PRACTICE ADVISORY[1]

March 31, 2020

GUERRERO-LASPRILLA V. BARR: IMPLICATIONS FOR JUDICIAL REVIEW

On March 23, 2020, the Supreme Court decided *Guerrero-Lasprilla v. Barr*, Nos. 18-776, 18-1015. The decision vacated two unpublished decisions of the U.S. Court of Appeals for the Fifth Circuit, *Guerrero-Lasprilla v. Sessions*, 737 F. App'x 230 (5th Cir. 2018), and *Ovalles v. Sessions*, 741 F. App'x 259 (5th Cir. 2018). The Court held that 8 U.S.C. § 1252(a)(2)(D), which preserves review over "constitutional claims or questions of law" in petitions for review of a removal order before the federal courts of appeals, provides for review of the application of a legal standard to undisputed facts.

This Practice Advisory addresses the Supreme Court's holding and rationale in *Guerrero-Lasprilla*, the decision's implications for judicial review in other contexts, and next steps for practitioners with cases impacted by the Court's decision.

1. What is *Guerrero-Lasprilla* about?

Guerrero-Lasprilla v. Barr, 2020 U.S. LEXIS 1907, 2020 WL 1325822 (U.S. Mar. 23, 2020) addresses the scope of judicial review available in petitions for review of removal orders filed with the U.S. courts of appeals.[2] Notably, although the case arose in the context of petitions for review of decisions denying requests to equitably toll the deadline for filing a motion to reopen, the decision is not about equitable tolling; neither the Fifth Circuit nor the Supreme Court addressed the merits of the underlying motions or the availability of equitable tolling.

2. What did the Supreme Court hold in *Guerrero-Lasprilla*?

At issue in *Guerrero-Lasprilla* is the meaning of 8 U.S.C. § 1252(a)(2)(D), which reads:

> Nothing in subparagraph (B) or (C) [of 8 U.S.C. § 1252(a)(2)], or in any other provision of this Act (other than [§ 1252]) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or

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[2] For more information on petitions for review, see American Immigration Council, *How to File a Petition for Review* (Nov. 2015), available here.

> questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

The Court found that 8 U.S.C. § 1252(a)(2)(D)'s preservation of review of "questions of law" includes review of mixed questions of law and fact, including the application of law to "undisputed" or "established" facts. *See Guerrero-Lasprilla v. Barr*, Nos. 18-776, 18-1015, Slip Op. at 4 (Mar. 23, 2020). Thus, for claims that would otherwise be subject to the jurisdictional bars at § 1252(a)(2)(B) (barring review over certain discretionary decisions), § 1252(a)(2)(C) (barring review for those removable for certain criminal convictions), or provisions limiting or eliminating judicial review in the Immigration and Nationality Act,[3] the Court held that § 1252(a)(2)(D) preserves review over the proper application of law to settled facts.

In so holding, the Court reversed the Fifth Circuit's decisions finding that it lacked jurisdiction to review the application of "the equitable tolling due diligence standard" to undisputed facts. Slip Op. at 3 (discussing the Fifth Circuit's jurisdictional holdings). The Court remanded the cases for further proceedings consistent with its opinion. *Id*. at 13.

3. What was the Supreme Court's rationale?

The Supreme Court provided four main reasons to support its holding:

- First, the Court explained that nothing in the text of the statute or case law precluded the conclusion that "questions of law" refers to the application of a legal standard to facts. The Court pointed to its prior precedent treating mixed questions of law and fact as raising a legal inquiry. Slip Op. at 4-5.

- Second, the Court relied on the "well-settled" and "strong" presumption favoring judicial review of administrative action. Slip Op. at 6 (quoting *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496, 498 (1991)). This presumption can only be overcome by "clear and convincing evidence" that Congress intended to prohibit judicial review. Because excluding mixed questions from § 1252(a)(2)(D) would insulate from review any Board decision that simply stated the correct legal standard—even when it was evident that the Board misapplied that standard—the presumption supported the Court's broader interpretation of the statute. *Id.* (quoting *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 64 (1993)); *see also id.* at 6-7.

- Third, the Court looked to § 1252(a)(2)(D)'s statutory context. The Court pointed to another provision within the same section—§ 1252(b)(9)—which uses the phrase "questions of law" in a manner that suggests it includes the application of law to fact. The Court concluded Congress likely intended "questions of law" to have the same meaning in § 1252(a)(2)(D). Slip Op. at 7-8.

- Finally, the Court considered § 1252(a)(2)(D)'s statutory history. Slip Op. at 8-11. Congress enacted § 1252(a)(2)(D) in response to the Court's decision in *INS v. St. Cyr*, 533 U.S. 289 (2001). *St. Cyr* interpreted several previous jurisdiction-stripping

[3] *E.g.*, 8 U.S.C. § 1231(a)(5) (barring review of orders underlying reinstatement orders).

provisions of immigration statutes as not barring claims that were traditionally reviewable in habeas corpus proceedings. *Id.* at 299-305, 314. The Court observed that Congress likely intended § 1252(a)(2)(D) to cover all claims available in habeas, which included the application of law to established facts. Slip Op. at 10. The Court further reasoned that Congress is presumed to have been aware that, prior to the enactment of § 1252(a)(2)(D), many courts had reviewed mixed questions of law and fact raised in habeas petitions. *Id.* at 10-11 (citation omitted).

The Court rejected the government's argument that permitting review would undermine Congress's intent, through its enactment of § 1252(a)(2)(C), to curtail review for noncitizens with criminal convictions, noting that review is limited in that courts cannot review factual determinations in those cases. Slip Op. at 11-13. Moreover, the Court stated, the government's interpretation would leave the Board free to state the correct legal standard and then "apply it in a manner directly contrary to well-established law." *Id.* at 13. This would be contrary to § 1252(a)(2)(D)'s "basic purpose of providing an adequate substitute for habeas review." *Id.*

4. What are the implications of the decision judicial review?

The Court's decision implicates judicial review in cases in which petitioners must rely on the jurisdiction restoring provision of 8 U.S.C. § 1252(a)(2)(D).

As noted above in Question 2, § 1252(a)(2)(D) is relevant in cases in which some other provision limits or eliminates judicial review, such as 8 U.S.C. § 1252(a)(2)(C) (conviction bar), 8 U.S.C. § 1252(a)(2)(B)(ii) (discretionary bar), or 8 U.S.C. § 1231(a)(5) (collateral review bar). *Guerrero-Lasprilla* holds that the courts of appeals, on petition for review, can review mixed questions of law and fact, including the application of law to established facts. Other such questions *could* include the following:

- Whether an offense qualifies as a particularly serious crime pursuant to 8 U.S.C. §§ 1158(b)(2)(A)(ii), 1231(b)(3)(B)(ii);
- Whether asylum applicants qualify for an exception to the one-year filing deadline under 8 U.S.C. § 1158(a)(2)(B);
- Whether, under undisputed facts, a noncitizen is entitled to reopening to apply for asylum based on changed country conditions under 8 U.S.C. § 1229a(c)(7)(C)(ii);
- Whether an organization and its activities fall within the scope and meaning of the statutory terrorism bar at 8 U.S.C. § 1182(a)(3)(B);
- Whether, under established facts, a noncitizen satisfies the continuous presence requirement for purposes of cancellation of removal pursuant to 8 U.S.C. § 1229b(b)(1)(A); or
- Whether established facts amount to "exceptional or extremely unusual hardship" for purposes of cancellation of removal pursuant to 8 U.S.C. § 1229b(b)(1)(D).

Note that the above list is neither dispositive nor exhaustive.

Furthermore, in cases addressing the scope of judicial review, *Guerrero-Lasprilla* can be cited to support two key canons of statutory interpretation: the presumption in favor of judicial review

and the rule that courts should interpret a statute's plain meaning in keeping with its statutory context. *See also supra* Question 3.

First, the Court reiterated the "'well-settled' and 'strong presumption'" that "when a statutory provision 'is reasonably susceptible to divergent interpretation, we adopt the reading that accords with traditional understandings and basic principles: that executive determinations generally are subject to judicial review.'" Slip Op. at 6 (quoting *McNary*, 498 at 496, 498; *Kucana v. Holder*, 558 U.S. 233, 251 (2010)).

Second, the Court considered the "immediate statutory context"—and specifically, the text of 8 U.S.C. § 1252(b)(9)—in interpreting the plain meaning of 8 U.S.C. § 1252(a)(2)(D). *Id*. at 7-8. This is in keeping with the cardinal rule of statutory construction that "[i]n ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988); *see also Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1017 (1984) ("[W]here two statutes are 'capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.'") ((quoting *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 133-34 (1974)).[4]

5. What are the implications of the decision for equitable tolling?

Guerrero-Lasprilla arose in the context of petitions for review of BIA decisions holding that petitioners had not met the standard to merit equitable tolling of the 90-day deadline to file a motion to reopen. *See* 8 U.S.C. § 1229a(c)(7)(C)(i). *See also infra* Question 8.[5] In those cases, the Fifth Circuit found that it lacked jurisdiction to review whether the BIA was wrong to conclude that petitioners were not sufficiently diligent to merit equitable tolling of the motion to reopen deadline.[6] Neither the Fifth Circuit nor the Supreme Court addressed the merits of the tolling claims.

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[4] The Court does not directly address the standards of review in judicial review of removal orders but does reference previous decisions discussing the appropriate standard of review for mixed questions of law fact. *See* Slip Op. at 5 (noting that the case does not present a "question involving the standard of review" and noting that where a question "primarily 'require[s] courts to expound on the law,'" *de novo* review is generally required, but that "deferential review" is often required where a question "'immerse[s] courts in case-specific factual issues'") (quoting *U.S. Bank N.A. v. Village at Lakeridge, LLC*, 583 U.S. __, 138 S. Ct. 960, 967 (2018)). Because the Court interpreted application of law to established facts as encompassed in questions of law under 8 U.S.C. § 1252(a)(2)(D), such questions are subject to de novo review.

[5] Equitable tolling entitles litigants to an extension of non-jurisdictional filing deadlines if they act diligently in pursuing their rights but are nonetheless prevented from timely filing by some extraordinary circumstance. *See, e.g.*, *Holland v. Florida*, 560 U.S. 631, 649 (2010). Generally, an individual seeking equitable tolling must show an extraordinary circumstance prevented timely filing and s/he pursued his/her claims with reasonable diligence. *Id*. at 649, 653. Every court of appeals to have addressed the issue in a published decision has held that the motion to reopen and reconsider deadlines are subject to equitable tolling.

[6] *See Guerrero-Lasprilla*, 737 F. App'x at 231 (citing *Penalva v. Sessions*, 884 F.3d 521, 525 (5th Cir. 2018)); *Ovalles*, 741 F. App'x at 261 (same).

Accordingly, because the decision addressed only issues related to judicial review of application of a legal standard to undisputed facts—and not issues related to the adjudication of tolling claims before the immigration courts or the BIA—*Guerrero-Lasprilla* is unlikely to have *any* impact on adjudication of tolling claims before the immigration courts or the BIA.

However, for individuals with criminal convictions who have filed or will file petitions for review of BIA decisions denying equitable tolling claims and are subject to 8 U.S.C. § 1252(a)(2)(C)'s jurisdictional bar, it is now clear that the courts of appeals can review the application of the equitable tolling standard to the facts of their cases under 8 U.S.C. § 1252(a)(2)(D). This is especially relevant for cases in circuits that have previously refused to review equitable tolling claims. *See, e.g.*, *Penalva*, 884 F.3d at 525.

6. How can *Guerrero-Lasprilla* be raised in a case with a pending petition for review?

There are two possible ways to raise *Guerrero-Lasprilla* in a pending petition for review where 8 U.S.C. § 1252(a)(2)(D) is relevant. If briefing is ongoing, the petitioner can address the decision in the opening or reply brief. If briefing or argument is completed, the petitioner can file a letter of no more than 350 words with the circuit clerk pursuant to Federal Rule of Appellate Procedure 28(j) citing the opinion as supplemental authority.

7. How can *Guerrero-Lasprilla* be raised in case in which a court of appeals already dismissed a petition for review?

If a court of appeals has already dismissed a petition for review based on lack of jurisdiction to review a mixed question of law and fact, it may be possible to bring the petition for review back before the court.

If the court of appeals denied a petition for review based on a jurisdictional bar to which 8 U.S.C. § 1252(a)(2)(D) applies but the mandate has not yet issued, the petitioner may file a motion for panel and/or en banc rehearing in light of *Guerrero-Lasprilla*, arguing that the panel's decision conflicts with new Supreme Court authority. *See* Fed. R. App. P. 40, 35; *see also* Fed. R. App. P. 41.

If the court of appeals has denied a petition for review based on a jurisdictional bar to which 8 U.S.C. § 1252(a)(2)(D) applies and has issued the mandate, the petitioner may file a motion to recall the mandate in light of *Guerrero-Lasprilla*, arguing that that the panel's decision conflicts with new Supreme Court authority and that the petitioner's claims were entitled to review under 8 U.S.C. § 1252(a)(2)(D). *See* Fed. R. App. P. 27, 41. The motion should indicate that the petitioner is filing as soon as practicable after the *Guerrero-Lasprilla* decision.

8. What were the underlying facts and procedural history in *Guerrero-Lasprilla v. Sessions* and *Ovalles v. Sessions* before those cases reached the Supreme Court?

The Supreme Court vacated two unpublished decisions, *Guerrero-Lasprilla v. Sessions*, 737 F. App'x 230 (5th Cir. 2018), and *Ovalles v. Sessions*, 741 F. App'x 259 (5th Cir. 2018). In both decisions, the Fifth Circuit held that it lacked jurisdiction to review whether the BIA erred in holding that, under an undisputed set of facts, the petitioners did not meet the diligence

requirement for equitable tolling. In both cases, the Fifth Circuit reasoned that the claims presented factual questions and that, because the petitioners were ordered removed based on certain criminal convictions, the court lacked jurisdiction over those questions pursuant to 8 U.S.C. § 1252(a)(2)(C). A more detailed discussion of the facts in those cases is provided below.

Guerrero-Lasprilla

In 1998, an immigration judge (IJ) ordered Mr. Guerrero-Lasprilla, a lawful permanent resident, deported for an aggravated felony conviction. Nearly eighteen year later, in 2016, he filed a motion to reopen removal proceedings under 8 U.S.C. § 1229a(c)(7), arguing that he was eligible for relief from removal and entitled to tolling of the statutory deadline. He claimed that he could not have filed his motion before issuance of *Lugo-Resendez v. Lynch*, 831 F.3d 337 (5th Cir. 2016), in which the Fifth Circuit joined its sister circuits in recognizing that the statutory deadline was subject to equitable tolling. The IJ denied the motion and the BIA affirmed.

The Fifth Circuit dismissed the petition for review, finding that it did not have jurisdiction to review the Board's equitable tolling determination. *Guerrero-Lasprilla*, 737 F. App'x at 230. The court held that the question under review, whether Mr. Guerrero-Laprilla's actions met the legal standard for diligence, was a question of fact, not law. Because he had an aggravated felony conviction, he was subject to 8 U.S.C. § 1252(a)(2)(C), and, therefore, the court found that it could not review that what it had mistakenly characterized as a factual question. *Id.* (citing *Penalva*, 884 F.3d at 525-26).

Ovalles

In 2004, the BIA reversed the decision of an IJ granting Mr. Ovalles cancellation of removal and ordered him removed, having concluded he had an aggravated felony conviction. Shortly thereafter, immigration officials deported him. Three years later, Mr. Ovalles unsuccessfully moved to reopen his removal proceedings *sua sponte* under 8 C.F.R. § 1003.2(a), arguing that under new Supreme Court precedent his conviction was not an aggravated felony. *See Ovalles v. Holder*, 577 F.3d 288 (5th Cir. 2009).

Mr. Ovalles filed a second motion to reopen in 2017, this time under 8 U.S.C. § 1229a(c)(7), and sought equitable tolling of the filing deadline, arguing that any motion filed before *Lugo-Resendez* would have been futile. The Board denied his second motion stating, *inter alia*, that he was not entitled to tolling because he had not acted diligently. The Fifth Circuit dismissed Mr. Ovalles' petition for review for lack of jurisdiction under 8 U.S.C. § 1252(a)(2)(C). *Ovalles*, 741 F. App'x at 261. The court of appeals held that the Board's diligence determination was an unreviewable question of fact. *Id.* (citing *Penalva*, 884 F.3d at 524-26).