her mother came to the United States on temporary nonimmigrant work visas. Nino was 14 years old, her status arose from her mother's since she was not working. Her mother filed to adjust her status to lawful permanent residence based on an employment-based immigrant visa. Nino did likewise, derivatively. Her mother's application was denied because she continued to work after her employment authorization period expired. Nino's application was denied as well. Nino's mother, Rusodan, after obtaining a new nonimmigrant visa while traveling abroad, reentered the United States and applied for adjustment of status a second time. Nino never left the United States. Rusodan's second application for permanent residence was approved. Nino's wasn't because she now had turned 21, so declared a federal administrative agency.

Nino ended up in a removal hearing before an administrative law judge. Her right to remain in our country with her mother was at stake. She claimed the Child Status Protection Act (CSPA) froze her age as of the date when her mother submitted her initial application for permanent residence. An immigration judge, and the Board of Immigration Appeals, [BIA], an administrative court and an administrative appellate tribunal, respectively, disagreed. In so doing these non-judicial decision-makers were required to interpret CSPA, and its effective date, a statute passed by Congress. Here is what the statute says:

* * *

> The amendments made by this Act shall take effect on the date of the enactment of this Act and shall apply to any alien who is a derivative beneficiary or any other beneficiary of –
>
> (1) a petition for classification under section 204 of the Immigration and Nationality Act (8

U.S.C. 1154) approved before such date but only if a final determination has not been made on the beneficiary's application for an immigrant visa or adjustment of status to lawful permanent residence pursuant to such approved petition;

(2) a petition for classification under section 204 of the Immigration and Nationality Act (8 U.S.C. 1154) pending on or after such date; or

(3) an application pending before the Department of Justice or the Department of State on or after such date.

What is "before" (Section 1) or what is "pending on or after such date" (Section 2 and Section 3) is hardly a paradigm of statutory clarity.

The CSPA, Pub. L. N. 107-208 (2002), provides relief to children who "age-out" as a result of delays which were caused by the U.S. Citizenship and Immigration Services (USCIS) in processing visa petitions and asylum and refugee applications for children. Congress passed the law to reunite the children who were waiting outside the United States with their parents. *Akhtar v. Burzynski*, 384 F.3d 1193 (9th Cir. 2005). A child "ages-out" when he or she turns 21 and loses the preferential immigration treatment provided to children. The Immigration and Nationality Act (INA) defines a "child" as an unmarried individual less than 21 years of age. 8 U.S.C. §1101(b)(1). The CSPA does not change this definition, but instead establishes a formula for determining "age" that is not based solely on chronological age.

The single issue presented by Nino to our Seventh Court of Appeals was whether the BIA erred in determining the effective date of CSPA. In so doing, it overruled one of its own decisions (*Gutnick v. Gonzalez*, 469 F.3d 683 (7th Cir. 2006). It concluded, rightfully, that the administrative decision makers got it wrong. (*Nino Arobelidze v. Holder*, — F.3d —, 2011 WL 3132459 (7th Cir. July 27, 2011) ("*Nino*").

If there is any task to which a jurist affiliates it is statute interpretation. It is a big part of the job. For the most part, they are good at it. And, there are very specific rules, as to how such interpretation takes place. For example, generally speaking, the court is to look at the language of the statute. If legislative intent is clear in the words employed, then neither an administrative agency nor a court can depart from them. *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984). The general rule being under Chevron's two-step approach is: If the statute's plain language expresses the intent of Congress, then that intent is determinative; only where the statute is silent or ambiguous does the administrative agency interpret the statute, and if so, the judiciary defers to that interpretation if reasonable. But this is always not so. (See, *United States v. Mead Corp.*, 533 U.S. 218 (2001).

The issue in *Mead* was the amount of deference that should be given to certain letters issued by the U.S. Customs Service to a particular individual concerning tariff classifications. The court held that Chevron deference was only required in construing a statute where Congress delegated power to the agency to make rules carrying the force of law; and, the agency which was claiming deference, can establish its interpretation was done pursuant to such legislative grant. That authority is one that emanates from the agency's rulemaking jurisdiction or through *ad hoc* adjudication that the agency uses to develop the statutory interpretation. The latter is not favored, nor should it be, because a litigant does not know what the interpretation is until the administrative agency makes a decision. And *ad hoc* adjudication, unlike rulemaking, can take years. (See, *Tovar v. U.S. Attorney General*, 646 F.3d 1300 (CA11 2011). In a word, it is unfair. If an administrative agency should be given deference in its interpretation of a statute it should state clearly what its position is when the rule is announced. *Ad hoc* adjudication is iterative, whereas rulemaking is clear and permits a period for comment by all of who may affected by the rule before it is promulgated.

The Board of Immigration Appeals is comprised of 15 members. They entertain appeals from a cadre of over 260 immigration judges in force throughout the United States. All of these men and women are employed by the executive branch of the federal government. All are appointed to the positions they hold. The BIA makes rulings with one or three member panels on immigration judge's determinations. The BIA's legal decision as well as constitutional ones are only reviewable by our circuit court of appeals. In *Nino*, the court determined what deference should be given to the BIA's decisions when no administrative rule had been enacted to implement CSPA. The interpretation of what the statute meant was created through *ad hoc* adjudication. The court concluded that non-precedential decisions of the BIA by a one member panel are not entitled to Chevron deference.

If you think about this proposition it makes a lot of sense. Unless the administrative agency's interpretation has the force of law, and non-precedential opinions do not, than why defer to them at all? (See, *Rotimi v. Gonzales*, 473 F.3d 55, 57 (2d Cir. 2007). In a more apt commentary it might be argued that federal jurists are better able to determine congressional intent since they are arbiters nor administrators. They have no agenda. Executive administrative agencies, like legislatures seek to control the outcome of a dispute where an Article III Judge's job is to decide the fray without an interest in the ultimate resolution. These jurists decide outcomes based on facts and rules of statutory interpretation the judiciary has sanctioned.

But our judiciary has concluded that, even if Chevron homage does not apply, some deference is required to less formal statements by an administrative agency. (See, *Skidmore v. Swift Co.*, 323 U.S. 134 (1944). This goes under the rubric of "respect" (*Bailey v. Pregis Innovative Packaging Inc.*, 600 F.3d, 748 (7th Cir. 2010)), or the "power to persuade." This may seem odd since the administrative agency is a courser for the executive branch, but nonetheless it is the current state of the law. *Christensen v. Harris County*, 529 U.S. 576 (2000). Maybe as lawyers and jurists we should rethink that. The concept of respect should involve confidence in the result reached not just honor the adage of some interpretation developed during the course of administrative litigation. Why is that worth any deference when the parties to the litigation become the grist for the statute's exposition? Where statute interpretation occurs in ad hod adjudication, there is really no reason for the judiciary to defer to an administrative interpretation at all. See, *Delgado v. Holder*, — F.3d —, 2011 WL 3633695 (9th Cir. Aug. 19, 2011).

So, whether the persuasive power of the BIA's decision making in Nino's case depends on the thoroughness evident in the BIA's consideration, the validity of its reasoning, its consistency with earlier and later pronouncements and all those facts which give it power to persuade (*Nino*, sl. op. at 14; *Arobelidze v. Holder*, — F.3d —, 2011 WL 3132459 (7th Cir. July 27, 2011)).

The court opined that BIA non-precedential decisions, ones that do not equate with the force of law do not deserve *Chevron* deference, because they do not have the "power

to persuade." This is correct since if these administrative decisions do not rely on BIA precedent, why should federal jurists defer to that agency's decision?

The Court held that the BIA's analysis was, in a word, deficient. It concluded even though parties argued otherwise, that the statute was ambiguous. It noted the BIA had concluded this was so in its own precedent. (*In re: Avila Perez* 24 I&N Dec. 78 (BIA 2007) Furthermore, it failed to consider the relevant history of the legislative debates of CSPA which was to be inclusive, promoting family reunification, not its opposite. (*Padash v. INS*, 358 F.3d. 1161, 1171 (9th Cir. 2004). The court concluded that Nino's argument that all beneficiaries of previously approved visa petitions other than those with applications adjudicated prior to CSPA's enactment, should be included. Maybe the entire doctrine of *Chevron* deference needs to be revisited, especially where the administrative agency, such as BCIS, has both enforcement and benefit bestowing branches. How can an agency continue to misconstrue what Congress wanted in CSPA. In the last analysis, it is the judiciary's job to say what the law is, not some administrative court or executive department employee.

As an advocate for immigrants for over 30 years, the government's litigation posture in *Nino* is wrong-headed. Congress clearly in CSPA sought to reunify and provide relief to families caught in the throes of the INA's preference and numerical limitations maze. The Executive branch's job is to implement, not thwart, laws Congress enacts. Where the language of a statute is unclear the executive agency should acknowledge some deference to the legislature's intent, not try to argue a position which frustrates it, and asks our judiciary to defer to its statutory surmise. ■