FFEDERAL COURT JURISDICTION OVER VISA REVOCATIONS

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INTRODUCTION

A circuit split has developed as to whether federal courts have been stripped of jurisdiction to review administrative revocations of visas.[1] The answer to this question turns on whether a visa revocation is a "discretionary" decision by United States Citizenship and Immigration Services (USCIS).[2] The Seventh,[3] Third,[4] and Fifth[5] Circuits answer both questions affirmatively. The Ninth Circuit answers both in the negative.[6]

Part I of this Article presents the content and evolution of the statutory provisions that are relevant to these questions.[7] Next, Part II describes four cases, *El-Khader v. Monica*,[8] *ANA International, Inc. v. Way* (*ANA*),[9] *Jilin Pharmaceutical USA, Inc. v. Chertoff* (*Jilin*),[10] and *Ghanem v. Upchurch*,[11] construing the relevant statutory provisions. Part III considers the wording, operation, and constitutionality of the jurisdiction-stripping provision at issue.[12] This Article concludes that the Supreme Court should adopt the Seventh, Third, and Fifth Circuits' position in the event that the Court resolves this circuit split.

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1. *See* 8 U.S.C.S. § 1252(a)(2)(B)(ii) (LexisNexis 1997 & Supp. 2007) (precluding review by federal courts of "discretion[ary]" decisions by the Secretary of Homeland Security).
2. *See id.* § 1155 (allowing, without using the word "discretion," the Secretary of Homeland Security to revoke, at any time, a previously approved visa petition "for what he deems to be good and sufficient cause").
3. El-Khader v. Monica, 366 F.3d 562, 568 (7th Cir. 2004).
4. Jilin Pharm. USA, Inc. v. Chertoff, 447 F.3d 196, 206 (3d Cir. 2006).
5. Ghanem v. Upchurch, 481 F.3d 222, 224–25 (5th Cir. 2007).
6. ANA Int'l, Inc. v. Way, 393 F.3d 886, 894 (9th Cir. 2004).
7. 8 U.S.C.S. §§ 1155, 1252(a)(2)(B)(ii) (LexisNexis 1997 & Supp. 2007).
8. *El-Khader*, 366 F.3d 562.
9. *ANA Int'l, Inc.*, 393 F.3d 886.
10. Jilin Pharm. USA, Inc. v. Ridge, No. 04-5678 (D.N.J. 2005) (dismissing the case for a lack of federal jurisdiction due to statutory amendments limiting review of decisions within the discretion of the Attorney General), *aff'd sub nom.* Jilin Pharm. USA, Inc. v. Chertoff, 447 F.3d 196, 206 (3d Cir. 2006).
11. Ghanem v. Upchurch, 481 F.3d 222 (5th Cir. 2007).
12. For analysis of agency discretion outside the visa revocation context, see generally Daniel Kanstroom, *The Better Part of Valor: The Real ID Act, Discretion, and the "Rule" of Immigration Law*, 51 N.Y.L. SCH. L. REV. 161 (2006).

I. STATUTES

Under 8 U.S.C.S. § 1155, "[t]he Secretary of Homeland Security may, at any time," revoke the approval of a visa petition "for what he deems to be good and sufficient cause."[13] The regulation for this section notes that USCIS "may revoke the approval of [a] petition upon notice to the petitioner on any ground . . . when the necessity for the revocation comes to the attention of [USCIS]."[14]

This revocation power is subject to a jurisdiction-stripping provision, 8 U.S.C.S. § 1252(a)(2)(B)(ii), which states:

> Notwithstanding any other provision of law (statutory or nonstatutory), . . . and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review . . . any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this title [8 USCS §§ 1151 et seq.] to be in the *discretion* of the Attorney General or the Secretary of Homeland Security . . . .[15]

This provision was added to the Immigration and Nationality Act (INA) by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA),[16] one purpose of which was "to improve deterrence of illegal immigration to the United States . . . by reforming exclusion and deportation law and procedures."[17]

The Real ID Act of 2005 (Real ID), comprising Division B of a congressional act entitled "Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief," broadened the reach of this jurisdiction-stripping by inserting into § 1252(a)(2)(B) the phrase "and regardless of whether the judgment, decision, or action is made in removal proceedings."[18] A draft of Real ID provides the following

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13. 8 U.S.C.S. § 1155 (LexisNexis 1997 & Supp. 2007).

14. 8 C.F.R. § 205.2(a) (2000). Prior to the breakup of the Immigration and Naturalization Service (INS) in 2003, INS, not its successor agency, USCIS, adjudicated visa petitions. The regulation therefore refers to "this Service" (INS) rather than to USCIS.

15. 8 U.S.C.S. § 1252(a)(2)(B)(ii) (LexisNexis 1997 & Supp. 2007) (emphasis added).

16. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified as amended in scattered sections of 8, 18, 28, and 42 U.S.C.).

17. H.R. REP. NO. 104-828, at 1 (1996).

18. Real ID Act of 2005, Pub. L. No. 109-13, § 101(f)(2), 119 Stat. 231, 305 (to be codified in pertinent part at 8 U.S.C. § 1252(a)(2)(B)). Prior to this amendment, some commentators argued that the jurisdiction-stripping should not apply outside the removal context. *See, e.g.*, David B. Pakula & Lawrence P. Lataif, *Judicial Review of Administrative Immigration Decisions: Can the Doctrine of "Ejusdem Generis" Save It from Extinction?*, 78 FLA. B.J. 32, 37 (2004) (arguing that *ejusdem generis*,

insight into Congress's intent in passing the Act:

> Making emergency supplemental appropriations for the fiscal year ending September 30, 2005, to establish and rapidly implement regulations for State driver's license and identification document security standards, to prevent terrorists from abusing the asylum laws of the United States, to unify terrorism-related grounds for inadmissibility and removal, to ensure expeditious construction of the San Diego border fence, and for other purposes.[19]

The section of Real ID that broadens jurisdiction-stripping is entitled "Preventing terrorists from obtaining relief from removal."[20] The question arises as to why a section with such wide-ranging effects outside the terrorism context would have this heading. Unfortunately, the legislative history of Real ID's jurisdiction-stripping provisions provides little insight. Indeed, one commentator noted that "[f]urther congressional tinkering with jurisdiction-stripping provisions to limit appeal court [sic] review of IJ [Immigration Judges] and BIA [Board of Immigration Appeals] denials of relief, following the direction of the Real ID Act, are possible, given the deliberate obscurity that characterizes the legislative history of previous 'reforms.'"[21] In any case, the Supreme Court has held that a section heading cannot be considered dispositive with respect to construction of a statute.[22] In a conversation with the author, a former congressional staffer speculated that the mismatch between the Real ID jurisdiction-stripping section heading and the section's content may have occurred because the heading predated the content and was not revised to reflect the section's ultimate content.[23]

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a canon of construction indicating that where general words follow specifically enumerated items, the general words apply to other items analogous to those enumerated, should be used to determine the scope of the statute). In light of the Real ID amendment to § 1252(a)(2)(B), that section now unambiguously applies outside the removal context.

19. H.R. 1268, 109th Cong. (1st Sess. 2005).

20. Real ID Act of 2005 § 101.

21. Michael M. Hethmon, *Tsunami Watch on the Coast of Bohemia: The BIA Streamlining Reforms and Judicial Review of Expulsion Orders*, 55 CATH. U. L. REV. 999, 1057 (2006).

22. Bhd. of R.R. Trainmen v. Balt. & Ohio R.R., 331 U.S. 519, 528–29 (1947).

> Where the text [of a statute] is complicated and prolific, headings and titles can do no more than indicate the provisions in a most general manner . . . . For interpretative purposes, they are of use only when they shed light on some ambiguous word or phrase. They are but tools available for the resolution of a doubt. But they cannot undo or limit that which the text makes plain.

Id.

23. Telephone Interview with former congressional staffer in Wilder, Vt. (Apr. 5, 2007) (on

II. CASES

As noted in the introduction to this Article, four circuit courts of appeal have considered the question of whether visa revocations are discretionary and therefore unreviewable by federal courts. The cases are discussed below.

A. Seventh Circuit: Discretionary

The Seventh Circuit concluded that visa revocations were discretionary and therefore not subject to judicial review in *El-Khader v. Monica*.[24] The following subpart discusses this case and the court's reasoning.

"Hani El-Khader, an alien with Jordanian citizenship, legally entered the United States on December 27, 1988, on a non-immigrant student visa."[25] In 1997, El-Khader married an American citizen, Nadia Muna.[26] Shortly thereafter, "El-Khader filed an application [with the Immigration and Naturalization Service (INS)] for adjustment of his immigration status to that of lawful permanent resident concurrent with his then-wife's filing of a Petition for Alien Relative."[27] When the couple divorced in 1998, "the INS denied El-Khader's adjustment [of] status application as well as his former wife's pending visa petition."[28]

Shortly after the divorce, "Ameritrust Mortgage Corporation, El-Khader's prospective employer, filed an Immigrant Petition for Alien Worker classification on El-Khader's behalf and sought permanent resident status for him pursuant to" a section of the INA providing visas for "[q]ualified immigrants who are capable . . . of performing skilled labor [or] . . . who hold baccalaureate degrees and who are members of the professions."[29] "INS approved Ameritrust's petition on behalf of El-Khader. Shortly thereafter, . . . El-Khader filed a new application for permanent resident status, which was premised on INS's recent acceptance of Ameritrust's approved visa petition for El-Khader's alien worker classification."[30]

While processing El-Khader's application, INS discovered

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file with author) (requesting anonymity and expressing personal views).

24. El-Khader v. Monica, 366 F.3d 562, 568–69 (7th Cir. 2004).

25. *Id.* at 564.

26. *Id.*

27. *Id.* Prior to the breakup of INS in 2003, INS, not its successor agency, USCIS, processed petitions for immigration benefits.

28. *Id.*

29. *Id.* at 564; 8 U.S.C. § 1153(b)(3)(A)(i)–(ii) (2000).

30. *Id.*

irregularities in his recently terminated marriage, "namely, that he never cohabited with his former wife, and, thus, they never consummated their marriage, and, further, that they possessed no joint, marital assets. Relying on this information, INS concluded that El-Khader's marriage to Muna was a sham, undertaken for the purpose of evading immigration laws."[31] On the basis of this conclusion and on 8 U.S.C. § 1154(c),[32] INS revoked "El-Khader's previously approved worker's visa."[33]

El-Khader brought suit against INS in the United States District Court for the Northern District of Illinois, "seek[ing] review of the INS' decision under the Administrative Procedure Act."[34] INS disputed the court's subject matter jurisdiction over the case.[35] Specifically, INS argued that 8 U.S.C. § 1252(a)(2)(B)(ii) precluded review by the court of the agency's discretionary decision to revoke El-Khader's visa.[36] El-Khader responded that § 1252(a)(2)(B)(ii) did "not apply to this case because that section only applies to removal proceedings[,] and the INS' decision was not discretionary" because of the decision's basis in a factual finding.[37]

In response to El-Khader's first argument, the court noted that "[b]ecause the District Director made his decision to revoke Plaintiff's visa petition pursuant to Section 1155, it clearly falls within the reach of § 1252(a)(2)(B)(ii)."[38] Furthermore, the court noted, "The plain language of § 1252(a)(2)(B)(ii) . . . demonstrates that it is not limited simply to orders of removal."[39]

Regarding El-Khader's second argument, that INS's decision to revoke his visa was not discretionary, the court noted instead that "[t]he plain language of [8 U.S.C. § 1155] gives the Attorney General discretion to revoke a petition when he deems it appropriate based on good and sufficient cause."[40] Accordingly, the district court granted INS's motion to dismiss El-Khader's complaint.[41]

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31. *Id.*

32. 8 U.S.C. § 1154(c) (2000) (forbidding the approval of a visa petition for an alien who "has sought to be accorded, an immediate relative . . . status as the spouse of a citizen of the United States . . . by reason of a marriage determined by the Attorney General to have been entered into for the purpose of evading the immigration laws").

33. *El-Khader*, 366 F.3d at 565. In the author's experience writing briefs for appeals of family-based visa petition denials at USCIS, a finding of sham marriage is frequently the basis for petition denials.

34. El-Khader v. Perryman, 264 F. Supp. 2d 645, 647 (N.D. Ill. 2003).

35. *Id.*

36. *Id.* at 648.

37. *Id.* at 648–49.

38. *Id.* at 648.

39. *Id.* at 649.

40. *Id.*

41. *Id.* at 650.

El-Khader appealed to the Seventh Circuit.[42] The court noted that the question of whether § 1252(a)(2)(B)(ii) applied outside the removal context had recently been answered in the affirmative by a Seventh Circuit panel.[43] The court then considered whether the revocation of El-Khader's visa was a "discretionary" decision by INS.[44] Like the district court, the Seventh Circuit focused on the wording of § 1155: "[T]he Attorney General *may*, at any time, for what *he deems to be good and sufficient cause*, revoke the approval of any petition approved by him."[45] Despite finding no binding precedent on point, the court concluded that "[t]his language plainly signifies a discretionary decision."[46] Ironically, as persuasive precedent for this conclusion, the court cited the *ANA* district court decision, a decision the Ninth Circuit subsequently reversed.[47]

Agreeing with the *El-Khader* district court that § 1252(a)(2)(B)(ii) applied in the revocation context and that the revocation decision was discretionary, the Seventh Circuit affirmed the district court's dismissal of the suit.[48]

B. Ninth Circuit: Not Discretionary

In *ANA*, the Ninth Circuit concluded that visa revocations were not discretionary and therefore that they were subject to judicial review.[49] A discussion of this case and the court's reasoning follows.

In 1994, Honggon Yu, a citizen of China and employee of Anshan AEC, a Chinese corporation, entered the United States on a B-1 temporary work visa.[50] The following year, Yu incorporated ANA International (ANA) in Oregon[51] "as a wholly owned subsidiary of Anshan."[52] In 1997, ANA filed an I-140 (employment-based) immigrant petition for Yu,

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42. El-Khader v. Monica, 366 F.3d 562, 565 (7th Cir. 2004).

43. *Id.* at 566 (citing Samirah v. O'Connell, 335 F.3d 545, 549 (7th Cir. 2003)).

44. *Id.* at 567.

45. *Id.* (quoting 8 U.S.C. § 1155 (2000)) (emphasis added by Seventh Circuit). The current version of the statute gives this power to the Secretary of Homeland Security, not to the Attorney General. 8 U.S.C.S. § 1155 (LexisNexis 1997 & Supp. 2007). This change reflects the transfer, in 2003, of immigration benefit processing from INS to USCIS.

46. *El-Khader*, 366 F.3d at 567.

47. *Id.* (citing ANA Int'l, Inc. v. Way, 242 F. Supp. 2d 906 (D. Or. 2002), *rev'd*, 393 F.3d 886 (9th Cir. 2004)).

48. *Id.* at 568–69.

49. *ANA Int'l, Inc.*, 393 F.3d at 895.

50. *ANA Int'l, Inc.*, 242 F. Supp. 2d at 910. This Article preserves the district court and Ninth Circuit's practice of stating Yu's given name before his family name. The Chinese custom is for the family name to precede the given name.

51. *Id.*

52. *ANA Int'l, Inc.*, 393 F.3d at 889.

requesting that INS "classify Yu as a multinational executive or manager."[53] INS approved ANA's petition after performing an investigation.[54] Based on this approval, "Yu filed with the INS an application to adjust his status to that of a lawful permanent resident."[55] In 2000, INS, while processing Yu's adjustment of status application, interviewed him in Portland, Oregon.[56] A short time later, INS notified Yu of the agency's intention to revoke its prior approval of ANA's I-140 petition, "conclud[ing that] the record did not support a finding that Yu's duties at ANA were 'primarily' executive or managerial[,] as required by" the statute governing employment-based visa petitions.[57] Despite ANA's rebuttal of the notice, INS revoked its prior approval of the I-140 petition.[58] ANA appealed the revocation to the Administrative Appeals Unit (AAU) of INS, which affirmed INS's revocation.[59]

ANA and Yu challenged AAU's finding in Oregon federal district court, alleging that "the [AAU's] decision [was] arbitrary and capricious, an abuse of discretion, and unsupported by substantial evidence in the record."[60] Plaintiffs sought "a permanent injunction [ordering] the INS to approve ANA's I-140 petition on behalf of Yu and [changing] Yu's status to that of a lawful permanent resident."[61] In support of the court's jurisdiction, plaintiffs cited federal question jurisdiction, the Declaratory Judgment Act, the Administrative Procedures Act, and the INA.[62] INS, "on the other hand, argue[d that] the Court lack[ed] subject matter jurisdiction over [the] action under the APA because the INA expressly precludes judicial review of this agency decision. In addition, [INS] contend[ed that] the APA preclude[d] judicial review because the INA commits the revocation decision to agency discretion."[63]

The district court held that the plain language of 8 U.S.C. § 1252(a)(2)(B)(ii) precluded review by the court of INS's revocation of Yu's visa, notwithstanding the title of the jurisdiction-stripping provision, "Judicial review of orders of removal."[64] The court declined to assert jurisdiction under the APA because the revocation decision was "made

53. *ANA Int'l, Inc.*, 242 F. Supp. 2d at 910.
54. *Id.* at 910–11.
55. *Id.* at 911.
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.* at 911.
60. *Id.* at 912.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.* at 919; 8 U.S.C. § 1252 (2000).

pursuant to a statute that expressly precludes judicial review"—§ 1252.[65] Accordingly, the district court dismissed plaintiffs' suit.[66]

Yu and ANA appealed to the Ninth Circuit.[67] The court announced that "there is a 'strong presumption in favor of judicial review of administrative action' governing the construction of jurisdiction-stripping provisions of IIRIRA, as articulated by *INS v. St. Cyr*," a United States Supreme Court case.[68] The court acknowledged "that § 1252(a)(2)(B)(ii) immunizes certain discretionary decisions of the Attorney General from judicial review."[69] However, the court noted, agency acts "guided by legal standards" are not truly discretionary.[70] Since INS's revocation of Yu's visa was guided by the "good and sufficient cause" legal standard in 8 U.S.C. § 1155 "and the [statutory] definition of 'managerial capacity,'" the revocation was not discretionary.[71] As a nondiscretionary decision, review of the revocation by federal courts was not precluded by § 1252(a)(2)(B)(ii).[72] Accordingly, the Ninth Circuit reversed the trial court and remanded the case for further proceedings.[73]

The *ANA* majority opinion had two votes; Judge Richard C. Tallman dissented.[74] Like the *ANA* district court and the *El-Khader* panel, Judge Tallman concluded that the plain language of § 1252(a)(2)(B)(ii) made clear that the decision to revoke a previously granted visa petition was discretionary.[75] He criticized the majority for improperly focusing on the phrase "good and sufficient cause" to the exclusion of the preceding phrase "may, at any time, for what he deems."[76] Judge Tallman noted that by apparently requiring Congress to include the talismanic phrase "sole and unreviewable discretion" in jurisdiction-stripping statutes, the majority

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65. *ANA Int'l, Inc.*, 242 F. Supp. 2d at 921–22.

66. *Id.* at 922.

67. ANA Int'l, Inc. v. Way, 393 F.3d 886, 890 (9th Cir. 2004).

68. *Id.* at 891 (citing INS v. St. Cyr, 533 U.S. 289, 298 (2001)). The use of this authority was disingenuous because the page from the *INS v. St. Cyr* opinion that the Ninth Circuit cited, 298, is concerned exclusively with IIRIRA's habeas jurisdiction-stripping provision, not IIRIRA's jurisdiction-stripping generally. INS v. St. Cyr, 533 U.S. 289, 298 (2001), *superseded by statute*, Real ID Act of 2005, Pub. L. No. 109-13, § 106, 119 Stat. 231, 310 (to be codified in pertinent part at 8 U.S.C. § 1252). Although *St. Cyr* could arguably stand for the Supreme Court's heightened scrutiny of IIRIRA's jurisdiction-stripping in general, the Ninth Circuit should have acknowledged the potential inappositeness of *St. Cyr*.

69. *ANA Int'l, Inc.*, 393 F.3d at 891.

70. *Id.* (citation omitted).

71. *Id.* at 893.

72. *Id.* at 895.

73. *Id.*

74. *Id.* at 888, 895.

75. *Id.* at 896 (Tallman, J., dissenting).

76. *Id.* at 897 (emphasis omitted).

asked too much of that legislative body.[77] He described the majority result as "an unwarranted expansion of federal jurisdiction into the minutiae of visa administration at a time when we are awash in immigration cases."[78]

C. Third Circuit: Discretionary

The Third Circuit concluded that visa revocations were discretionary and therefore not subject to judicial review in *Jilin*.[79] What follows is a discussion of this case and the reasoning of the trial and appellate courts.

Jilin Pharmaceutical Ltd. Co. is a Chinese corporation "engaged in the manufacture, import, export and wholesale distribution of pharmaceutical products."[80] Wei Zhao, a citizen of China, began work at this corporation in 1983.[81] In 1996, the Chinese corporation incorporated Jilin Pharmaceutical USA, Inc. (Jilin) in New Jersey as a wholly-owned subsidiary.[82] "Jilin Pharmaceutical is actively engaged in the purchase, import and wholesale distribution of pharmaceutical products and medicines to the North American Pharmaceutical Industry . . . ."[83]

In 1996, Jilin filed an employment-based nonimmigrant petition on behalf of Zhao.[84] INS approved this petition, and Zhao began work at Jilin the following year.[85] INS also approved an extension of Zhao's nonimmigrant visa through 1999.[86] In 1998, Jilin "filed an I-140 Immigrant Petition for an Alien Worker on behalf of . . . Zhao."[87] This petition, like

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77. *Id.* at 898. *Accord* E. Carpet House, Inc. v. Dep't of Homeland Sec., 430 F. Supp. 2d 672, 675 (S.D. Tex. 2006) (noting that the U.S. District Court for the Southern District of Texas does not require "the magic word 'discretion' to appear for [§ 1252(a)(2)(B)(ii)] to apply").

78. *ANA Int'l, Inc*., 393 F.3d at 895 (Tallman, J., dissenting). Judge Tallman later provided data on the Ninth Circuit's immigration caseload. "Of the 17,000 cases . . . pending before the Ninth Circuit [on September 20, 2006], approximately 8300 of those are immigration appeals." *Examining the Proposal to Restructure the Ninth Circuit: Hearing on S. 1845 Before the S. Comm. on the Judiciary*, 109th Cong. 1 (2006) (statement of Richard C. Tallman, Circuit J., United States Court of Appeals for the Ninth Circuit), http://judiciary.senate.gov/print_testimony.cfm?id=2071&wit_id=4727.

79. Jilin Pharm. USA, Inc. v. Chertoff, 447 F.3d 196, 206 (3d Cir. 2006).

80. Complaint at 5, Jilin Pharm. USA, Inc. v. Ridge, No. 04-5678 (D.N.J. Nov. 18, 2004) [hereinafter Jilin Complaint].

81. *Id.* at 4.

82. *Id.* at 3.

83. *Id.*

84. *Id.* at 6.

85. *Id.* at 6–7.

86. *Id.* at 7. The status of lawful "nonimmigrant" allows aliens to reside in the United States for a finite period of time and for a specified purpose. *See* 8 U.S.C. § 1101(a)(15) (2000) (listing the types of nonimmigrant visas). Unlike "nonimmigrants," "immigrants" are permitted to remain in the United States indefinitely. *See id.* (defining the statutory class of "immigrant" as "every alien except an alien" who qualifies under "nonimmigrant" status).

87. Jilin Complaint, *supra* note 80, at 7.

the earlier nonimmigrant petition, was premised on the managerial nature of Zhao's duties at Jilin.[88] INS approved the I-140 petition in 1998.[89] "[I]n reliance on [this] approval . . . Zhao, along with his immediate family members, filed I-485 applications for adjustment of status to lawful permanent residence with" INS.[90]

In 2000, INS "issued [Zhao] a Notice of Intent to Revoke the approval of the I-140 petition."[91] In its notice, INS expressed doubts as to whether Zhao's "duties [were] primarily managerial or executive in nature,"[92] citing "the number of employees [at Jilin], 4, and the 1997 gross receipts of $1,081,923.00."[93] Despite the submission by Jilin of additional evidence, INS revoked the I-140 approval in 2001.[94] Jilin unsuccessfully appealed to the Administrative Appeals Office.[95] While the appeal was pending, INS "denied the applications for adjustment of status to permanent residence by . . . Zhao and his family."[96]

Jilin and Zhao filed suit against the Department of Homeland Security, USCIS, and others on November 18, 2004 in New Jersey federal district court.[97] The complaint alleged that INS's "actions . . . were unlawful . . . , contrary to applicable statute, regulation and policy, as well as an unconstitutional denial of due process of law and equal protection of law."[98] In support of this allegation, the complaint cited, *inter alia*, the "substantial" evidence Jilin presented in support of the I-140 petition and the fact that INS initially accepted but later found insufficient this evidence.[99] Plaintiffs requested, *inter alia*, that the court declare INS's actions invalid, that the court order USCIS to approve the I-140 petition, and that the court order USCIS to reinstate the adjustment of status applications.[100] The complaint also alleged that the revocation was ultra vires under 8 U.S.C. § 1155, which only allowed INS to revoke visa petitions for "individuals [unlike Zhao] who are not yet present in the United States."[101]

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88. *Id.* at 6–8.
89. *Id.* at 8–9.
90. *Id.* at 9.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.* at 10.
95. *Id.*
96. *Id.* at 12.
97. *Id.* at 1.
98. *Id.* at 2.
99. *Id.* at 13.
100. *Id.* at 15.
101. *Id.* at 13.

On behalf of the defendants, the Assistant U.S. Attorney made several arguments. She noted that Congress had recently and retroactively removed from 8 U.S.C. § 1155 the language on which plaintiffs relied.[102] She urged the court to adopt the reasoning of three Circuit Courts of Appeals which had "held that the plain language of the text of section 242(a)(2)(B)(ii) precludes [judicial] review of discretionary determinations by USCIS,"[103] while acknowledging the contrary *ANA* decision.[104] In the alternative, the Assistant U.S. Attorney argued that, even if the court had jurisdiction, defendants' actions should be upheld under administrative law principles because their actions "were not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[105]

On February 25, 2005, Judge Hochberg dismissed the suit.[106] In her order, she noted that because of the recent amendment to 8 U.S.C. § 1155, that section no longer limited INS's authority to revoke a visa petition.[107] She found that INS's revocation of Zhao's visa was discretionary and that, therefore, her court had no jurisdiction over the matter.[108] In a footnote, she cited approvingly, *inter alia*, the Seventh Circuit *El-Khader* opinion and the *ANA* trial court opinion.[109] Plaintiffs moved for reargument, relying primarily on the similar fact pattern of *ANA*, in which the Ninth Circuit had found visa revocation nondiscretionary.[110] Judge Hochberg denied this motion, observing that none of the predicates for a successful motion to reargue were present, namely, "an intervening change in the controlling law," "evidence not previously available," "a clear error of law," or "manifest injustice."[111] Furthermore, she noted, the Ninth Circuit's decision in *ANA* was not binding precedent, and she had found more persuasive the reasoning of the *El-Khader* panel and the *ANA* trial court.[112]

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102. Letter from Pamela Perron, Assistant U.S. Attorney, to Judge Faith S. Hochberg 1–2 (Jan. 27, 2005) (citing Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 5304(c)(2), 118 Stat. 3638, 3736 (to be codified in pertinent part at 8 U.S.C. § 1155)).

103. *Id.* at 3 (citing El-Khader v. Monica, 366 F.3d 562, 563 (7th Cir. 2004); CDI Info. Serv., Inc. v. Reno, 278 F.3d 616, 620 (6th Cir. 2002); Van Dinh v. Reno, 197 F.3d 427, 421–32, 434 (10th Cir. 1999)).

104. *Id.* (acknowledging ANA Int'l, Inc. v. Way, 393 F.3d 886, 895 (9th Cir. 2004)).

105. *Id.* at 4 (citing 5 U.S.C. § 706(2)(A) (2000)).

106. Jilin Pharm. USA, Inc. v. Ridge, No. 04-5678, at 2 (D.N.J. 2005) (on file with author).

107. *Id.* at 1–2.

108. *Id.* at 2.

109. *Id.* at n.2.

110. Plaintiffs' Motion for Reargument at 4–6, Jilin Pharm. USA, Inc. v. Ridge, No. 04-5678 (D.N.J. 2005).

111. Order Denying Plaintiffs' Motion for Reargument at 2–3, Jilin Pharm. USA, Inc. v. Ridge, No. 04-5678 (D.N.J. 2005).

112. *Id.* at 3 n.8.

Jilin and Zhao appealed to the Third Circuit.[113] Their attorneys declined to provide to the author of this Article their appellate brief, and the author was unable to obtain the brief from the federal courts website. Nevertheless, the basis for the appeal may be divined from the Third Circuit's opinion:

> Appellants' essential contention before us is that within § 1155 the phrase "good and sufficient cause" is a nondiscretionary, reviewable "statutory standard which must be met before the Attorney General is free to exercise his discretion in revoking a petition." Although they concede that § 1252(a)(2)(B)(ii) precludes review of discretionary decisions, they argue that rather than giving the Attorney General limitless discretion to revoke approvals, "the language of § 1155 is intended to give the Attorney General [only] a small degree of latitude in determining the revocability of a petition." In this case, they contend that the revocation was grounded on the "clear and specific requirements [of § 1101(a)(44)(A) & (B)] that must be met in order to qualify as an executive or managerial employee," and we may therefore review that underlying "statutory determination." Absent a grant of complete discretion pursuant to § 1155, they argue, the jurisdictional bar of § 1252(a)(2)(B)(ii) does not apply.[114]

The U.S. Department of Justice's Office of Immigration Litigation (OIL) represented the defendants in the appeal. The arguments in OIL's appellate brief follow.

OIL first described the statutory framework under which 8 U.S.C. § 1155 gave INS the authority to revoke the approval of the I-140 petition and 8 U.S.C. § 1252(a)(2)(B)(ii) stripped federal court jurisdiction over this discretionary decision.[115] OIL noted that Real ID made it clear that § 1252(a)(2)(B)(ii) applied outside removal proceedings.[116] OIL described a recent Third Circuit case holding that § 1252(a)(2)(B)(ii) precludes judicial review of another type of discretionary decision, the denial of a waiver.[117] OIL also urged the court to consider a D.C. Circuit case in which the court found that the word "deems" in 8 U.S.C. § 1153(b)(2)(B)(i) indicated agency discretion, suggesting that the same word in § 1155 should

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113. Jilin Pharm. USA, Inc. v. Chertoff, 447 F.3d 196, 197 (3d Cir. 2006).

114. *Id.* at 202–03 (emphasis and citations omitted).

115. Brief of Respondents-Appellees at 8–9, Jilin Pharm. USA, Inc. v. Chertoff, 447 F.3d 196 (3d Cir. 2006) (No. 05-2788) [hereinafter OIL Brief].

116. *Id.* at 9–10.

117. *Id.* at 12–16 (citing Urena-Tavarez v. Ashcroft, 367 F.3d 154, 159–60 (3d Cir. 2004)).

also indicate agency discretion.[118] OIL then presented further support for the discretionary nature of INS's revocation authority, using the *El-Khader* majority and *ANA* dissenting opinions[119] and adopting Judge Tallman's critique of the *ANA* result.[120]

OIL concluded its brief by addressing Jilin's assertion that the I-140 approval revocation constituted "an unconstitutional denial of due process of law and equal protection of law."[121] OIL dismissed as "not colorable"[122] the allegations that the revocation "was arbitrary, capricious, and *ultra vires* in contravention of the Fifth Amendment, and that the revocation violated due process because the approval was a legal right on which appellants had relied for over two years"[123] on the basis that courts have not recognized the approval of a visa petition as a protected property right.[124] OIL dismissed plaintiffs' "equal protection claims . . . that the government's revocation of Zhao's visa petition constituted unwarranted invidious discrimination against small companies in favor of large companies, and was an improper attempt to enforce U.S. trade and tariff policy through the immigration laws"[125] on the basis that plaintiffs had not shown "disparate treatment of different groups"[126] or explained how "small companies are a protected class."[127]

The Third Circuit's opinion began by noting that the court had previously ruled that the statutory language governing visa approvals did not give USCIS discretion.[128] Thus, the key inquiry in the case sub judice was whether the visa *revocation* language differed enough from the visa approval language to give USCIS discretion with respect to revocation.[129] It did.[130] As the court noted, the approval language states that "[v]isas *shall* be made available" to qualified applicants, whereas the revocation language states that "[t]he Secretary of Homeland Security *may*, *at any time*, for what he *deems* to be good and sufficient cause, revoke the approval of any

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118. *Id.* at 16–17 (citing Zhu v. Gonzales, 411 F.3d 292, 295 (D.C. Cir. 2005)).

119. *Id.* at 17–21 (citing ANA Int'l, Inc. v. Way, 393 F.3d 886, 897–98 (9th Cir. 2004) (Tallman, J., dissenting); El-Khader v. Monica, 366 F.3d 562, 567 (7th Cir. 2004)).

120. *Id.* at 22–24 (citing *ANA Int'l, Inc.*, 393 F.3d at 896, 898–99 (Tallman, J., dissenting)).

121. Jilin Complaint, *supra* note 80, at 2; *see id.* at 24–26.

122. OIL Brief, *supra* note 115, at 24–25.

123. *Id.* at 24 (citation and internal quotation marks omitted).

124. *Id.* at 25.

125. *Id.* at 24 (citations and internal quotation marks omitted).

126. *Id.* at 25.

127. *Id.* at 26.

128. Jilin Pharm. USA, Inc. v. Chertoff, 447 F.3d 196, 197 (3d Cir. 2006) (citing Soltane v. U.S. Dep't of Justice, 381 F.3d 143, 147 (3d Cir. 2004)).

129. *Id.*

130. *Id.* at 200.

petition approved by him under section 1154."[131] The court observed that it had already ruled that the word "may" is indicative of agency discretion,[132] and the words "at any time" and "deems" further supported Judge Hochberg's finding of discretion.[133] The court declined to consider Jilin's constitutional claims because:

> The jurisdiction granted by 28 U.S.C. §§ 1331 & 2201 and 5 U.S.C. § 702 to review constitutional questions is immediately precluded by the opening words of 8 U.S.C. § 1252(a)(2)(B), which states that "[*n*]*otwithstanding any other provision of law*, . . . no court shall have jurisdiction to review . . . decision[s] . . . specified in this subchapter to be in the discretion of the . . . Attorney General or the Secretary of Homeland Security."[134]

Because the revocation was discretionary, the bar set by 8 U.S.C. § 1252(a)(2)(B)(ii) precluded review of the revocation.[135] The Third Circuit therefore affirmed the lower court's dismissal of the suit.[136] In doing so, the Third Circuit embraced the reasoning of the Seventh Circuit in *El-Khader*[137] and rejected that of the Ninth Circuit in *ANA*.[138] Jilin and Zhao moved unsuccessfully for rehearing en banc.[139]

D. Fifth Circuit: Discretionary

In *Ghanem v. Upchurch*, the Fifth Circuit joined the Seventh and Third Circuits in concluding that federal courts lack jurisdiction to review visa

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131. *Id.* (citing 8 U.S.C.S. § 1155 (LexisNexis 1997 & Supp. 2006)) (emphasis added). The citation was actually to 8 U.S.C. § 1155 (2005), which does not and will never exist.

132. *Jilin Pharm. USA, Inc*., 447 F.3d at 203 (citing Urena-Tavarez v. Ashcroft, 367 F.3d 154, 160 (3d Cir. 2004)).

133. *Id.*

134. *Id.* at 206 (alterations in original). See *infra* Part III.C, arguing the constitutional considerations were more complex than the Third Circuit averred.

135. *Id.*

136. *Id.*

137. *Id.* at 203.

138. *Id.* at 202 (characterizing Judge Tallman's dissent in *ANA* as "persuasive"), 203–04 (rejecting the Ninth Circuit's holding that the "good and sufficient cause" language in § 1155 implies the existence of "reviewable nondiscretionary factors beyond the reach of the jurisdictional bar of § 1252(a)(2)(B)(ii)").

139. Appellants' Petition for Rehearing at 3, Jilin Pharm. USA, Inc. v. Chertoff, 447 F.3d 196 (3d Cir. 2006) (No. 05-2788) [hereinafter Petition for Rehearing]. The Third Circuit denied this motion on June 28, 2006. Order Denying Petition for Banc Rehearing, Jilin Pharm. USA, Inc. v. Chertoff, 447 F.3d 196 (3d Cir. 2006) (No. 05-2788).

revocations because such revocations are discretionary.[140] The following subpart recounts the facts of this case and the Fifth Circuit's reasoning.

Ayed Ghanem, a citizen of Jordan, married Sandy Ghanem, a citizen of the United States, in 2002.[141] Subsequently, Sandy filed a marriage-based immigrant visa petition with USCIS "on behalf of Ayed."[142] In 2004, USCIS approved this petition.[143] USCIS later served a Notice of Intent to Revoke on Sandy.[144] USCIS issued this notice because, the agency alleged, Ayed had previously sought an immigration benefit on the basis of a fraudulent marriage.[145] Notwithstanding Sandy's response to this Notice, USCIS revoked the petition.[146]

After an unsuccessful, unreported appeal to the BIA, "[t]he Ghanems filed a complaint for review of the revocation of the visa in [federal] district court."[147] In the district court action, the Ghanems argued that the court had federal question and Administrative Procedures Act jurisdiction to review the revocation.[148] They also argued that USCIS violated their Fifth Amendment due process rights by disregarding the pertinent regulatory and statutory provisions.[149] The Ghanems did not argue that the court should follow *ANA*, nor did they argue that the visa revocation decision was nondiscretionary and therefore reviewable.[150] Judge McBryde, "not persuaded by the [jurisdictional] arguments and authorities" provided by the Ghanems, dismissed the action for want of jurisdiction.[151]

The Ghanems appealed to the Fifth Circuit.[152] The court noted at the outset that the jurisdictional question turned on whether USCIS's revocation power was discretionary.[153] Relying on the dictionary definition of "deem," the court found that the language of 8 U.S.C. § 1155 made the decision discretionary.[154] Reading the statute in its entirety, the court rejected the

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140. Ghanem v. Upchurch, 481 F.3d 222, 225 (5th Cir. 2007).

141. *Id.* at 223.

142. *Id.*

143. *Id.*

144. *Id.*

145. Complaint for Review of Revocation of Visa Petition at 3, Ghanem v. Upchurch, No. 4-06-CV-087-A (N.D. Tex. Feb. 27, 2006) [hereinafter Ghanem Complaint].

146. *Ghanem*, 481 F.3d at 223.

147. *Id.*

148. Memorandum of Legal Authority at 1–2, Ghanem v. Upchurch, No. 4-06-CV-087-A (N.D. Tex. Feb. 27, 2006).

149. *Id.* at 2.

150. *Id.* at 1–3; Ghanem Complaint, *supra* note 145, at 1–3. The federal courts website has no record of USCIS's response to the Ghanems' arguments.

151. Order at 2, Ghanem v. Upchurch, 481 F.3d 222 (N.D. Tex. 2007) (No. 4:06-CV-087-A).

152. *Ghanem*, 481 F.3d at 223.

153. *Id.*

154. *Id.* at 224–25.

Ninth Circuit's reliance on the phrase "good and sufficient cause."[155] The court therefore affirmed the district court's dismissal of the suit.[156]

III. ANALYSIS

A. Plain Meaning Supports Discretion

Does 8 U.S.C. § 1155, which states that "[t]he Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him," indicate that revocation is discretionary for USCIS?[157] The judiciary's task in answering this question would be easier if the statute had either of the following two alternate wordings. First, revocation would clearly be nondiscretionary if the statute said "the Secretary of Homeland Security may revoke a petition previously approved by him only for good and sufficient cause, as defined by judicially reviewable standards." Second, revocation would clearly be discretionary if the statute said "the Secretary of Homeland Security may revoke a petition previously approved by him for absolutely any reason; he has unbridled discretion in the matter." To the extent that the actual wording of § 1155 does not match either of these two alternate wordings, § 1155 is ambiguous with respect to discretion. The existence of a circuit split reflects this ambiguity.

The *ANA* majority held that the phrase "good and sufficient cause" in § 1155 "refers to a meaningful standard that the [Secretary] may 'deem' applicable or inapplicable in a particular case, but which he does not manufacture anew in every new instance."[158] This holding relied on the following implicit syllogism. "Good cause" is "[a] legally sufficient reason."[159] Since courts are presumably arbiters of what is "legally sufficient," courts retain the ability to review actions taken pursuant to § 1155.

The problem with this reasoning is that it discounts the rest of the words in § 1155. If Congress meant to limit USCIS's discretion in § 1155, what could the words "may," "at any time," and "for what he deems" mean? The more supportable construction of "good and sufficient cause" is that the phrase is hortatory. That is, the Secretary *should* find "good and

155. *Id.* at 224.
156. *Id.* at 225.
157. 8 U.S.C.S. § 1155 (LexisNexis 1997 & Supp. 2007).
158. ANA Int'l, Inc. v. Way, 393 F.3d 886, 894 (9th Cir. 2004).
159. BLACK'S LAW DICTIONARY 235 (8th ed. 2004).

sufficient cause" before revoking a visa, not revoke it arbitrarily or out of spite. Admittedly, to accept that this phrase is not legally significant requires a cognitive leap. But this is just one phrase. A much larger leap would be required to accept that the *three distinct* words and phrases "may," "at any time," and "for what he deems" are not legally significant.

B. External Decision Factors

The *ANA* majority found,[160] and counsel for Jilin argued,[161] that external decision factors in INS's decisions also limited the agency's discretion. Specifically, they reasoned that 8 U.S.C. § 1101(a)(44)(A)[162] "define[d] the notion of 'managerial capacity' upon which the decision[s to revoke the I-140 visas in both cases] relied. This subsection provides detailed criteria for determining, for any purpose governed by another section of the immigration law, whether someone is employed in a managerial capacity."[163] Because, under this reasoning, "[i]t is emphatically the province and duty of the"[164] courts, not an agency, "to say what the law is,"[165] an agency decision based on a legal concept, in this case a statutory definition, is inherently nondiscretionary, notwithstanding any jurisdiction-stripping provision to the contrary.

This reasoning does not withstand scrutiny. USCIS's decisions are often based on statutory definitions. For example, when denying a family-based I-130 petition for an adopted child, the agency might rely on 8 U.S.C.

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160. *ANA Int'l, Inc.*, 393 F.3d at 894–95.

161. Petition for Rehearing, *supra* note 139, at 8–12.

162. 8 U.S.C. § 1101(a)(44)(A) (2000).

> The term "managerial capacity" means an assignment within an organization in which the employee primarily (i) manages the organization, or a department, subdivision, function, or component of the organization; (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization; (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) or, if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Id.

163. *ANA Int'l, Inc.*, 393 F.3d at 894–95.

164. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

165. *Id.*

§ 1101(b)(1)(E), which defines "adopted child."[166] Indeed, it is difficult to imagine a USCIS decision *not* based on a statutorily defined concept, whether it be "managerial capacity," "adopted child," or something else. If all USCIS decisions involving statutorily-defined concepts are nondiscretionary and therefore not subject to jurisdiction-stripping statutory provisions, vanishingly few USCIS decisions *would be* subject to such provisions. The effect of this "external decision factors" rule is clearly at odds with Congress's plenary power over the jurisdiction of federal courts in general[167] and its plenary power over immigration matters in particular.[168]

C. Constitutional Considerations

The *Jilin* court found that it "lack[ed] the jurisdiction to consider" Jilin's constitutional challenges to the revocation of the approval of its I-140 petition because of the phrase "[n]otwithstanding any other provision of law" in 8 U.S.C. § 1252(a)(2)(B)(ii), the jurisdiction-stripping provision.[169] This finding was incorrect. As the First Circuit noted when faced with a different jurisdiction-stripping provision, "[f]ederal courts . . . retain subject matter jurisdiction over habeas petitions brought by aliens facing removal to the extent that those petitions are based on colorable claims of legal error, that is, colorable claims that an alien's statutory or constitutional rights have been violated."[170]

The Constitution is not merely a "provision of law." It overrides any statutory provision.[171] Considering a constitutional challenge to yet another

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166. 8 U.S.C. § 1101(b)(1)(E) (2000). Of course, USCIS decisions also rely on regulations. The regulation at 8 C.F.R. § 204.2(d) (2000) defines "adopted child."

167. *E.g.*, Sheldon v. Sill, 49 U.S. (8 How.) 441, 449–50 (1850) (allowing Congress to preclude federal court jurisdiction for certain diversity suits despite the constitutional source of diversity jurisdiction).

168. *E.g.*, Fiallo v. Bell, 430 U.S. 787, 792 (1977) ("[I]n the exercise of its broad power over immigration and naturalization, Congress regularly makes rules that would be unacceptable if applied to citizens.") (citation and internal quotation marks omitted); Chae Chan Ping v. United States, 130 U.S. 581, 604 (1889).

> The powers to declare war, make treaties, suppress insurrection, repel invasion, regulate foreign commerce, secure republican governments to the States, and admit subjects of other nations to citizenship, are all sovereign powers, restricted in their exercise only by the Constitution itself and considerations of public policy and justice which control, more or less, the conduct of all civilized nations.

Id.

169. Jilin Pharm. USA, Inc. v. Chertoff, 447 F.3d 196, 206 (3d Cir. 2006).

170. Carranza v. INS, 277 F.3d 65, 71 (1st Cir. 2002). *Accord* Enwonwu v. Chertoff, 376 F. Supp. 2d 42, 66 (D. Mass. 2005) ("[B]ecause [an alien] claim[ed] a violation of his constitutional rights, [a jurisdiction-stripping statutory provision did] not deprive [the federal courts] of subject matter jurisdiction . . . .").

171. Marbury v. Madison, 5 U.S. (1 Cranch) 137,177 (1803) ("[A]n act of the legislature,

jurisdiction-stripping provision, the Second Circuit noted in *Battaglia v. General Motors Corp.* that "if one of [the] effects [of a jurisdiction-stripping provision] would be to deprive [someone] of property without due process or just compensation, [the provision] would be invalid."[172] Despite *Battaglia*'s continued viability, the Supreme Court might allow Congress to preclude federal court consideration of constitutional challenges to statutes if there were a "clear, unambiguous, and express statement" of Congress's intent to do so, but, as the Court warned, this would raise "serious constitutional questions."[173] Jilin's constitutional challenges to § 1252(a)(2)(B)(ii) therefore merit further analysis.

1. Due Process

Jilin alleged that the revocation of the approval of Zhao's I-140 petition "violated due process because the approval was a legal right on which appellants had relied for over two years,"[174] implying that Jilin, Zhao, or both had a protected property interest in the visa, an interest upon which both INS and AAU trampled. Jilin cited no authority for the existence of this interest. As OIL noted, the Second Circuit has explicitly held that the interest does not exist.[175] The Ninth Circuit[176] and Board of Immigration Appeals[177] have suggested as much.

Unlike the courts named in the preceding paragraph, the Supreme Court has not considered whether a property interest exists in visa petition

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repugnant to the constitution, is void.").

172. Battaglia v. Gen. Motors Corp., 169 F.2d 254, 257 (2d Cir. 1948), *cert. denied*, 335 U.S. 887 (1948).

173. INS v. St. Cyr, 533 U.S. 289, 314 (2001). While never stated explicitly, for all practical purposes *St. Cyr* was superseded by the Real ID Act. *See* Enwonwu v. Chertoff, 376 F. Supp. 2d 42, 82 (D. Mass. 2005) (looking at legislative history and determining that Congress expressed its dissatisfaction with *St. Cyr* in the Real ID Act).

174. OIL Brief, *supra* note 115, at 24 (citation and internal quotation marks omitted).

175. *Id.* at 25 (citing Azizi v. Thornburgh, 908 F.2d 1130, 1134 (2d Cir. 1990)). "[T]he Azizis cannot succeed on their due process challenge, because they do not have an inherent property right in an immigrant visa, and [the statutory provision at issue in the case] does not grant them any such property interest." *Azizi*, 908 F.2d at 1134.

176. Tongatapu Woodcraft Haw., Ltd. v. Feldman, 736 F.2d 1305, 1308 (9th Cir. 1984). "An approved visa petition is merely a preliminary step in the visa application process. It does not guarantee that a visa will be issued, nor does it grant the alien any right to remain in the United States." *Id.* (citations omitted).

177. *In re* Ho, 19 I. & N. Dec. 582, 589 (B.I.A. 1988).

> [T]he approval of a visa petition vests no rights in the beneficiary of the petition. Approval of a visa petition is but a preliminary step in the visa or adjustment of status application process, and the beneficiary is not, by mere approval of the petition, entitled to an immigrant visa or to adjustment of status.

Id.

approvals or, for that matter, what due process requirements would flow from such an interest. However, an examination of the due process requirements imposed by the Court when it *did* find a novel, protected property interest is instructive. In *Goldberg v. Kelly*, certain beneficiaries in New York of Aid to Families with Dependent Children (AFDC) saw their benefits terminated; other beneficiaries were threatened with termination of their benefits.[178] At the time litigation began, New York gave AFDC beneficiaries essentially no process with respect to benefit termination.[179] The beneficiaries sued in federal court, challenging the terminations and threats of benefit termination as "denying them due process of law."[180] After litigation began, New York instituted formal termination procedures, but the beneficiaries maintained their suit, "challeng[ing] the constitutional adequacy of those procedures."[181] The suit eventually made its way to the United States Supreme Court, which not only found that AFDC beneficiaries had a property interest in AFDC benefits,[182] but also imposed a set of stringent, constitutionally-mandated requirements on benefit termination proceedings, summarized by one commentator as follows:

> - Notice [;]
> - An oral hearing before an "impartial" decision-maker with direct and cross-examination[;]
> - retained counsel (although not appointed counsel)[;]
> - compilation of a record[;]
> - the use of that record as the exclusive basis for a decision[; and]
> - a decision accompanied by a statement of reasons (although not by the sort of formal findings and conclusions that a trial judge must make).[183]

Assuming, arguendo, that Jilin and Zhao had a property right in the approved I-140 petition, would these stringent requirements apply? If so, to

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178. Goldberg v. Kelly, 397 U.S. 254, 255–56 (1970). Despite the 1996 abolition of AFDC, *Goldberg* is of continued relevance to agency due process analysis. WILLIAM F. FOX, JR., UNDERSTANDING ADMINISTRATIVE LAW 122 (4th ed. 2000) ("[B]ecause *Goldberg* is a constitutional decision, it follows that any state welfare program that is modeled after AFDC would have to abide by the principles articulated by the Supreme Court in *Goldberg*."). The due process analysis that follows is indebted to Professor Fox.

179. *Goldberg*, 397 U.S. at 256–57.

180. *Id.* at 256.

181. *Id.* at 257.

182. *Id.* at 262 n.8 ("It may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity.'").

183. FOX, *supra* note 178, at 124.

what extent were they followed? If either (a) the requirements did not apply or (b) the requirements were substantially met, the due process challenge properly failed.

Under the *Goldberg* analysis, the strict procedural requirements should not apply to visa revocation proceedings. Justice Brennan's imposition of the strict procedural requirements relied on the fact that "[f]or qualified recipients, welfare provides the means to obtain essential food, clothing, housing, and medical care. . . . Since [a welfare recipient] lacks independent resources, his situation becomes immediately desperate" when AFDC benefits are terminated.[184] A welfare recipient has a "brutal need" for welfare benefits.[185]

Jilin Pharmaceutical USA, Inc., as a corporation, can not be said to have those same brutal needs. It has no need for "food, clothing, housing, [or] medical care."[186] The due process challenge therefore properly failed with respect to the corporation. Wei Zhao, as a human being, does need "food, clothing, housing, and medical care."[187] The need is not brutal, however. Zhao, a graduate of the Jilin Chemical Institute, worked continuously for Jilin Pharmaceutical Ltd. Co. and its subsidiary from 1983 until 2004, when the complaint was filed, and perhaps longer.[188] His ability to meet basic subsistence needs was not presumably in doubt during this period, in sharp contrast to the indigent recipients of AFDC benefits. There is little reason to doubt that if Zhao leaves (or left) the United States, he could continue (or continued) to work for Jilin Pharmaceutical Ltd. Co., thereby meeting (or having met) his subsistence needs. His due process challenge therefore also properly failed.

Assuming, however, that Zhao's need was brutal, the process that INS and AAU gave him substantially met Justice Brennan's *Goldberg* requirements, and his due process challenge therefore properly failed on that alternative basis. An analysis of the six factors follows.

(1) INS issued "a Notice of Intent to Revoke the approval of the I-140 petition," thereby satisfying the "notice" requirement.[189]

(2) Strictly speaking, there was not "[a]n oral hearing before an 'impartial' decision-maker with direct and cross-examination."[190] Given the high volume of appeals that AAU hears,[191] however, an oral hearing

184. *Goldberg*, 397 U.S. at 264.
185. *Id.* at 261.
186. *Id.* at 264.
187. *Id.*
188. Jilin Complaint, *supra* note 80, at 3–6.
189. *Id.* at 9; FOX, *supra* note 178, at 122.
190. FOX, *supra* note 178, at 124.
191. "The [AAU] received 20,121 cases in 2004." Letter from Robert Divine, Acting Deputy

does not seem practical. To the extent that AAU reverses USCIS where the Office finds that USCIS has erred,[192] AAU is impartial.[193] That is, AAU does not merely rubber-stamp USCIS's actions. Direct- and cross-examination, at least as conventionally understood, are also not practical due to AAU's caseload.[194] Jilin and Zhao had ample opportunity, however, both to present their own evidence and to challenge USCIS's evidence,[195] thereby satisfying the policy goals of direct- and cross-examination.[196]

(3) Jilin and Zhao were represented by counsel throughout their appeal to AAU, satisfying the representation requirement. This representation accorded with USCIS's policy of permitting adverse-decision appellants to be represented by counsel.[197]

(4) Not only did USCIS compile a record while processing the I-140 petition and the appeal of its denial, but the applicable regulation states that counsel for aliens have access to this record.[198] The record requirement was therefore satisfied.

(5) The record compiled while INS was processing the I-140 petition was the exclusive basis for INS's decision, satisfying the "exclusive basis" requirement. AAU has stated that it will consider evidence first offered on appeal in certain circumstances,[199] but there is no indication that AAU examined new evidence in this case.

(6) In INS's notice of revocation of approval of the I-140 petition, the

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Dir., U.S. Citizenship & Immigration Servs. to Prakash Khatri, Ombudsman, U.S. Citizenship & Immigration Servs. (Dec. 6, 2005) [hereinafter Divine letter]. The regulations do permit a petitioner to request oral argument. 8 C.F.R. § 103.3(b) (2000).

192. *See, e.g.*, *In re* Buschini, AAU, 2006 WL 3004073, at 2, (June 30, 2006) (reversing USCIS's finding that an alien was not a citizen of Cuba).

193. Prior to 2003, the AAU, the Board of Immigration Appeals (BIA), and USCIS were united under one agency, INS. In that year, Congress moved AAU and INS's immigration benefit activities, but not the BIA, from the Department of Justice to the Department of Homeland Security. AAU might be less subject to criticism for partiality if the Office had remained, like the BIA, under the Department of Justice.

194. *See* Divine Letter, *supra* note 191, at 2 (describing AAU's caseload).

195. Jilin Complaint, *supra* note 80, at 10 ("Plaintiffs, in their rebuttal to the Defendant's Notice of Intent to Revoke . . . demonstrated that an organization such as Jilin Pharmaceutical, with its level of volume and transactions, by its very nature, must be directed by an executive individual.").

196. Of course, if USCIS had relied on oral evidence not subject to cross-examination, the confrontation policy goal of cross-examination would be less well met.

197. 8 C.F.R. § 103.3(a)(iii)(B) (2000). The option of attorney representation is not merely buried in the regulations but is also announced on the USCIS website. U.S. Citizenship & Immigration Servs., Administrative Appeals Office: How Do I Appeal the Denial of My Petition or Application?, http://tinyurl.com/3xhvcl (last visited Sept. 12, 2007) ("The person appealing the decision may be represented by an attorney or representative.").

198. 8 C.F.R. § 292.4(b) (2000).

199. *In re* ___, 33 Immig. Rptr. B2-8, at 4 (AAU 2005) (noting that a "document submitted for the first time on appeal [that] was not specifically requested by the director" may be considered on appeal).

agency gave the following reasoning:

> The Service is not persuaded that in an organization the size and nature of yours, the beneficiary will be engaged in primarily executive or managerial job duties. Rather, we presume that he has been and will be engaged in the non-managerial day to day operations involved in producing a product or providing a service.[200]

This reasoning satisfied the "statement of reasons" requirement.

2. Equal Protection

In an apparent reference to INS's reliance on Jilin's small size in the agency's finding that Zhao was not employed in a managerial position, Jilin alleged "that the decisions of the Defendants constituted unwarranted invidious discrimination against small companies in favor of large companies."[201] To the extent that a small company might have more difficulty showing that its employee is engaged primarily in managerial pursuits, INS's reliance on Jilin's small size might be considered discriminatory, though not invidiously so, as argued below.

Acts of Congress are presumptively valid,[202] and laws that do not discriminate against "discrete and insular minorities" receive minimal scrutiny from the courts.[203] As creatures of statute, agencies are also subject to this analysis.

As OIL noted in the appeal to the Third Circuit, Jilin did not demonstrate that "'small companies' are a protected class."[204] In other words, Jilin did not demonstrate that small companies constitute a "discrete and insular minorit[y]."[205] To the contrary, small companies are, in some ways, an *advantaged* class. For example, the Securities Exchange Act of 1934[206] imposes onerous reporting requirements on companies with assets exceeding $10 million.[207] Large companies are subject to tremendous

200. Jilin Complaint, *supra* note 80, at 10.
201. *Id.* at 14.
202. United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938).
203. *Id.* at 153 n.4.
204. OIL Brief, *supra* note 115, at 26.
205. *Carolene Prods. Co*., 304 U.S. at 153 n.4.
206. Securities Exchange Act of 1934, 15 U.S.C. § 78(a)–(lll) (2000).
207. *See* 17 C.F.R. § 240.12g-1 (noting that the Securities Exchange Act of 1934 exempts small businesses from section 12(g) reporting requirements where "on the last day of its most recent fiscal year the issuer had total assets not exceeding $10 million").

scrutiny by the public.[208] Small companies have an entire federal agency, the Small Business Administration, devoted to their welfare.[209] Finally, small companies have demonstrated considerable lobbying prowess,[210] a reality that weighs against protected group classification.[211]

Even assuming that INS, acting under its congressionally delegated authority, was discriminating against one type of company (small ones) in favor of another type of company (large ones), the Supreme Court would not find this discrimination invidious—the Court has upheld other types of inter-enterprise discrimination.[212] "[I]t is for the legislature, not the courts, to balance the advantages and disadvantages" of inter-enterprise discrimination.[213] Furthermore, as the Third Circuit has noted, assuming that INS was discriminating against one group of aliens, those employed by small companies, in favor of another group of aliens, those employed by large companies, "disparate treatment of different groups of aliens triggers only rational basis review under equal protection doctrine."[214]

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208. *See, e.g.*, Wal-Town, http://www.uberculture.org/waltown (last visited Dec. 2, 2007) (describing "an effort to examine, expose and ultimately resist the negative impact that multinational retailers such as Wal-Mart have on Canadian communities, as well as international implications around Human Rights, labour and exploitation").

209. Small Business Act of 1953, 15 U.S.C. § 631 (2000). This act declared the "policy of the Congress that the Government should aid, counsel, assist, and protect . . . the interests of small-business concerns." *Id.* § 631(a). This policy is to be done "through the Small Business Administration, acting in cooperation with the Department of Commerce and other relevant State and Federal agencies . . . ." *Id.* §§ 631(b)(1).

210. *E.g.*, National Federation of Independent Businesses, Success Stories, http://www.nfib.com/object/learnmore (follow "SUCCESS STORIES" hyperlink) (describing successful lobbying of Congress in the realms of healthcare, taxation, worker safety, and prisoner labor).

211. *E.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 445 (1985) (rejecting a heightened scrutiny standard of review for legislation directed at the developmentally disabled because this group is not "politically powerless"). *See also* Lewis F. Powell, Jr., *Carolene Products Revisited*, 82 COLUM. L. REV. 1087, 1088–89 (1982).

> The fundamental character of our government is democratic. Our constitution assumes that majorities should rule and that the government should be able to govern. Therefore, for the most part, Congress and the state legislatures should be allowed to do as they choose. But there are certain groups that cannot participate effectively in the political process. And the political process therefore cannot be trusted to protect these groups in the way it protects most of us.

Id.

212. *E.g.*, New Orleans v. Dukes, 427 U.S. 297, 304 (1976) (per curiam) (rejecting an equal protection challenge to a city ordinance favoring street vendors who had eight or more years of presence in the French Quarter); Williamson v. Lee Optical, 348 U.S. 483, 488–89 (1955) (rejecting an equal protection challenge to a statute imposing certain licensing requirements on opticians but not on sellers of ready-to-wear glasses).

213. *Williamson*, 348 U.S. at 487.

214. DeSousa v. Reno, 190 F.3d 175, 184 (3d Cir. 1999).

CONCLUSION

This Article takes no position as to whether the preclusion of judicial review of visa revocations is advisable from a public policy perspective. It is true, as Jilin noted, that this jurisdiction-stripping leads to the arguably absurd result that USCIS could avoid judicial review of its visa decisions by approving and then revoking, rather than initially denying, visa petitions.[215] Indeed, it is possible that USCIS's use of company size as a decision factor when considering employment-based visa petitions could lead to the economically wasteful result that decisions about whether to form a subsidiary or joint venture will be based on visa considerations. On the other hand, immigration matters, some of them perhaps not meritorious, constitute a large proportion[216] of the increasingly crowded federal dockets.[217] The effect of the *Jilin*/*El-Khader*/*Ghanem* result is to free up federal courts for speedier resolution of non-immigration matters, many of them surely meritorious.

One way the Supreme Court could resolve the circuit split would be to choose the *ANA* result for the policy reason that USCIS should not be able to insulate its visa decisions from review by approving and then revoking visa petitions, rather than initially denying them. This would be a mistake because the Court would be substituting its judgment for that of Congress, thereby weakening the "rule of law."[218] This substitution would be erroneous because the statutory regime is neither intractably ambiguous,[219]

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215. Petition for Rehearing, *supra* note 139, at 13. The author's examinations of the Third, Fifth, Seventh, and Ninth Circuit cases revealed no "bad faith revocations" on the part of INS or USCIS.

216. Press Release, Federal Judiciary, Legal Decisions, Legislation & Forces of Nature Influence Federal Court Caseload in FY 2005 (Mar. 14, 2006), *available at* http://www.uscourts.gov/Press_Releases/judbus031406.html ("Administrative agency appeals [to the circuit courts of appeal] grew 12 percent [in 2005] to 13,713, primarily due to challenges to Bureau of Immigration Appeals (BIA) decisions, which increased 14 percent to 12,349.").

217. *See id.* ("For the tenth consecutive record-breaking year, filings in the 12 regional courts of appeals rose 9 percent to an all-time high of 68,473."); *see also* Jeffrey O. Cooper & Douglas A. Berman, *Passive Virtues and Casual Vices in the Federal Courts of Appeals*, 66 BROOK. L. REV. 685, 689 (2000) ("Not surprisingly, the increased workloads facing the federal circuit courts, as well as the corresponding changes in their administrative structures and practices, have prompted substantial scholarly commentary."). Cooper and Berman surveyed the impacts, most of them not salutary, of the federal courts' increasingly crowded dockets. *Id.* at 694–703.

218. Posting of Brian Tamanaha to Balkinization, http://balkin.blogspot.com/2006/12/judge-posners-seductive-realism-and.html (Dec. 4, 2006, 10:27 EST). Tamanaha argued that judges should not decide cases on policy grounds when confronted with tractable statutory ambiguity. *Id.*

219. Statutory ambiguity may, of course, be so intractable that resort to policy analysis is appropriate. *See, e.g.*, Josh Adams, Note, *The Conundrum of Classifying State Drug Offenses Under the Immigration and Nationality Act: Guidelines Approach or Hypothetical Federal Felony Test?*, 31 VT. L. REV. 185, 207–08, 211–12 (2006) (applying policy analysis to an intractably ambiguous statutory regime).

as argued above in Part III.A, nor repugnant to the Constitution, as argued above in Part III.C. The relevant statutory provisions, §§ 1155 and 1252(a)(2)(B)(ii), must therefore be given full effect, stripping federal courts of jurisdiction over visa revocations.