



CATHOLIC LEGAL IMMIGRATION NETWORK, INC.

Practice Pointer

U.S. Supreme Court Decision: *Guerrero-Lasprilla v. Barr*

April 21, 2020¹

1. Why is the U.S. Supreme Court decision in *Guerrero-Lasprilla v. Barr* significant?

In a major victory for noncitizens, the U.S. Supreme Court held in a 7-2 decision that the federal circuit courts have jurisdiction to review mixed questions of law and fact. Specifically, the Court examined section 242(a)(2)(D) of the Immigration and Nationality Act (INA),² known as the “Limited Review Provision,” which allows for judicial review of only “constitutional claims or questions of law” when the removal order rests on the noncitizen’s commission of certain crimes. The Court ruled that this provision allows for judicial review of “the application of a legal standard to undisputed or established facts.”³ As a result of this decision, many more noncitizens may access the federal courts, rather than seeing their cases end with an unfavorable decision from the Board of Immigration Appeals (BIA).

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² INA § 242(a)(2)(D) states:

Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

³ *Guerrero-Lasprilla v. Barr*, No. 18-1015, 2020 WL 1325822, at *4 (U.S. Mar. 23, 2020). Note, this practice pointer will use the Westlaw pagination because the pagination has not yet been added to the Supreme Court reporter, though the case has been given the citation, *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062 (2020).

2. What statutory provision did the U.S. Supreme Court review in *Guerrero-Lasprilla v. Barr*?

The case addresses section 242(a) of the INA, which delineates the limited powers of the federal courts to review final orders of removal. At issue in this case is INA § 242(a)(2)(C), which states that “no court shall have jurisdiction to review any final order of removal against [a noncitizen] who is removable by reason of having committed” certain criminal offenses, including controlled substance offenses and aggravated felonies.⁴ Despite this jurisdiction-stripping provision, there is still limited judicial review available for “constitutional claims or questions of law” under INA § 242(a)(2)(D), which the Supreme Court calls “the Limited Review Provision.”

3. What is the factual and procedural background of *Guerrero-Lasprilla v. Barr*?

Petitioners in the consolidated cases before the Court, Pedro Pablo Guerrero-Lasprilla and Ruben Ovalles, were both convicted of drug-related crimes and were subject to removal proceedings. An Immigration Judge (IJ) ordered Guerrero-Lasprilla removed in 1998. In 2004, the BIA affirmed the IJ’s removal order for Ovalles. Both petitioners left the United States after their removal orders became administratively final in 1998 and 2004, respectively.

Years later, both petitioners filed motions to reopen their removal proceedings (Guerrero-Lasprilla in 2016 and Ovalles in 2017) arguing they had become eligible for discretionary relief in light of new case law. Though the motions were well beyond the 90-day time limit for filing motions to reopen, both petitioners argued that the time limit should be equitably tolled. The equitable tolling claim in each case was based on the Fifth Circuit’s decision in *Lugo-Resendez v. Lynch*, 831 F.3d 337 (5th Cir. 2016), which held that the 90-day time limit for motions to reopen could be equitably tolled. In denying both of petitioners’ requests for reopening, the BIA found petitioners did not qualify for equitable tolling because they had not demonstrated due diligence.

Both petitioners sought review before the U.S. Court of Appeals for the Fifth Circuit. The Fifth Circuit held that “whether an alien acted diligently in attempting to reopen removal proceedings for purposes of equitable tolling is a factual question.”⁵ Because the circuit court found that equitable tolling was a factual question, the Fifth Circuit held that it lacked jurisdiction to review the BIA’s equitable tolling determinations.

⁴ INA § 101(a)(43).

⁵ *Guerrero-Lasprilla v. Barr*, No. 18-1015, 2020 WL 1325822, at *4 (U.S. Mar. 23, 2020) (citing *Guerrero-Lasprilla v. Sessions*, 737 F. App’x 230, 231 (2018) (*per curiam*); *Ovalles v. Sessions*, 741 F. App’x 259, 261 (2018) (*per curiam*)).

In requesting that the Supreme Court grant certiorari, the petitioners argued that the underlying facts related to equitable tolling were not in dispute, and asked the Supreme Court to “determine whether their claims that the BIA incorrectly applied the equitable tolling due diligence standard to the ‘undisputed’ (or established) facts is a ‘question of law,’ which the Limited Review Provision authorizes courts of appeals to consider.”⁶

The Supreme Court reversed the Fifth Circuit’s determination that it lacked jurisdiction to consider the petitioners’ due diligence claims for equitable tolling of a motion to reopen. Justice Breyer, writing for the majority (7-2), held that the Limited Review Provision, which provides for judicial review only of “constitutional claims or questions of law,” includes review of “the application of a legal standard to undisputed or established facts.” The Court held circuit courts have jurisdiction to review the BIA’s denial of requests for equitable tolling of a filing deadline for motions to reopen filed by noncitizens who are removable for having committed certain crimes when the underlying facts are not in dispute.

4. What did the U.S. Supreme Court emphasize in its analysis of INA § 242(a)(2)(D), “the Limited Review Provision”?

In its analysis, the U.S. Supreme Court emphasized:

- Plain Language of Statute
 - “Nothing in that language precludes the conclusion that Congress used the term ‘questions of law’ to refer to the application of a legal standard to settled facts.”⁷
 - The Court then provided examples of where it had previously “referred to the question whether a given set of facts meets a particular legal standard as presenting a legal inquiry.”⁸
- Presumption of Judicial Review of Administrative Action
 - The Court emphasized “the presumption favoring judicial review of administrative action,”⁹ and cited *Kucana v. Holder*, 558 U.S. 233 (2010), in which the Supreme Court held that the statutory proscription of judicial review applies only to agency determinations made discretionary by statute, not to determinations declared discretionary by the agency itself through regulation. For example, in *Kucana v. Holder*, the Supreme Court held that when Congress codified the motion to reopen process for the first time via the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, (IIRIRA), the statute did not specify that such motions are discretionary and thus rendered motions to reopen subject to judicial review. The

⁶ *Guerrero-Lasprilla v. Barr*, No. 18-1015, 2020 WL 1325822, at *4 (U.S. Mar. 23, 2020).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at *5.

Court noted it has "'consistently applied' the presumption of reviewability to immigration statutes."¹⁰

- "[I]nterpreting the Limited Review Provision to exclude mixed questions would effectively foreclose judicial review of the BIA's determinations so long as it announced the correct legal standard. The resulting barrier to meaningful judicial review is thus a strong indication, given the presumption, that 'questions of law' does indeed include the application of law to established facts."¹¹

- Immediate Statutory Context

- INA § 242(b)(9) states in part that, "Judicial review of *all questions of law and fact*, including interpretation and application of constitutional and *statutory provisions*, arising from any action taken . . . to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section." (Emphasis added). This is known as the "zipper clause" because it "consolidates or 'zips' judicial review of immigration proceedings into one action in the court of appeals."¹²
- The Court found that the zipper clause language of "all questions of law and fact, including interpretation and application of constitutional and statutory provisions" "makes clear that Congress understood the statutory term 'questions of law and fact' to include the application of law to facts."¹³
- INA § 242(a)(2)(D), the Limited Review Provision, allowing for judicial review of constitutional claims or questions of law brought by noncitizens with removal orders predicated on certain crimes, is in the same statutory section as the "zipper clause" at INA § 242(b)(9).

- Legislative History of the Limited Review Provision

- Congress enacted the Limited Review Provision in 2005 in response to *INS v. St. Cyr*, 533 U.S. 289, 313 (2001). In *INS v. St. Cyr*, the Court held the jurisdiction stripping provisions of the Antiterrorism and Effective Death Penalty Act of 1996 and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 did not strip the federal district courts of their general habeas corpus jurisdiction because the Constitution at a minimum protected habeas, relief that existed in 1789. In *Guerrero-Lasprilla*, the Court found the "statutory history strongly suggests that Congress added [the Limited Review Provision] because it sought an 'adequate substitute'" for habeas in view of *St. Cyr's* guidance.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Morales-Izquierdo v. Dep't of Homeland Sec.*, 600 F.3d 1076, 1082 (9th Cir. 2010).

¹³ *Guerrero-Lasprilla v. Barr* at *6.

- In habeas cases, petitioners request judicial review of detention based on erroneous application of statutes. Therefore, if Congress intended to preserve habeas relief for noncitizens and habeas review requires analysis of the application of a legal standard to undisputed or established facts, then the Limited Review Provision must provide federal courts the opportunity to review the misapplication of a legal standard to undisputed facts. Otherwise, this provision would foreclose habeas relief, which Congress never intended.

5. What are the implications of *Guerrero-Lasprilla v. Barr*?

For noncitizens subject to the Limited Review Provision at INA § 242(a)(2)(D) because they have been convicted of an aggravated felony or a controlled substance offense:

- Federal circuit courts still lack jurisdiction to review factual determinations.¹⁴
- Federal circuit courts have jurisdiction to review:
 - constitutional questions,
 - pure questions of law, and
 - the application of a legal standard to undisputed or established facts (also sometimes referred to as mixed questions of law and fact).

In this case, the Supreme Court considered the Limited Review Provision in conjunction with the jurisdiction limiting provision of INA § 242(a)(2)(C) for noncitizens removable by reason of having committed certain specified criminal offenses. However, the Court’s reasoning applies more broadly.¹⁵ The decision provides for judicial review of whether the agency correctly applied the legal standards to established facts in many contexts, including, but not limited to:

- Any judgment on discretionary relief under sections 212(h) (waiver of certain crimes), 212(i) (fraud waiver), 240A (cancellation of removal), 240B (voluntary departure), or 245 (adjustment of status) of the INA;¹⁶
- Any other decisions that are specified to be in the discretion of the Attorney General or Secretary of Homeland Security that are not listed under INA § 242(a)(2)(B)(i);¹⁷ and

¹⁴ *Id.* at *8 (“The Limited Review Provision, however, will still forbid appeals of factual determinations—an important category in the removal context.”).

¹⁵ The Supreme Court notes in looking at the statutory language that the “Limited Review Provision applies to more of the statute than the immediately preceding subparagraph. See § 1252(a)(2)(D) (applying notwithstanding “subparagraph (B) or (C), or in any other provision of this chapter (other than this section)”).” *Guerrero-Lasprilla v. Barr*, No. 18-1015, 2020 WL 1325822, at *8 (U.S. Mar. 23, 2020).

¹⁶ INA § 242(a)(2)(B)(i).

¹⁷ INA § 242(a)(2)(B)(ii). Examples of reviewable discretionary decisions under INA § 242(a)(2)(B)(ii) include I-751 waivers of joint filing requirements or non-LPR cancellation of removal. Note that INA § 242(a)(2)(B)(ii) expressly exempts asylum from the jurisdiction stripping provision. Thus, while asylum is discretionary, review of whether or not a non-citizen qualifies for asylum as a matter of law and discretion is subject to judicial review. However, INA § 208(a)(3) and INA § 208(b)(2)(D) limit judicial review of certain asylum bars, which are discussed in the next bullet point and may now be subject to judicial review as a result of *Guerrero-Lasprilla v. Barr*.

- Determinations of the Attorney General related to bars to asylum, including:¹⁸
 - Whether a noncitizen may be removed to a safe third country;¹⁹
 - The one-year filing deadline for asylum;²⁰
 - Whether a noncitizen is barred from applying for asylum based on a prior denied asylum application.²¹

6. What are some practice pointers for practitioners to consider?

- Practitioners should preserve constitutional and legal arguments, which include questions regarding the application of undisputed facts to law, to overcome any jurisdictional bars before the immigration court and the BIA.
- Practitioners should raise arguments on appeal related to constitutional issues and questions of law, which include questions regarding the application of law to undisputed facts, to overcome any jurisdictional bars.
- Practitioners with non-LPR cancellation cases may argue based on *Guerrero-Lasprilla v. Barr* that the court of appeals may review whether the IJ and the BIA correctly applied the exceptional and extremely unusual hardship legal standard to established facts. For example, if an IJ finds that a respondent who lacks a qualifying relative with a serious health condition does not amount to exceptional and extremely unusual hardship citing *Matter of J-J-G-*, 27 I&N Dec. 808 (BIA 2020), the practitioner should consider preserving and presenting this claim to the court of appeals with jurisdiction.²²
- Likewise, practitioners with non-LPR cancellation cases may now argue that the court of appeals may review whether the IJ and the BIA committed an error in the discretionary analysis. For example, if an IJ interprets *Matter of Castillo-Perez*, 27 I&N Dec. 664 (A.G.

¹⁸ INA § 208(a)(3).

¹⁹ INA § 208(a)(2)(A).

²⁰ INA § 208(a)(2)(B); see also *Ramadan v. Gonzales*, 479 F.3d 646, 648 (9th Cir. 2007) (*per curiam*) (considering its own jurisdiction to review an Immigration Judge’s determination that the petitioner had failed to show changed country conditions to excuse the one year filing deadline, the circuit court held “that our jurisdiction over ‘questions of law’ as defined in the Real ID Act includes not only ‘pure’ issues of statutory interpretation, but also application of law to undisputed facts, sometimes referred to as mixed questions of law and fact.”).

²¹ INA § 208(a)(2)(C).

²² Historically, the courts of appeals have found that they lack jurisdiction to review an IJ’s finding that a noncitizen’s removal would not cause “exceptional and extremely unusual hardship” because they have determined that this determination is fundamentally discretionary in nature. E.g. *Mendez-Moranchel v. Ashcroft*, 338 F.3d 176, 179 (3d Cir. 2003); *Romero-Torres v. Ashcroft*, 327 F.3d 887, 892 (9th Cir. 2003) (“We lack jurisdiction to review the BIA’s discretionary determination that an alien failed to satisfy the ‘exceptional and extremely unusual hardship’ requirement for cancellation of removal.”); *Gonzalez-Oropeza v. Att’y Gen.*, 321 F.3d 1331, 1333 (11th Cir. 2003) (*per curiam*) (“[T]he exceptional and extremely unusual hardship determination is a discretionary decision not subject to review.”). However, whether the agency applied the correct legal standard and considered the appropriate factors are legal questions. See *Pareja v. Att’y Gen.*, 615 F.3d 180, 187 (3d Cir. 2010) (finding jurisdiction to review whether the BIA misinterpreted the statutory phrase “exceptional and extremely unusual hardship” when denying the noncitizen’s request for cancellation of removal because the issue was a question of law that related solely to the nondiscretionary question of whether the BIA correctly interpreted statutory language).

2019), as establishing a *per se* rule to deny all cases with two or more DUIs pursuant to INA § 101(f), the practitioner should consider preserving and presenting this incorrect discretionary analysis claim to the court of appeals with jurisdiction.

- Practitioners representing a noncitizen petitioner before a court of appeals who may be subject to one of the jurisdiction-stripping provisions including, INA §§ 242(a)(2)(B) (related to discretionary forms of relief), 243(a)(2)(C) (noncitizens subject to a final order of removal and removable by reason of having committed certain specified criminal offenses), or 208(a)(3) (certain bars to asylum) should be sure to include the *Guerrero-Lasprilla* decision in their briefing. Where briefs have already been submitted, practitioners should consider filing a letter under Federal Rule of Appellate Procedure 28(j) to inform the circuit court of the *Guerrero-Lasprilla* decision. Rule 28(j) provides that a party in a case may advise the court via a letter that includes citations if the party learns of pertinent and significant authorities after the party has filed a brief or argued the case but before court has issued a decision. If the court of appeals denied a petition for review, but the mandate has not yet issued, the practitioner should consider filing a petition for panel or *en banc* rehearing in light of *Guerrero-Lasprilla*. If the circuit court has denied a petition for review based on the jurisdictional bar and has issued the mandate, the practitioner should evaluate filing a motion to recall the mandate in consideration of *Guerrero-Lasprilla*.
- Frequently, the government will argue on appeal to the BIA and before the courts of appeals that certain issues are “factual,” and thus reviewed under the deferential “clear error” or “substantial evidence” standards of review. To the extent that the application of a legal standard to undisputed or established facts presents a “question of law,” *Guerrero-Lasprilla* lends support to the proposition that this question should be reviewed *de novo* on appeal.

For further analysis, see American Immigration Council, [Guerrero-Lasprilla v. Barr: Implications for Judicial Review](#), Mar. 31, 2020.