

No. 09-3600

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

ALEJANDRA SANDOVAL,
Petitioner

v.

ERIC H. HOLDER, JR.,
Attorney General of the United States,
Respondent

PETITION FOR REVIEW
FROM THE UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE OF IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
AGENCY CASE NO. A 029 303 178

REPLY BRIEF OF PETITIONER ALEJANDRA SANDOVAL

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Reply Argument

I. The BIA's interpretation of the false-claims statute runs contrary to law and is not entitled to deference

Alejandra Sandoval was sixteen years old and alone when the events underlying this appeal took place. Twice now the BIA has refused to consider Sandoval's minority in any meaningful way in interpreting Section 1182(a)(6)(C)(ii)(I) of Title 8 and in otherwise deciding her appeal. So it is unsurprising that the government is unable to articulate the BIA's rationale for applying the harshest sanction that our immigration laws allow to unaccompanied children.¹ Indeed, like the BIA, the government ignores the critical fact of Sandoval's minority throughout its analysis.² Sandoval challenges the agency's interpretation of the statute, which would take a standard that was developed for adults and apply it, without alteration, to an unaccompanied child.

Because the BIA has never provided any intelligible explanation of how 8 U.S.C. § 1182(a)(2)(6)(C)(ii)(I) relates to children, the government's brief is just a misguided effort to rehabilitate a deficient agency opinion. This Court cannot affirm the post-hoc arguments of government counsel.³ When, as here, the BIA

¹ See Respondent's Br. at 24-27.

² See *id.* at 18-23.

³ *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (“[A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency.”).

fails to provide its own meaningful interpretation of an immigration statute, “the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.”⁴ Petitioner respectfully submits that the BIA’s repeated evasion of this question of law is a “rare circumstance” justifying *de-novo* review by the Court now.

A. *Chevron* does not apply to the unpublished agency decisions at issue in this case

An agency is entrusted with filling the gaps in statutes that it administers.⁵ The statute here is plain, however, and because the BIA has twice refused to conduct any meaningful statutory analysis of Section 1182(a)(6)(C)(ii)(I) of Title 8, Sandoval urges this Court to step in, conduct a *de-novo* review, and settle her claims in the first instance. To this end, Sandoval agrees with the government that the Court should not extend *Chevron* deference here.⁶ The Eighth Circuit should

⁴ *INS v. Ventura*, 537 U.S. 12, 16 (2002) (quoting *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) (citing *Chenery*, 332 U.S. at 196)); see also *Negusie v. Holder*, 129 S. Ct. 1159, 1168 (2009).

⁵ See *Godinez-Arroyo v. Mukasey*, 540 F.3d 848, 850 (8th Cir. 2008) (“We generally defer to reasonable BIA interpretations of gaps in statutes and regulations it administers because ‘[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.’”) (quoting *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984)).

⁶ See Respondent’s Br. at 17.

join those circuits that have refused to apply the *Chevron* framework to unpublished BIA decisions.⁷

Sandoval presents a straightforward issue of statutory interpretation that the BIA has twice now failed to elucidate, despite pleas that the agency meet its regulatory directive to address the application of 8 U.S.C. § 1182 (a)(6)(C)(ii) to unaccompanied children.⁸ This is a rare circumstance where the BIA, by its purposeful evasions, has abdicated any claim of special agency expertise. Likewise, in its reply, the government has not pointed to any reasoning by the agency that could explain why the false-claims statute should be interpreted in

⁷ See *Godinez-Arroyo*, 540 F.3d at 851 (declining to decide the level of deference afforded an unpublished BIA opinion); see also *Mushtaq v. Holder*, 583 F.3d 875, 877 (5th Cir. 2009) (stating that *Skidmore* applies to unpublished BIA decision); *Quinchia v. U.S. Atty. Gen.*, 552 F.3d 1255, 1258 (11th Cir. 2008) (stating that an unpublished BIA decision that does not rely on BIA or circuit court precedent does not receive *Chevron* deference); *Rotimi v. Gonzales*, 473 F.3d 55, 57-58 (2d Cir. 2007) (deciding that an unpublished BIA decision that does not rely on precedent for its definition of a contested term does not receive *Chevron* deference because it is not “‘promulgated’ under [the agency’s] authority to ‘make rules carrying the force of law’”) (quoting *U.S. v. Mead Corp.*, 533 U.S. 218, 226-27 (2001)); *Garcia-Quintero v. Gonzales*, 455 F.3d 1006, 1012-14 (9th Cir. 2006) (opining that an unpublished BIA decision does not have the force of law and therefore does not receive *Chevron* deference).

⁸ A.R. at 28-29; 8 C.F.R. § 1003.1(d)(1) (2010) (“The Board shall resolve the questions before it . . . [and] through precedent decisions, shall provide clear and uniform guidance to the Service, the immigration judges, and the general public on the proper interpretation and administration of the Act.”).

such a way as to hold unaccompanied alien children to the same standard as adults. Only lesser *Mead/Skidmore* deference is proper here.⁹

In reviewing an unpublished agency decision, the weight given to an administrator’s ruling depends on “the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade. . . .”¹⁰ These principles illustrate the level of rationale and analysis—absent in this case—that might be deserving of deference. In contrast, the two unpublished decisions in this case:

- ***Are not thorough***: Instead of explaining why the false-claims statute could apply to unaccompanied alien children, the agency pointed to a vacuum, saying only that there is “no legal authority or support for the Immigration Judge’s ‘bright line rule’ and a conclusion that persons under the age of eighteen categorically lack sufficient maturity and mental capacity to falsely claim United States citizenship.”¹¹
- ***Are not valid***: The BIA decisions are inconsistent with congressional treatment of children throughout the Act, as well as the agency’s own policies regarding the treatment of unaccompanied alien children, and they conflict with the

⁹ See *Mushtaq v. Holder*, 583 F.3d at 877.

¹⁰ *Skidmore v. Swift*, 323 U.S. 134, 140 (1944).

¹¹ A at 28 (first BIA decision).

prevailing view in our laws—as demonstrated through decades of civil and criminal law—that unaccompanied children possess limited legal capacity.

- ***Are not consistent with earlier and later pronouncements:*** There are no earlier or later pronouncements directly on point because the agency has never articulated a meaningful position on either of Sandoval’s issues—in this case, or in any other case. However, the BIA decisions are in stark conflict with closely related statutes and agency policies regarding unaccompanied children, most notably the regulation 8 C.F.R. § 1240.10(c), which categorically treats unaccompanied children as incompetent to admit to removal charges in immigration courts, including a false claim charge under 8 U.S.C. § 1182(c)(6)(C)(ii).¹²
- ***Are not persuasive:*** The agency did not provide any explanation or reasoning for its decisions, pointing instead to the void that the BIA should have—but refused to—fill itself.¹³

Twice the agency was asked to provide guidance on the false-claims statute and twice it has dodged the issue. The agency has provided no rationale below that is deserving of deference. This Court should step in and conduct a *de-novo* review of Sandoval’s claims in the first instance. In the alternative, and at a minimum, it

¹² See discussion in Section I.B., *infra*.

¹³ See 8 C.F.R. § 1003.1(d)(1).

should remand the case to the BIA and force the agency to conduct a meaningful analysis of this important issue.¹⁴

B. The agency has not articulated a meaningful position on the proper construction of the false-claims statute

Section 1182(a)(6)(C)(ii)(I) of Title 8 bars from the United States any alien who makes a false claim of United States citizenship. The statute does not say that “any alien” includes children. But the prevailing view in our laws—as evidenced through centuries of civil and criminal law—is that children acting alone have a limited legal capacity.¹⁵ This understanding is reinforced through internal DHS policy and throughout the Immigration and Nationality Act, which consistently treats children under eighteen as incompetent to make immigration applications and other purposeful legal representations.¹⁶

¹⁴ See, e.g., *Negusie*, 129 S. Ct. at 1168; *Bushira v. Gonzales*, 442 F.3d 626, 633 (8th Cir. 2006).

¹⁵ See *Bellotti v. Baird*, 443 U.S. 633-34 (1979) (“The Court has long recognized that the status of minors under the law is unique in many respects. As Mr. Justice Frankfurter aptly put it: ‘[C]hildren have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State’s duty towards children.’”) (quoting *May v. Anderson*, 345 U.S. 528, 536 (1953)).

¹⁶ See, e.g., 8 U.S.C. § 1145 (2006) (restricting naturalization applications to those over eighteen years); 8 U.S.C. § 1183(a) (2006) (excluding those under the eighteen years from filing affidavits of support); 8 U.S.C. § 1182(a)(9)(B)(iii)(I) (2006) (stating that those under eighteen do not accrue “unlawful presence”); 8 C.F.R. § 208.4(a)(5)(ii) (2010) (classifying unaccompanied children along with mental incompetents as legally disabled for the purpose of defining an “extraordinary circumstance” that excuses the one-year asylum application filing deadline at 8 U.S.C. § 1158(a)(2)(D)); 8 C.F.R. § 236.3(a) (2010) (defining a

The BIA has sidestepped this critical issue. The BIA has never articulated a recognizable position on the interpretation of the false-claims statute, stating only that there is no authority for the IJ's bright-line rule to exclude children. The government does not offer any reasonable explanation for the void where the BIA's reasoning should be, arguing simply that the statute clearly applies to any alien, because the plain language refers to "any alien."¹⁷ But Sandoval is *not* just any alien. She was an unaccompanied child. She couldn't even buy her own plane ticket to Mexico—someone bought it for her because she was too young.¹⁸ The government's proposed reading of the statute is overbroad and would lead to the exclusion of unaccompanied ten-year-olds, five-year-olds, and profoundly retarded people who make false claims. The statute should not be interpreted to allow such an unjust approach.¹⁹

The government dismisses Sandoval's analogies to criminal law as inappropriate and inapplicable because immigration proceedings are civil.²⁰ But this distinction does not hold up to the slightest scrutiny. Deportation is a severe penal measure that is better compared to imprisonment and other criminal penalties

"juvenile" as an alien under the age of eighteen); 8 C.F.R. § 1240.10(c) (2010) (prohibiting an immigration judge from accepting an admission of deportability from an unaccompanied respondent under age eighteen).

¹⁷ See Respondent's Br. at 24.

¹⁸ A at 102-107, 111 (Sandoval testimony).

¹⁹ See *Bellotti*, 443 U.S. at 633-34.

²⁰ Respondent's Br. at 26.

than to civil penalties. And there is an obvious analogy between misdeed and consequence; imprisonment and exclusion. And the consequences in this case—permanent exclusion from the United States, where her husband and child reside—are more severe than most criminal sanctions.²¹ Indeed, the Supreme Court has recently considered the “particularly severe ‘penalty’” of deportation in the criminal context.²² And in this case, the severe penalty is being levied on Sandoval for conduct that occurred when she was a child. The inappropriateness of applying such harsh sentences to children was recently reaffirmed in *Graham v. Florida*, in which the Supreme Court ruled that the Eighth Amendment prohibits sentencing a juvenile offender to life in prison without parole for a nonhomicide crime.²³

Here again, the government’s efforts to justify the BIA decision, apart from being meager and unpersuasive, are entirely misplaced because the Court can only affirm on grounds invoked by the BIA itself.²⁴

II. The BIA failed to consider Sandoval’s arguments about how the retraction rule should apply to unaccompanied alien children

The government devotes a great deal of attention in its brief to the disputed circumstances in this case in an effort to persuade this Court that substantial evidence supports the agency’s finding that Sandoval failed to timely retract her

²¹ See *Padilla v. Kentucky*, 130 S.Ct. 1473, 1481 (2010).

²² *Id.* at 1481 (citing *Fong Tue Ting v. U.S.*, 149 U.S. 698, 740 (1893)).

²³ No. 08-7412, slip op., 2010 WL 1946731 (U.S. May 17, 2010).

²⁴ See *Chenery*, 332 U.S. at 196.

false claim to U.S. citizenship.²⁵ But the government fails to account for the most important fact in this case—that Sandoval was only sixteen years old at the time and unaccompanied by an adult. And further, the government mischaracterizes Sandoval’s opening brief by suggesting that Sandoval is specifically asking this Court for a special rule.²⁶ Sandoval was not asking for a specific rule—she was showing this Court that the BIA erred by failing to even consider her arguments about the retraction rule.

By mischaracterizing the procedural facts, the government masked the BIA’s failure to even consider a retraction rule that would account for the important difference between adults and children. At the initial hearing, the IJ did not consider the retraction issue, since he determined that Sandoval was eligible for a waiver of inadmissibility due to her minority at the time of the false claim.²⁷ The BIA in its first decision did not consider the timely retraction issue either, because it remanded the case back to the IJ on the false-claim issue.²⁸ On remand, the IJ appeared to misinterpret the BIA decision as requiring that age not be factored into

²⁵ In its recital of the facts, the government relies on the disputed I-213 form and Officer Vega’s testimony. Despite its admission, the I-213 was proven utterly unreliable, as was Vega’s testimony and affidavit. *See Kim v. Holder*, 560 F.3d 833, 836 (8th Cir. 2009) (dismissing Kim’s arguments that the I-213 is inadmissible hearsay where she was able only to make generalizations about the form’s unreliability but pointing out several cases where the document was found unreliable based on specific contrary facts).

²⁶ *See* Respondent’s Br. at 23 n.3.

²⁷ A at 25 (first IJ decision).

²⁸ A at 28-29 (first BIA decision).

the analysis.²⁹ He applied *Matter of M*—a case involving an adult—to determine that there was no timely retraction under the circumstances of Sandoval’s case, circumstances that were likely infected with intimidation, fear, submission, and all those other factors that might attend an unaccompanied child’s dealings with the government.³⁰ And then the BIA, finally addressing the retraction issue during Sandoval’s second appeal, did not consider her age at all, and simply concurred with the IJ’s flawed finding.³¹ The BIA never addressed Sandoval’s arguments about how the timely-retraction doctrine should account for the special status of an unaccompanied child. In failing to do so, the agency ignored its own policies regarding the treatment of minors and took a rule that was fashioned for adults and, without analysis or alteration, applied it to a child.³² The government repeats this fallacy by failing to account for Sandoval’s age in defending the BIA’s decision.

III. The government does not challenge—and therefore concedes—that the IJ and the BIA committed reversible error by applying the wrong burden of proof

Sandoval argued to the BIA and to this Court in her opening brief that the IJ committed reversible error by adopting an incorrect—and more stringent—burden

²⁹ A at 46-47 (second IJ decision).

³⁰ A at 47 (second IJ decision); *Matter of M*-, 9 I&N Dec. 118, 119 (BIA 1960).

³¹ A at 55 (second BIA decision).

³² See *Bellotti*, 443 U.S. at 633-34.

of proof.³³ The government does not challenge Sandoval’s assertion, and therefore tacitly concedes that the IJ and the BIA erroneously applied the “clearly and beyond doubt” standard of 8 U.S.C. § 1229a(c)(2)(A) instead of the correct—and more lenient—preponderance of the evidence standard.³⁴ Given the stark disagreement about how the Dallas airport encounter unfolded and the nature and quality of the evidence concerning that event, the mistake caused the IJ’s analysis to be infected with outcome-determinative legal error. The BIA decision must be reversed because the agency failed to give Sandoval the opportunity to prove her admissibility by a preponderance of the evidence.³⁵

Conclusion

There is an absence of guiding agency authority on the issues that Sandoval presents to this Court. Sandoval—and indeed, immigration judges, practitioners,

³³ See Petitioner’s Br. at 41-42; A.R. at 42-43 (Petitioner’s Br. to BIA).

³⁴ See generally Respondent’s Br.; *Matter of Martinez Espinoza*, 25 I&N Dec. 118, 125 (BIA 2009) (remanding to IJ to allow respondent opportunity to prove admissibility by preponderance of the evidence).

³⁵ See *id.* Because *Matter of Martinez Espinoza* presents the Board’s reasonable and authoritative construction of ambiguous statutes, 8 U.S.C. §§ 1229a(c)(2)(A) and 1229a(c)(4)(B), this Court is obligated to defer to the agency’s reasonable interpretation despite its earlier decisions, *Rodriguez v. Mukasey*, 519 F.3d 773 (8th Cir. 2008); *Kirong v. Mukasey*, 529 F.3d 800 (8th Cir. 2008); and *Hashmi v. Mukasey*, 533 F.3d 700 (8th Cir. 2008), each of which upheld unpublished BIA decisions applying the “clearly and beyond doubt” burden when determining an alien’s eligibility for immigration relief. See *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Services*, 545 U.S. 967 (2005).

the general public, and current and future applicants for immigration benefits— finally deserves a meaningful answer to these questions. Because the BIA has twice refused to provide meaningful agency guidance, this Court should take up these legal questions directly and interpret the false-claims statute and reverse the BIA. In the alternative and at a minimum, this Court should remand to the BIA with instructions to provide a meaningful analysis and decision on the proper application of these immigration laws to unaccompanied children.

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Certificate of Compliance

I, Anna M. Petosky, certify that Petitioner's Brief was prepared with proportionately spaced 14-point type and in Times New Roman font on the Microsoft Word 2003 word processing software program. Petitioner's Brief complies with the type-volume limitation in that it contains 2,916 words and thirteen pages excluding the cover page, the Table of Contents, the Table of Authorities, and the Certificate of Compliance. I further certify that the enclosed CD containing Petitioner's Brief is free of viruses.

Dated: June 11, 2010

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Certificate of Service and Filing

I, Anna Petosky, declare under penalty of perjury that I am an attorney in the office of Robins, Kaplan, Miller & Ciresi L.L.P., Attorneys at Law, 2800 LaSalle Plaza, 800 LaSalle Avenue, Minneapolis, Minnesota 55402-2015; that on June 11, 2010, I dispatched to a third-party commercial carrier (Federal Express) for overnight delivery to the Clerk of Court of the Eighth Circuit Court of Appeals for filing the original and nine copies of Petitioner's Reply Brief, a digital version of Petitioner's Reply Brief in Portable Document Format on a CD, and a Certificate of Service and Filing; also, I dispatched to Federal Express for overnight delivery two copies of the Petitioner's Reply Brief and a digital version of Petitioner's Reply Brief in Portable Document Format on a CD, to the persons named below at each of the addresses stated below:

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