

**No. 19-55517**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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E.J. D.-B., a Minor, Elad Dvash-Banks as the guardian *ad litem*, and  
ANDREW DVASH-BANKS,

*Plaintiffs-Appellees,*

v.

U.S. DEPARTMENT OF STATE and MICHAEL POMPEO,

*Defendants-Appellants.*

On Appeal from the United States District Court  
for the Central District of California  
No. 18-cv-00523  
Hon. John F. Walter

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**PLAINTIFFS-APPELLEES' MOTION FOR JUDICIAL NOTICE**

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## INTRODUCTION

Pursuant to Federal Rule of Appellate Procedure 27 and Federal Rule of Evidence 201, Plaintiffs-Appellees, Andrew Dvash-Banks and E.J. D.-B. (together, “Plaintiffs”), respectfully request that the Court take judicial notice of the briefs for the respondents in *Scales v. INS*, No. 97-70915 (9th Cir.), and *Solis-Espinoza v. Gonzales*, No. 03-70625 (9th Cir.). Copies of those briefs are annexed as Exhibits 1 and 2, respectively, to the Declaration of Theodore Edelman (“Edelman Dec.”), submitted concurrently with this motion (“Motion”). Those briefs were filed by the Civil Division of the Department of Justice (the same entity litigating the above-captioned appeal) in the two prior appeals that the district court in this case held, and Defendants-Appellants (“Defendants”) concede, are binding here.<sup>1</sup> See *Dvash-Banks v. Pompeo*, 2019 WL 911799, at \*7 (C.D. Cal. Feb. 21, 2019) (relying on *Solis-Espinoza v. Gonzales*, 401 F.3d 1090 (9th Cir. 2005), and *Scales v. INS*, 232 F.3d 1159 (9th Cir. 2000)); (Defendants’ Opening Brief (“Op. Br.”) at 35–36.) This Motion asks that the Court consider the respondents’ briefs in those cases, which Plaintiffs contend take positions on the clarity of the language in Section 301(g) of the Immigration and Nationality Act

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<sup>1</sup> Defendants are the United States Department of State (“State Department”) and the Honorable Michael R. Pompeo, in his capacity as Secretary of State.

(“INA”) of 1952, as amended, 8 U.S.C. § 1401(g) (“Section 301(g)”), that are inconsistent with those Defendants assert on this appeal.

Defendants urge this Court to accept the State Department’s policy, memorialized in its *Foreign Affairs Manual* (“FAM”), of requiring a child claiming U.S. citizenship under Section 301(g) to establish, among other things, a biological relationship with a U.S. citizen parent. (Op. Br. at 29–33.) *See* 8 FAM § 304.1-2. Defendants contend that “Section [301(g)]’s text supports the [State] Department’s interpretation” and that “Congress has made clear that a child’s legal parent . . . must also be his biological parent for § [301(g)] to apply.” (Op. Br. at 15, 16.) Defendants assert that “[t]he State Department’s longstanding interpretation of § [301(g)] and related provisions is exactly the sort of interpretation that warrants *Skidmore* deference” and that “the State Department’s position is consistent and longstanding.” (Op. Br. at 29, 32 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).))

In *Scales* and *Solis-Espinoza*, however, the respondents argued that Section 301(g) does not, on its face, require a biological relationship to transmit citizenship (*see* Edelman Dec. Ex. 1 at 15; Ex. 2 at 16), and specifically suggested in *Scales* that ““Congress has not directly addressed the precise question at issue[.]”” (Edelman Dec. Ex. 1 at 15 (quoting *Montana v. Clark*, 749 F.2d 740, 745 (D.C. Cir. 1985).)) As a result, the respondents in *Scales* and *Solis-Espinoza*

urged the Court to defer to their interpretation of Section 301(g) under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The respondents in those cases did not ask the Court to defer to their interpretation of Section 301(g) under *Skidmore*.

For the following reasons, Plaintiffs therefore request that the Court take judicial notice of Exhibits 1 and 2.

### **ARGUMENT**

#### **JUDICIAL NOTICE IS APPROPRIATE BECAUSE THE MATERIAL TO BE NOTICED IS NOT REASONABLY SUBJECT TO DISPUTE.**

Under Federal Rule of Evidence 201, “at any stage of the proceeding,” the “court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the court’s territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201; *see Harris v. Cty. of Orange*, 682 F.3d 1126, 1131–32 (9th Cir. 2012). The court “may take judicial notice of undisputed matters of public record, including documents on file in federal or state courts.” *Harris*, 682 F.3d at 1132 (internal citation omitted); *see In re Korean Air Lines Co.*, 642 F.3d 685, 689 n.1 (9th Cir. 2011) (“[A] court may take judicial notice of its own records in other cases.”) (citing *United States v. Wilson*, 631 F.2d 118, 119 (9th Cir.1980)).

Here, Plaintiffs request that the Court take judicial notice of the briefs for the respondents in two prior appeals to this Court. (*See* Edelman Dec. Ex. 1; Ex. 2.) Specifically, Plaintiffs ask that the Court take judicial notice of the respondent’s assertion in Exhibit 1 that “Neither INA § 301(g), which describes nationals and citizens of the United States at birth, nor INA § [1]101(c)(1), which defines ‘child’ for purposes of INA § 301, expressly states whether a child can claim derivative citizenship from a parent’s spouse who is not his natural father.” (Edelman Dec. Ex. 1 at 15); and the respondent’s virtually identical assertion in Exhibit 2 that “Neither INA § 301(g), which describes nationals and citizens of the United States at birth, nor INA § [1]101(c)(1), which defines ‘child’ for purposes of INA § 301, expressly state whether a child can claim derivative citizenship from a parent’s spouse who is not his natural mother.” (Edelman Dec. Ex. 2 at 16.) Plaintiffs further request that the Court take judicial notice of the suggestion in the petitioner’s brief in *Scales* that ““Congress has not directly addressed the precise question at issue[.]”” (Edelman Dec. Ex. 1 at 15 (quoting *Montana v. Clark*, 749 F.2d at 745.)) Plaintiffs request that the Court also take judicial notice that the respondents argued in their briefs in *Scales* and *Solis-Espinoza* that the Court should defer to their interpretation of Section 301(g) under *Chevron*, but did not seek *Skidmore* deference.

The Court may take judicial notice of the contents of Exhibits 1 and 2 to the Edelman Declaration, but not of the merits of the assertions in those documents. *See Mays v. Wal-Mart Stores, Inc.*, 330 F.R.D. 562, 571 n.3 (C.D. Cal. 2019) (“[T]he Court may judicially notice the documents filed in other proceedings, it may not notice the documents for the truth of any facts or arguments recited therein.” (citing *Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9th Cir. 2001)). The material to be noticed is properly the subject of judicial notice because the fact that the respondents made these statements in their filings with this Court is both readily ascertainable and not reasonably subject to dispute. *See Wright & Miller, Fed. Prac. & Proc. Evid.* § 5106.4 (2d ed. 2019) (“A court could take judicial notice that a party made a statement in some document filed with the court[.]”).

### CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant their Motion in full.

Date: December 12, 2019

Respectfully submitted,

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ad litem, and Andrew Dvash-Banks*

**CERTIFICATE OF SERVICE**

I hereby certify that on December 12, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: December 12, 2019

By: /s/ Alexa M. Lawson-Remer  
Alexa M. Lawson-Remer

No. 19-55517

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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E.J. D.-B., a Minor, Elad Dvash-Banks as the guardian *ad litem*, and  
ANDREW DVASH-BANKS,

*Plaintiffs-Appellees,*

v.

U.S. DEPARTMENT OF STATE and MICHAEL POMPEO,

*Defendants-Appellants.*

On Appeal from the United States District Court  
for the Central District of California  
No. 18-cv-00523  
Hon. John F. Walter

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**DECLARATION OF THEODORE EDELMAN IN SUPPORT OF  
PLAINTIFFS-APPELLEES' MOTION FOR JUDICIAL NOTICE**

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**DECLARATION OF THEODORE EDELMAN**

I, THEODORE EDELMAN, hereby declare as follows:

1. I am an attorney duly licensed by the State of New York and am admitted to practice before this Court. I am a partner at Sullivan & Cromwell LLP (“S&C”), and am one of the lawyers representing Plaintiffs-Appellees Andrew Dvash-Banks and E.J. D.-B. (together, “Plaintiffs”), *pro bono* in the above-captioned action. I respectfully submit this declaration in support of Plaintiffs-Appellees’ Motion for Judicial Notice, filed concurrently herewith.

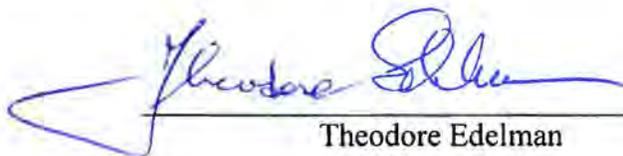
2. Attached to this declaration as Exhibit 1 is a true and correct copy of the brief for the respondent in *Scales v. INS*, No. 97-70915 (9th Cir.), filed by the Civil Division of the Department of Justice on or about January 12, 1998.

3. Attached to this declaration as Exhibit 2 is a true and correct copy of the brief for the respondent in *Solis-Espinoza v. Gonzales*, No. 03-70625 (9th Cir.), filed by the Civil Division of the Department of Justice on or about October 16, 2003.

4. The attached briefs are publicly available documents that S&C obtained from the archives of the United States Court of Appeals for the Ninth Circuit, and are attached in the form in which S&C received them from the Court's archives.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 12, 2019.



Theodore Edelman

1/5  
29/95

ORIGINAL

No. 97-70915

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

STANLEY RUSSELL SCALES, Jr.

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

ON PETITION FOR REVIEW OF AN ORDER OF  
THE BOARD OF IMMIGRATION APPEALS

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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STANLEY RUSSELL SCALES, Jr.

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

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BRIEF FOR RESPONDENT

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STATEMENT OF JURISDICTION

Stanley Russell Scales, Jr. petitions for review of the Board of Immigration Appeals's August 1, 1997, final order of deportation.<sup>1</sup> In general, the Court has jurisdiction over petitions for review of final orders of deportation under the Immigration and Nationality Act ("INA") § 106(a), 8 U.S.C. § 1105(a).<sup>2</sup> However, the petitioner is an alien who was convicted of drug trafficking and is an aggravated felon under INA § 241(a)(2)(B), 8 U.S.C. § 1251(a)(2)(B). The Antiterrorism and Effective Death Penalty Act ("AEDPA") § 440(a), Pub. L. No. 104-132, 110

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<sup>1</sup> The Board had jurisdiction under 8 C.F.R. § 3.1(b)(2).

<sup>2</sup> Scales's petition, filed within thirty days of the Board's decision, was timely. See Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), § 309(c)(4)(C), 110 Stat. 3009-546, 3009-626 (Sept. 30, 1996).

Stat. 1214 (Apr. 24, 1996),<sup>3</sup> and IIRIRA § 309(c)(4)(G) deprive this Court of jurisdiction to review this petition and the Court should dismiss for lack of subject matter jurisdiction.<sup>4</sup> See Abdel-Razek v. INS, 114 F.3d 831 (9th Cir. 1997) (dismissing petition for lack of jurisdiction under AEDPA § 440(a)); Duldulao v. INS, 90 F.3d 396, 399 (9th Cir. 1996) (same).

There remains, however, one question the Court must address before it can dismiss for lack of subject matter jurisdiction. The petitioner contends that he is an United States citizen and is therefore not subject to deportation. INA § 106 authorizes this Court to review the petitioner's citizenship claim. See INA § 106(a)(5), 8 U.S.S. § 1105a(a)(5). A court does retain jurisdiction to determine its jurisdiction, *i.e.*, whether, as a threshold matter, the petitioner is an "alien" who "is deportable" for an enumerated offense. See Coronado-Durazo v. INS, 123 F.3d 1322 (9th Cir. 1997); see also Ter Yang v. INS, 109 F.3d 1185, 1192 (7th Cir. 1997); but see Berehe v. INS, 114 F.3d 159, 162 (10th Cir. 1997) ("We conclude that such review is contrary to Congress's intent to expedite deportation of criminal aliens."). If this Court confirms the

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<sup>3</sup> AEDPA § 440(a), precludes judicial review of "any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered by § 241(a)(2)(A)(iii), (B), (C), or (D) ."

<sup>4</sup> In the case in which a final order of exclusion or deportation is entered more than thirty days after [September 30, 1996], notwithstanding any provision of section 106 of the Immigration and Nationality Act as in effect as of the date of the enactment of this Act) to the contrary-

\* \* \*

(G) there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense covered in section 212(a)(2) or section 241(a)(2)(A)(iii), (B), (C), or (D) of the [INA] (as in effect as of the date of the enactment of this Act) . . . .

IIRIRA § 309(c)(4)(G) (emphasis added).

petitioner is an alien deportable under INA § 212(a)(2) or § 241(a)(2)(A)(iii), (B), (C), or (D), it should dismiss for lack of jurisdiction under AEDPA § 404(a) and IIRIRA § 309(c)(4)(G).

### **STATEMENT OF THE ISSUES**

- I. Is the petitioner's citizenship claim frivolous and does it lack a genuine issue of material fact when he conceded that he is not a United States citizen, his father, Stanley Scales, Sr., signed an Affidavit of Non-Paternity, and the circumstances conclusively show that Stanley Scales, Sr. could not be his natural father?
- II. Is AEDPA § 440(d), precluding criminal aliens from obtaining discretionary relief from deportation, constitutional when applied to criminal aliens who had convictions on its effective date?
- III. Does application of AEDPA § 440(d) to aliens who were convicted of aggravated felonies before its enactment violate equal protection?

### **STATEMENT OF THE CASE**

#### **I. Proceedings and Disposition Below**

On January 12, 1996, in the Superior Court of Washington for King County, the petitioner was convicted of trafficking in cocaine. AR 92. On February 6, the INS issued an order to show cause charging him with being deportable under INA § 241(a)(2)(A)(iii), 8 U.S.C. § 1251(a)(2)(A)(iii) by reason of his conviction of a crime defined as an aggravated felony by INA § 101(a)(43), 8 U.S.C. § 1101(a)(43). AR 92-94. At his deportation hearing, he stated that he is a native and citizen of the Philippines who entered the United States on June 23, 1979, on

an immigrant visa.<sup>5</sup> AR 83-84. He conceded that he is not an United States citizen. AR 80-84. He also admitted his conviction for drug trafficking and acknowledged that he is deportable as an aggravated felon. AR 84. The Immigration Judge found him ineligible for discretionary relief from deportation because of that conviction and ordered him deported to the Philippines. AR 84-86.

On October 26, 1996, the petitioner, through counsel, appealed to the Board, arguing for the first time that he is the "legitimate child" of an United States citizen and therefore not subject to deportation. AR 75. He proffered additional evidence including: (1) Stanley Scales, Sr.'s second affidavit dated November 13, 1996; (2) Stanley Scales, Sr.'s birth certificate; (3) the Department of the Navy's permission for Stanley Scales, Sr. to marry Aily Paglinawan Topaz dated February 7, 1977; (4) Stanley Scales, Sr.'s honorable discharge from the Navy; (5) the Scales's marriage certificate dated March 13, 1977; (6) the petitioner's birth certificate; and (7) Aily Paglinawam Scales's birth certificate. AR 62-71.

The INS produced the petitioner's file, including Stanley Scales, Sr.'s application for an immigrant visa and alien registration for the petitioner and his January 25, 1979, Affidavit of Non-Paternity in support of that application. AR 39-52.

Relying on Stanley Scales, Sr.'s Affidavit of Non-Paternity, the Board dismissed the appeal. AR 2-4. Quoting the State Department's Foreign Affairs Manual, the Board concluded that a child does not acquire United States citizenship from a parent who is not a blood relation. AR 4. The Board found no evidence showing the petitioner to be Stanley Scales, Sr.'s natural son. AR 4. It also noted that Stanley Scales, Sr.'s 1979 Affidavit of Non-Paternity specifically

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<sup>5</sup> The petitioner declined the assistance of counsel. AR 80.

disavowed such a relationship, and that his 1996 affidavit did not contradict his original 1979 affidavit, but merely avoided addressing whether the petitioner is his natural son. AR 4. The Board specifically commented on the absence of an affidavit from the petitioner's mother, and concluded that the record did not warrant a remand. AR 4. It found the petitioner ineligible for a waiver of deportation under INA § 212(c) because of his drug trafficking conviction. AR 4.

The petitioner petitioned for review on August 18, 1997. On November 20, he filed an initial brief accompanied by a document titled "Excerpts of Record." The "Excerpts of Record" includes a declaration from the petitioner's mother that was not part of the information before the Board. See Petitioner's Excerpts of Record at 30-33 ("Sworn Declaration of Aily Scales"). The declaration is not part of the Certified Record of the proceedings. Indeed the Board specifically noted that the petitioner offered no statement or declaration from his mother. AR 4 ("Significantly the respondent has not submitted the affidavit of his mother."). Nevertheless, the petitioner offers this document for the first time to this Court, cites to it, and relies on it, taking his statement of facts almost entirely from it. See Petitioner's Brief at 5, 6, 18-19. This Court must consider the petition solely upon the administrative record on which the deportation order is based. See 8 U.S.C. § 1105a(4); see also Vargas v. INS, 831 F.2d 906, 907-08 (9th Cir.1987).

## **II. Statement of Facts**

Aily Paglinawn Topaz, a native and citizen of the Philippines, was pregnant when she met Stanley Scales, Sr. while he was stationed at the United States Naval Base Subic in the Philippines. AR 62. They married in March 1977 in the Philippines and the petitioner was born three weeks later at the Naval Medical Center there. They remained in the Philippines until 1979, when Stanley Scales, Sr. was transferred to the Chase Field Naval Air Station in Texas.

AR 63. In preparing to leave for the United States, Stanley Scales, Sr. filed an Application for Immigrant Visa and an Alien Registration and Application to Classify Status of Alien Relative for Issuance of Immigrant Visa for his wife and for the petitioner. AR 40-45. In support of the petitioner's application, Stanley Scales, Sr. swore out an Affidavit of Non-Paternity dated January 25, 1979, in which he detailed the circumstances surrounding his marriage and the petitioner's birth. He acknowledged the petitioner is not his natural son, but explained that he intended to raise the child as his own. AR 50.

Stanley Scales, Sr. stated that he met his wife, Aily Topaz, during the first week of September 1976. AR 50. Aily Topaz told him that she was approximately one month pregnant when they met. AR 50. They were married on March 13, 1977. The petitioner was born at the U.S. Naval Regional Medical Center, Cubi Point, Philippines on April 6, 1977. AR 50. Stanley Scales, Sr. wrote that, although the petitioner is not his natural child, he and his wife agreed that he should nevertheless be named Stanley Scales, Jr. AR 50. Stanley Scales, Sr. also stated that he accepted the petitioner as his son, but had made no attempts to claim United States citizenship on his behalf. AR 50. The petitioner's birth certificate shows that he was born after a full term, 42-week pregnancy. AR 49. His birth date, April 6, 1977, falls thirty weeks after Stanley Scales, Sr. met Aily Topaz. AR 49.

#### **SUMMARY OF THE ARGUMENT**

The INS had the burden to prove the petitioner's alienage by clear, convincing, and unequivocal evidence. The INS showed that the petitioner was born in the Philippines. The petitioner conceded that he is not an United States citizen and that he is a native and citizen of the Philippines. Having been born in a foreign country, the petitioner is presumed to be an alien

and bears the burden of going forward with the evidence to establish his claim to United States citizenship. The evidence of the petitioner's alienage is clear, convincing, and unequivocal and therefore he had the burden to prove his citizenship claim.

The record demonstrates conclusively that Stanley Scales, Sr. is not the petitioner's natural father and therefore the petitioner did not derive United States citizenship from him. When Stanley Scales, Sr. was preparing to return to the United States, he applied for immigrant visas for his wife, the petitioner's mother, and for the petitioner. As part of the application process, Stanley Scales, Sr. provided a sworn Affidavit of Non-Paternity, in which he detailed the circumstances that make it impossible for him to be the petitioner's natural father. The petitioner was born on April 6, 1977, thirty weeks after Stanley Scales, Sr. and Aily Topaz met. His birth certificate records that the petitioner was born after a full term 42-week pregnancy. Stanley Scales, Sr.'s 1979 affidavit and the petitioner's birth certificate demonstrate that it is impossible for the petitioner to be Stanley Scales, Sr.'s natural child. The petitioner's claim of United States citizenship is frivolous.

Even if this Court were to conclude the petitioner's claim is not frivolous, the record contains no genuine issue of material fact. The sole issue before this Court is whether the petitioner can claim derivative citizenship from his mother's husband, merely because she married prior to his birth and despite the fact that his mother's husband is not his natural father. This is an issue of law that is properly decided by this Court.

Neither INA § 301(g), which describes nationals and citizens of the United States at birth, nor INA § 101(c)(1), which defines "child" for purposes of INA § 301, expressly states whether a child can claim derivative citizenship from a parent's spouse. In such a case, the court must defer

to the reasonable interpretation of an agency charged with administering the statute. Judicial deference to an administering agency's interpretation reflects a sensitivity to the proper roles of the political and judicial branches. Deference is a natural consequence of the agencies' expertise and the fact that their statutory interpretations are driven by important policy considerations.

In this case, the Court should defer to the State Department's interpretation of the circumstances permitting acquisition of derivative citizenship. The Constitution gives Congress the power to establish a uniform rule of naturalization. Congress vested power in the Secretary of State to determine citizenship. The State Department has interpreted the acquisition of United States citizenship through a parent to require a blood relationship between the child and the parent through whom the child claims citizenship. This Court should defer to that interpretation and conclude that the petitioner has failed to demonstrate derivative citizenship through his mother's husband who is not his natural parent.

AEDPA § 440(d) does not violate Due Process because it does not divest aliens of a recognized Constitutional right or entitlement. A statute does not operate retroactively merely by taking into account events that occurred before its effective date. To determine if the application of a statute to cases pending on its effective date would have a retroactive effect, it is necessary to determine whether the interest that is adversely affected is entitled to Constitutional protection. Application of AEDPA § 440(d) to bar certain convicted felons from eligibility for discretionary relief from deportation does not deprive them of a vested right, does not make unavailable a previously viable defense to deportation, and therefore does not have a retroactive effect. AEDPA § 440(d) merely rescinded the Attorney General's jurisdiction to affect the

deportation of criminal aliens convicted of specified offenses. As a jurisdiction-stripping statute, AEDPA 440(d) is properly applied to cases pending on its effective date,

Nor does the application of AEDPA § 440(d) to criminal aliens in deportation proceedings violate equal protection of the law. As a criminal alien subject to deportation, the petitioner is not similarly situated to a criminal alien in exclusion proceedings. AEDPA § 440(d) does not distinguish between two similarly situated classes of aliens; it distinguished two different groups of aliens, those subject to deportation proceedings with all the attendant due process protections, and those subject to exclusion proceedings. AEDPA's classification is rational and is supported by a facially legitimate and bona fide reason.

### ARGUMENT

#### **I. THE PETITIONER'S CLAIM OF UNITED STATES CITIZENSHIP IS FRIVOLOUS AND FAILS TO RAISE A GENUINE ISSUE OF MATERIAL FACT**

##### **A. Burden of Proof and Standard of Review**

The INS had to prove the petitioner's alienage with clear, convincing, and unequivocal evidence. See Woodby v. INS, 385 U.S. 276 (1966); Murphy v. INS, 54 F.3d 605, 608 (9th Cir. 1995). Once a petitioner's birth in a foreign country is established, however, there is a presumption of alienage. INS v. Pangilinan, 486 U.S. 875, 886 (1988) (quoting Berenyi v. District Director, INS, 385 U.S. 630, 637 (1967)); Lim v. Mitchell, 431 F.2d 197, 198 (9th Cir. 1970) (citing Lee Hon Lung v. Dulles, 261 F.2d 719, 720 (9th Cir. 1958); Lee Shew v. Brownell, 219 F.2d 301 (9th Cir. 1955)). Once established, alienage is presumed to continue absent countervailing evidence. United States ex rel. Bilokumsky v. Tod, 263 U.S. 149 (1923); Farrell v. United States, 381 F.2d 368 (9th Cir. 1967), cert. denied, 389 U.S. 963 (1967). The petitioner

had the burden to demonstrate United States citizenship by a preponderance of the evidence. INS v. Pangilinan, 486 U.S. at 886; Lim v. Mitchell, 431 F.2d at 198); Vlisidis v. Holland, 245 F.2d 812 (3d Cir. 1957); Matter of Leyva, 16 I. & N. 118 BIA 1977); Matter of Vergara, 15 I. & N. 388 (BIA 1975); Matter of Tijerina-Villareal, 13 I. & N. Dec. 327 (BIA 1969).

Judicial review of a claim of derivative citizenship is governed by INA § 106(a)(5), 8 U.S.C. § 1105a(a)(5), which sets forth a two-step inquiry.<sup>6</sup> Agosto v. INS, 436 U.S. 48 (1978). First, the Court determines whether the petitioner's claim is frivolous; whether the underlying legal theory has any merit. See Sierra-Reyes v. INS, 585 F.2d 762, 764 (5th Cir. 1978) (citing Agosto, 436 U.S. 748). If the claim is not frivolous, the Court must decide whether there exists a genuine issue of material fact to be resolved. Rule 56 of the Federal Rules of Civil Procedure governing summary judgment principles controls the inquiry. Sanchez-Sanchez v. INS, 957 F.2d 702, 703 (9th Cir. 1992). The evidence the petitioner presents in support of his citizenship claim must be sufficient to entitle him to a trial if it were offered to oppose a motion for summary judgment. Id. (quoting Agosto, 436 U.S. at 754-56). When no genuine issue of material fact

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[W]henver any petitioner who seeks review of an order under this section claims to be a national of the United States and makes a showing that his claim is not frivolous, the court shall (A) pass upon the issues presented when it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; or (B) where a genuine issue of material fact as to the petitioner's nationality is presented, transfer the proceedings to a United States district court for the district where the petitioner has his residence for hearing de novo of the nationality claim and determination as if such proceedings were originally initiated in the district court under the provisions of section 2201 of Title 28.

INA § 106(A)(5), 8 U.S.C. § 1105a(a)(5).

exists, the court of appeals has authority to pass on any remaining legal issue. Agosto, 436 U.S. at 751 (citing INA § 106(a)(5), 8 U.S.C. § 1105a(a)(5)).

The petitioner's birth in the Philippines raised a presumption of alienage. He failed to produce sufficient evidence that would have required, under Rule 65 of the Federal Rules of Civil Procedure, a trial on the issue of his citizenship claim. The record demonstrates conclusively that Stanley Scales, Sr. is not the petitioner's natural father and therefore the petitioner did not derive United States citizenship from him. The petitioner's alternative theory -- that he derived United States citizenship merely because Stanley Scales, Sr. married Aily Topaz before she gave birth to the petitioner -- lacks legal merit. In light of the clear and convincing evidence of the petitioner's alienage and his failure to produce sufficient evidence to support his claim, his unsupported claim of derivative citizenship is frivolous.

Furthermore, the record contains no genuine issue of material fact that would entitle him to a trial if presented in opposition to a motion for summary judgment. The sole question, which asks whether the petitioner can derive United States citizenship from his mother's husband who is not his natural father and who never formally adopted him, is a legal issue that is properly decided by this Court.

#### **B. The Petitioner's Citizenship Claim Is Frivolous**

The INS produced the petitioner's birth certificate, his mother's birth certificate, and Stanley Scales, Sr.'s application for an immigrant visa for the petitioner. One born abroad is presumed to be an alien until he or she shows otherwise. Corona-Palomera v. INS, 661 F.2d 814 (9th Cir. 1981); United States ex rel. Rongetti v. Neelly, 207 F.2d 281 (7th Cir. 1953); Matter of Benitez, 19 I. & N. Dec. 173 (BIA 1984); Matter of Velasco, 16 I. & N. Dec. 281 (BIA 1977);

Matter of Ponco, 15 I. & N. Dec. 120 (BIA 1974); Matter of Tijerina-Villarreal, 13 I. & N. Dec. 327 (BIA 1969); Matter of A--M--, 7 I. & N. Dec. 332 (BIA 1956). The petitioner's and his mother's birth certificates establish that they were born in the Philippines and that he and his natural mother are natives and citizens of that country.

When Stanley Scales, Sr. was preparing to return to the United States, he applied for immigrant visas for his wife, the petitioner's mother, and for the petitioner. See Veneracion v. INS, 791 F.2d 778, 779-80 (9th Cir. 1986) (visa application and foreign birth certificate created a burden-shifting presumption). As part of the application process, Stanley Scales, Sr. provided a sworn Affidavit of Non-Paternity, in which he detailed the circumstances that make it impossible for him to be the petitioner's natural father. Finally, the petitioner conceded that he is a native and citizen of the Philippines, that he is not a United States citizen, and that he is deportable by reason of his drug trafficking conviction. Having admitted birth in foreign country, he is presumed to be an alien and bears the burden of going forward with the evidence to establish his claim to United States citizenship. Farrell, 381 F.2d at 369 (admission of foreign birth and foreign birth certificate conclusively established alienage); Matter of Ponco, 15 I. & N. Dec. 120; Matter of Vergara, 15 I. & N. 388; Matter of Tijerina-Villarreal, 13 I. & N. Dec. 327; Matter of A--M--, 7 I. & N. Dec. 332. The evidence of his alienage is clear, convincing, and unequivocal.

The petitioner cites section 301(g) of the INA, which endows a child born outside of the United States with derivative citizenship if one of his parents is a United States citizen. See INA § 301(g), 8 U.S.C. § 1401(g). But for a child to claim derivative citizenship based on a parent's citizenship, the eligible parent must be the child's natural parent. In this case, the petitioner

attempts to claim United States citizenship through his mother's husband, despite the record evidence showing conclusively that Stanley Scales, Sr. is not his natural father.

The petitioner argues that, under the law of the state of his residence, Washington, he is presumed to be legitimate by virtue of his birth during his mother's marriage to Stanley Scales, Sr. and therefore he is presumed to be an American citizen.<sup>7</sup> See Petitioner's Brief at 13-15. Washington law provides that a man is presumed to be the natural father of a child if "[w]hile the child is under the age of majority, he receives the child into his home and openly holds out the child as his child." Wash.Rev.Code § 26.26.040 (1996). Although Stanley Scales, Sr. received the petitioner into his home and held him out as his son, the presumption that he is the petitioner's natural father is rebuttable with "clear, cogent, and convincing evidence." Id. The evidence that Stanley Scales, Sr. is not and could not be the petitioner's natural father is uncontroverted.

When Stanley Scales, Sr. was transferred to the United States, he applied for an immigrant visa for the petitioner to allow him to travel to the United States and supplied a sworn Affidavit of Non-Paternity dated January 25, 1979. AR 50. Stanley Scales, Sr. clearly understood that, despite his willingness to raise the petitioner as his son, the petitioner was not his natural child and was therefore not a citizen of the United States.

Stanley Scales, Sr. met Aily Topaz in the first week of September 1977. AR 50. One week later, she told him that she was approximately one month pregnant. The petitioner was

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<sup>7</sup> For purposes of determining nationality under INA § 301(g), a child can be legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile." INA § 101(c)(1), 8 U.S.C. § 1101(c)(1); see also Burgess v. Meese, 802 F.2d 338 (9th Cir. 1986).

born on April 6, 1977, thirty weeks after Stanley Scales, Sr. and Aily Topaz met. His birth certificate records that the petitioner was born after a full term 42-week pregnancy. Stanley Scales, Sr.'s 1979 affidavit and the petitioner's birth certificate demonstrate that Aily Topaz was twelve weeks pregnant when she met Stanley Scales, Sr., making it impossible for the petitioner to be his natural child.

Stanley Scales, Sr.'s January 1997 affidavit does not contradict his 1979 Affidavit of Non-Paternity, and in fact bolsters the evidence of the petitioner's alienage. In his second affidavit, Stanley Scales, Sr. avoids mentioning the exact date that he met Aily Topaz, saying only that it was in 1976. AR 62. Although he consistently refers to the petitioner as his son in his January 1977 affidavit, Stanley Scales, Sr. does not claim the petitioner is his natural child. The documentary evidence demonstrates that it is impossible that Stanley Scales, Sr. is the petitioner's natural father. See, e.g., Stone v. Stone, 458 P.2d 183, 184 (Wash. 1969) (presumption rebutted by evidence that is so strong and irresistible that no other conclusion can reasonably be made).

The petitioner's claim, in so far as it relies on an inference that he is the natural son of Stanley Scales, Sr., is frivolous. The record contains no genuine issue of material fact. The remaining issue is a question of law that should be decided by this Court.

**C. The Petitioner's Claim Contains No Genuine Issues of Material Fact**

The record contains no genuine issue of material fact. The sole issue before this Court is whether the petitioner can claim derivative citizenship from his mother's husband, merely because they married prior to his birth and despite the fact that his mother's husband is not his natural father. This is an issue of law that is properly decided by this Court.

Neither INA § 301(g), which describes nationals and citizens of the United States at birth, nor INA § 101(c)(1), which defines "child" for purposes of INA § 301, expressly states whether a child can claim derivative citizenship from a parent's spouse who is not his natural father. The State Department, however, has affirmatively rejected the petitioner's position that a child, even if legitimated under the law of his birthplace by his mother's marriage prior to his birth, will obtain citizenship through a father who is not his natural parent.

The laws of acquisition of U.S. citizenship through a parent have always contemplated the existence of a blood relationship between the child and the parent(s) through whom citizenship is claimed. It is not enough that the child is presumed to be the issue of the parents' marriage by the laws of the jurisdiction where the child was born. Absent a blood relationship between the child and the parent on whose citizenship the child's own claim is based, U.S. citizenship is not acquired.

Foreign Affairs Manual Vol. 7, sec. 1131.4.

When reviewing an agency's interpretation of a statute, established canons of statutory construction apply. Cardoza-Fonesca v. I.N.S., 480 U.S. 421, 431 (1987). The words used are to be given their ordinary meaning, Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), and the language in question is to be construed in harmony with related provisions and the statute as a whole. K Mart Corp. v. Cartier Inc., 486 U.S. 281, 291 (1988). If examination of the statutory language and, where appropriate, extrinsic evidence reveals that "Congress has not directly addressed the precise question at issue," the court's task is to determine whether to afford deference to an agency's effort to explicate the ambiguous language or fill the statutory void. Montana v. Clark, 749 F.2d 740,745 (D.C. Cir. 1985). (citing Chevron, 467 U.S. at 843).

"If 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." Chevron, 467 U.S. at 843-44; see also Morton v. Ruiz, 415 U.S. 199, 231 (1974). In this context, the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), and Chevron direct the Court to affirm the agency's construction unless it is arbitrary, capricious, or manifestly contrary to law. If, however, "the legislative delegation to an agency . . . is implicit rather than explicit," Chevron directs the Court to affirm an agency's interpretation of a statute it is entrusted to administer provided that it is "reasonable." Chevron, 467 U.S. at 844; see also Whirlpool Corp. v. Marshall, 445 U.S. 1, 11 (1980). Deference in this context, no less than in the case of explicit delegation, reflects the deep institutional premise that it is for the agency in its capacity as delegate of the legislative branch, not the court, to make policy within the boundaries assigned to it by Congress. Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 565 (1979).

Judicial deference to an administering agency's interpretation of ambiguous statutory provisions reflects a sensitivity to the proper roles of the political and judicial branches. Pauley v. Bethenergy Mines, Inc., 501 U.S. 680, 696 (1991) (citing Chevron, 467 U.S. at 866). This deference is a natural consequence of the agencies' expertise and the fact that their statutory interpretations are driven by important policy considerations. Pauley, 501 U.S. at 681. The resolution of a statutory ambiguity is often a question of policy rather than of law. Id. at 696. "When Congress, through express delegation or the introduction of an interpretative gap in the statutory structure, has delegated policy-making authority to an administrative agency, the extent of judicial review of the agency's policy determination is limited. Id.

The Constitution gives Congress the power "[t]o establish an uniform Rule of Naturalization..." U.S. Const. art. I, § 8. Congress vested power in the Secretary of State to determine citizenship, a power that flows naturally from its duties. See, e.g., Magnuson v. Baker, 911 F.2d 330, 333 n.5 (9th Cir. 1990). Courts give considerable weight to the State Department's opinion in matters concerning its area of expertise. See, e.g., Nenadovic v. INS, 108 F.3d 124, 128 n.12 (7th Cir. 1997) (quoting Kaczmarczyk v. INS, 933 F.2d 588, 594 (7th Cir.1991)); Tzankov v. INS, 107 F.3d 516, 520 (7th Cir. 1997) (citing Mitev v. I.N.S., 67 F.3d 1325, 1332 (7th Cir.1995) (noting that great weight be given to opinions of State Department within its area of expertise). The Chevron deference is particularly apropos in the immigration context because the INA and its amendments have produced an extremely complex regulatory scheme. See, e.g., Pauley, 501 U.S. at 697; Martin v. Occupational Safety and Health Review Comm'n, 499 U.S. 144, 152-53 (1991) (deference to Secretary of Labor's interpretation of OSHA regulations); Aluminum Co. of America v. Central Lincoln Peoples' Utility Dist., 467 U.S. 380, 390 (1984) (deference to administrator's interpretation of the Pacific Northwest Electric Power Planning and Conservation Act) .

The State Department has interpreted the acquisition of United States citizenship through a parent to require a blood relationship between the child and the parent through whom the child claims citizenship. This Court should defer to that interpretation and conclude that the petitioner has failed to demonstrate derivative citizenship through his mother's husband who is not his natural parent.

**II. APPLICATION OF AEDPA § 440(d) TO REQUESTS FOR DISCRETIONARY RELIEF FROM DEPORTATION PENDING ON ITS EFFECTIVE DATE DOES NOT VIOLATE DUE PROCESS**

**A. Standard of Review**

This Court reviews de novo the Board's determinations of law. Fisher v. INS, 79 F.3d 955, 960 (9th Cir. 1996) (en banc). "The Board's interpretation of the INA will be reversed only where the interpretation is demonstrably irrational or clearly contrary to the plain and sensible meaning of the statute." Chevron, 467 U.S. at 843. Indeed, "only a 'clear showing' of a contrary congressional intent will justify overruling the agency's interpretation of the statute it is charged with administering." Castillo-Felix v. INS, 601 F.2d 459, 465 (9th Cir. 1979).

**B. Statutory Eligibility**

AEDPA § 440(d) amended INA § 212(c) to make criminal aliens convicted of drug trafficking crimes ineligible for its discretionary relief. The Attorney General concluded that application of AEDPA § 440(d) to criminal aliens whose cases were pending on April 24, 1996, its effective date, did not operate retroactively to deprive them of any constitutionally protected entitlement. See Matter of Soriano, Int. Dec. 3289 (A.G. Feb. 21, 1997).

**C. The Board's Use of AEDPA § 440(d) To Dismiss The Petitioner's Appeal Did Not Have A Retroactive Effect**

**1. To Operate Retroactively, A Statute Must Deprive An Individual of a Constitutionally Protected Interest or a Right That Vested Before Its Effective Date**

A statute does not operate retroactively "merely because it . . . upsets expectations based in prior law." Landgraf v. USI Film Products, Inc., 511 U.S. 244, 269 (1994) (citing Republic Nat. Bank of Miami v. United States, 506 U.S. 80 (1992) (Thomas, J., concurring in part and

concurring in judgment)). Nor does a statute act retroactively merely because it draws on antecedent facts for its operation. Cox v. Hart, 260 U.S. 427, 435 (1922). When a statute takes into account events that occurred before its effective date and Congress issued no express command regarding its temporal reach, the court must determine whether the new statute acts retroactively. Landgraf, 511 U.S. at 280. Consideration of whether a particular statute operates retroactively requires a judgment concerning the nature and extent of the change and the degree of the connection between its operation and the relevant past event. Id. at 269-270. For a statute to operate retroactively, it must attach new legal consequences to events completed before its enactment, i.e., impair rights an individual had when he acted, increase his liability for past conduct, or impose new duties with respect to transactions already completed. Id. at 270.

**2. The Petitioner Did Not Possess a Constitutionally Protected Interest or a Vested Right in INA § 212(c) as of AEDPA's Effective Date**

To determine whether an alien is entitled to claim Constitutional protection for deprivation of a particular interest, it is necessary to look at the nature of the interest at stake. Board of Regents v. Roth, 408 U.S. 564, 571 (1972) (distinction between life, liberty, property or "entitlements" and unprotected interests or "mere expectations") (citing Morrissey v. Brewer, 408 U.S. 471, 481 (1972)). The petitioner ignores the nature of INA § 212(c)'s discretionary relief when he argues that AEDPA § 440(d) "unmistakably eliminates a defense to deportation." Petitioner's Brief at 38. His mis-labeling of INA § 212(c) as a "defense" does not convert what is a mere discretionary possibility into a Constitutional entitlement.

INA § 212(c) is not a defense to a finding of deportability, it is a discretionary grant of admission after and despite a finding of deportability. "A grant of [discretionary relief from

deportation] is manifestly not a matter of right under any circumstances, but rather a matter of grace." Jay v. Boyd, 351 U.S. 345, 352 (1956). Discretionary relief from deportation is similar to a discretionary parole after a finding of guilt and imposition of sentence.

In Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979), the Court examined the nature of the interest in a grant of discretionary parole from a constitutionally valid criminal sentence. It rejected the argument that a convicted felon had a constitutional right to be conditionally released before the expiration of that sentence or that he had a protected expectation in a decision regarding discretionary parole. Id. at 7. The Court said that, while an inmate has an interest in obtaining a discretionary parole before the expiration of his sentence, that interest is neither recognized nor protected by the Constitution. Id. at 10.

Decisions of the Executive Branch, however serious their impact, do not automatically invoke due process protection. Greenholtz, 442 U.S. at 8. This is especially true with respect to "equity" types of judgments. Id. When a decision turns on a discretionary assessment, it holds out only the possibility that the relief will be granted. Id. at 10. This gives the expectant grantee no more than a possibility or a "mere hope" that he will obtain the benefit. Id.; see also Connecticut Board of Pardons v. Dumschat, 452 U.S. 458, 465 (1981) (prisoner not entitled to reasons for denial of a commutation of his sentence because it amounted to no more than "an appeal for clemency").

Prior to its amendment by ADEPA, INA § 212(c) gave a criminal alien the opportunity to appeal for clemency. The decision granting or denying the relief was a discretionary assessment creating no more than a hope that he would avoid deportation. INA § 212(c), 8 U.S.C.

§ 1182(c). The decision was committed entirely to the Attorney General's discretion. INA § 212(c) offered an alien no more than a possibility that its relief "may be" granted. Equity assessments of the type involved in INA § 212(c)'s discretionary grant of relief create "mere hopes" and not "defenses" as the petitioner claims. See Greenholtz, 442 U.S. 10; see also Kentucky Dept of Corrections v. Thompson, 490 U.S. 454 (1989)(discretionary language in rules regulating prison visits failed to create an interest protected by the Due Process Clause); Jago v. Van Curen, 454 U.S. 14 (1981) (parole board could rescind parole without a hearing after learning the prisoner lied to the board); Dumschat, 452 U.S. 458 (due process imposed no procedural safeguards against arbitrary treatment of a request for commutation of a constitutionally imposed sentence); Leis v. Flynt, 439 U.S. 438 (1979)(no constitutionally protected liberty or property interest in pro hac vice admission of out-of-state lawyers and thus no inquiry into judge's refusal was constitutionally necessary).

Before the enactment of AEDPA, the petitioner was deportable because of his drug trafficking conviction. INA § 212(c) was not a defense to that finding. It offered only a "mere hope" that, if found deportable, the petitioner could persuade the Attorney General to exercise her discretion to allow him to remain in the United States. AEDPA did not alter that result. Enactment of AEDPA § 440(d) did not divest the petitioner of an interest or a defense that is recognized or protected by the Constitution. It merely removed the Attorney General's discretion to affect the deportation of criminal aliens. Application of its terms to aliens with criminal convictions at the time of its enactment does not have a retroactive effect.

**3. When a Statute Does Not Operate Retroactively It Does Not Trigger The Presumption Against Retroactivity**

The use of AEDPA § 440(d) to cases pending on its effective date is controlled by the longstanding presumption requiring courts to apply the law in effect at the time they render their decisions. Landgraf, 511 U.S. at 277; Bradley v. Richmond School Board, 416 U.S. 696, 713, 719 (1974)("in 'great national concerns . . . the court must decide according to existing laws.") (quoting United States v. Schooner Peggy, 1 Cranch 103, 110 (1801)). The Supreme Court's decision in Bradley anchored its opinion on that presumption, explicitly rejecting the contention that a change in the law should be given effect in a pending case only when there is a clear and stated intention of the legislature. Bradley, 416 U.S. at 715. The absence of language in AEDPA § 440(d) requiring its application upon enactment is not dispositive of its application to cases pending on its effective date. Rather, the absence of a retroactive effect presumes its application to cases pending on its effective date.

**4. Application of a Jurisdictional Rule Does Not Affect Substantive Rights But Only Affects the Power of the Tribunal Hearing the Case**

The Supreme Court regularly applies intervening legislation conferring or ousting jurisdiction to pending cases, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed. Landgraf, 511 U.S. at 274. In Bruner v. United States, 343 U.S. 112, 116-17 (1952), the Court ordered a suit dismissed because the jurisdictional statute under which it had been filed was subsequently repealed. "Application of a new jurisdictional rule usually 'takes away no substantive right but simply changes the tribunal that is to hear the case.'" Landgraf, 511 U.S. at 274 (quoting Hallowell v. Commons, 239 U.S. 506-508-09

**1. Criminal Aliens in Deportation Proceedings Are Not Similarly Situated To Criminal Aliens In Exclusion Proceedings**

The petitioner did not show or even allege that, for constitutional purposes, as a criminal alien in deportation proceedings he was "similarly situated" to a criminal alien in exclusion proceedings. Instead, he relies on Francis v. INS, 532 F.2d 268 (2d Cir. 1976). The facts that prompted the court's decision in Francis are easily distinguished.

Before Francis, the Board had allowed resident aliens in deportation proceedings to apply for relief under INA § 212(c) only if they had departed from the United States after becoming subject to deportation and as a consequence were inadmissible at the time of their last entry. See Matter of Silva, 16 I. & N. Dec. 26, 28 (BIA 1976); Matter of Arias-Uribe, 13 I. & N. Dec. 696 (BIA 1971), aff'd, 466 F.2d 1198 (9th Cir. 1972). Deportable aliens who had not departed after being placed in deportation proceedings were ruled ineligible.

Francis addressed the Board's distinction between different categories of deportable aliens, those who could demonstrate a departure from the country and those who could not. 532 F.2d 268. It did not address the significant difference between criminal aliens in exclusion proceedings and criminal aliens in deportation proceedings. The Francis court concluded that distinguishing between similarly situated deportable aliens was not rationally related to any legitimate purpose of the statute. Id. at 272. That distinction, which the Board created with its interpretation of section 212(c), was found to violate equal protection of the law. Id.; see Matter of Gonzalez-Camarillo, Int. Dec. 3320 (BIA 1997).

In contrast, AEDPA § 440(d) distinguishes between criminal aliens in deportation proceedings and criminal aliens who were placed in exclusion proceedings after seeking admission into the United States. Criminal aliens in these two classes are not similarly situated.

Prior to IIRIRA, criminal aliens who remained in the United States waited until the INS instituted deportation proceedings, and remained in the United States until those proceedings ran their course. Aliens like the petitioner may be expelled only after completion of deportation proceedings that conform to traditional standards of fairness encompassed in due process. Shaughnessy v. Mezei, 345 U.S. 206, 212 (1953). In contrast, criminal aliens who returned from abroad were subject to exclusion proceedings, with the substantial risk that they would be barred from re-entering. Aliens in exclusion proceedings were not entitled to the constitutional protections afforded aliens in deportation proceedings. Id. "[A]n alien on the threshold of initial entry stands on a different footing: 'Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.'" Id. (quoting Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950)). Resident aliens in deportation and resident aliens in exclusion proceedings are "two differently situated groups of aliens." See Landon v. Plasencia, 459 U.S. 21, 25-26, 31 (1982) (discussing the fundamental differences in the purposes and procedures in exclusion and deportation proceedings); Maldonado-Sandoval v. INS, 518 F.2d 278, 280 n.3 (9th Cir. 1975) (noting that aliens in exclusion and deportation proceedings are governed by entirely different sets of principles and standards); Matter of Fuentes-Campos, Int. Dec. 3318 (emphasizing important distinctions between excludable and deportable aliens).

As a criminal alien in deportation proceedings, the petitioner was not similarly situated to a criminal alien in exclusion proceedings. Application of AEDPA § 440(d) to prevent him from benefitting from the discretionary relief of INA § 212(c) did not violate equal protection.

**2. Congress's Classification Is Facially Legitimate  
And Bona Fide**

The Supreme Court has repeatedly stressed the paramount authority of the executive and legislative branches over immigration matters. *See, e.g., Reno v. Flores*, 507 U.S. 292, 305 (1993); *Fiallo v. Bell*, 430 U.S. at 792; *Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 n.21 (1976); *Mathews v. Diaz*, 426 U.S. 67, 81-82 (1976); *Kleindienst v. Mandel*, 408 U.S. at 765-67; *Galvan v. Press*, 347 U.S. 522, 531 (1954); *Harisiades v. Shaunghnessy*, 342 U.S. 580, 588-89 (1952). In the exercise of that authority, Congress may distinguish between classes of aliens and confer benefits on one that are not available to others if the distinction is predicated on a rational basis. *See Mathews v. Diaz*, 426 U.S. at 81-84. If a classification is supported by "a facially legitimate and bona fide reason," it must be sustained. *Fiallo v. Bell*, 430 U.S. at 794; *Kleindienst v. Mandel*, 408 U.S. at 770; *Ablang v. Reno*, 52 F.3d at 804.<sup>8</sup>

Congress's decision to distinguish between deportable criminal aliens and excludable criminal aliens is supported by a facially legitimate and bona fide reason. AEDPA's legislative history demonstrates that Congress was gravely concerned with a burgeoning criminal alien

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<sup>8</sup> The government has no obligation to produce evidence to sustain the rationality of a statutory classification. *Heller v. Doe*, 509 U.S. 312, 319 (1993). A statutory classification bears a "strong presumption of validity," and those attacking its rationality have "the burden to negate every conceivable basis which might support it," whether or not the basis has a foundation in the record. *Id.* at 320; *see also FCC v. Beach Communications, Inc.*, 508 U.S. 307, 314-15 (1993). It is "entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *FCC v. Beach Communications*, 508 U.S. at 315.

population and the difficulty and delays in removing them. See, e.g., 141 Cong. Rec. S7822-23 (daily ed. June 7, 1995) (450,000 criminal aliens residents is a conservative estimate; approximately 20-25% of federal prison inmates are non-citizens); id. (convicted felons are removed at a rate of only 4% a year, in part because of equitable waivers and other types of judicial review never meant to apply to them); id. (70% recidivist rate among criminal aliens); see also S. Rep. No. 48, 104th Cong., 1st Sess. 3, 16 (1995), available in 1995 WL 170285, at \*46 ("deportation process for criminal aliens is byzantine to say the least"). AEDPA furthers Congress's legitimate legislative purpose by streamlining and speeding the process of removing criminal aliens from the United States.

The number of criminal aliens in deportation proceedings greatly exceeds those subject to exclusion proceedings.<sup>9</sup> Using AEDPA § 440(d), Congress chose to address the more pressing problem of removing criminal aliens who have already passed through the gates. Removing the availability of discretionary relief from the great numbers of deportable criminal aliens streamlines the deportation process. Congress has rationally chosen to concentrate the government's resources initially to effectuate and to speed the removal of deportable criminal aliens. Addressing the greater and more pressing aspect of the problem is a rational goal. See Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955) ("[R]eform may taken one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.").

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<sup>9</sup> See, e.g., H.R. Rep. No. 104-469(I) (1996), available at 1996 WL 168955, at \*384-85 (in 1995 approximately 29,255 criminal aliens deported compared to 2,738 criminal aliens excluded); see also U.S. Department of Justice, Immigration and Naturalization Service 162 (1997) (in 1994, 39,830 criminal aliens were deported in contrast to 5,678 criminal aliens who were excluded).

Congress's attention to this particular concern is supported by the collective amendments to AEDPA § 440. The change to INA § 212(c) was part of a comprehensive package of amendments aimed at enhancing the ability of the United States to deport criminal aliens. See H.R. Conf. Rep. No. 518, 104th Cong., 2d Sess. (1996), reprinted in 1996 U.S.C.C.A.N. 924, 952. The amendments target those criminal aliens whose offenses are covered by the listed deportation grounds. See AEDPA §§ 440(a), (c), (d), (h). Collectively, these changes were intended to target criminal aliens for expedited removal. The amendments mandate detention, eliminate INA § 212(c) relief, remove judicial review, and specify a 30-day period for actual removal after the final administrative order. Id. These provisions were intended to speed the process and streamline the criminal alien's deportation proceeding.

Moreover, exempting criminal aliens whose convictions precede AEDPA § 440(d)'s effective date would continue to allow thousands of criminal aliens the relief Congress never intended them to have, would give the Attorney General jurisdiction to exercise discretion that Congress has eliminated, and would continue to snarl the deportation process. In enacting AEDPA § 440, Congress took one firm step toward accomplishing its goal of effectuating the removal of criminal aliens from within the United States. Its decision to target the more pressing facet of an enormous problem is facially legitimate and bona fide, and, accordingly, survives constitutional scrutiny. See Williamson v. Lee Optical Co., 508 U.S. at 489.

The Supreme Court has upheld under-inclusive classifications on the sound theory that a legislature may deal with one aspect of a problem without addressing all of it. See, e.g., Id. at 488-89. The Supreme Court refuses to invalidate a statute because Congress might have gone farther. Roschen v. Ward, 279 U.S. 337, 339 (1929). It also recognized that the legislature need

not "strike all evils at the same time," Semler v. Dental Examiners, 294 U.S. 608, 610 (1935), and that "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind," Williamson v. Lee Optical Co., 348 U.S. at 489.

AEDPA § 440(d) does not distinguish between two similarly situated classes of aliens. Its classification is not "wholly irrational," Sudomir v. McMahon, 767 F.2d 1456, 1464 (9th Cir. 1985), and is supported by "a facially legitimate and bona fide reason," Fiallo v. Bell, 430 U.S. at 794. See also Kleindienst v. Mandel, 408 U.S. at 770; Ablang v. Reno, 52 F.3d at 804. Application of AEDPA § 440(d) to this petitioner, who is a criminal alien deportable by reason of his conviction for trafficking in cocaine, does not violate equal protection.

#### CONCLUSION

For all the reasons set forth, this Court should dismiss the petition for lack of jurisdiction, or, in the alternative, this Court should deny to the petition and affirm the Board's decision.

Respectfully submitted,

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## STATEMENT OF RELATED CASES

Based upon a survey of colleagues in the Office of Immigration Litigation, the following cases raise issues of jurisdiction under IIRIRA Section 309(c)(4)(G), as well as the issues of whether AEDPA Section 440(d) is consistent with equal protection or is not impermissibly retroactive when applied to pending cases.

Magana-Pizano v. INS, 97-15678, 97-70384 (argued 8/12/97)

Alberto-Gonzalez v. INS, 97-70473

Arceo-Rodriguez v. INS, 97-70612

Banuelos v. INS, 97-70703

Beltran-Vasquez v. INS, 97-70610

Bermudez-Lara v. INS, 97-70658

Celedon-Guerrero v. INS, 97-70505

Charan v. INS, 97-70887

Diaz-Garcia v. INS, 97-70474

Gomez v. INS, 97-70629

Gonzalez-Bustamante v. INS, No. 97-70465

Heredia-Toscano v. INS, 97-70419

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Hernandez-Rivera v. INS, 97-70501

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Jimenez-Romero v. INS, 97-70605

Kepes v. INS, 97-70515

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Palmas-Rojas v. INS, 97-70232

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Ramos-Birueta v. INS, 97-70588

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Valencia-Cortez v. INS, 97-70441  
Vasquez v. INS, 97-70351  
Velasquez-Bravo v. INS, 97-70427  
Zapata v. INS, 97-70401



ALISON MARIE IGOE

**CERTIFICATE OF COMPLIANCE**

Pursuant to Ninth Circuit Rule 32(e)(3), I certify that the "Brief For Respondent" appears in Times New Roman 12 pt., does not exceed 10.5 characters per inch, includes 10, 566 words, and does not exceed 40 pages.

  
ALISON MARIE IGOE

**CERTIFICATE OF SERVICE**

I certify that on January 5, 1998, I served 2 copies of the Respondent's Brief on the petitioner by placing them in the Department of Justice mail room for same day mailing, First Class postage prepaid, addressed to:

Michael Bochenek, Esq..  
Immigration Project  
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Granger, Washington 98932

A handwritten signature in blue ink, appearing to read "Alison Marie Igoe". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

ALISON MARIE IGOE

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No. 03-70625

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

EDUARDO SOLIS-ESPINOZA,  
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Petitioner,

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v.

JOHN ASHCROFT, ATTORNEY GENERAL.

Respondent.

ON PETITION FOR REVIEW OF AN ORDER  
OF THE BOARD OF IMMIGRATION APPEALS

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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**No. 03-70625**

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**EDUARDO SOLIS-ESPINOZA,  
(INS # A 35-620-773)**

**Petitioner,**

**v.**

**JOHN ASHCROFT, ATTORNEY GENERAL**

**Respondent.**

---

**ON PETITION FOR REVIEW OF AN ORDER OF  
THE BOARD OF IMMIGRATION APPEALS**

---

**BRIEF FOR RESPONDENT**

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**STATEMENT OF JURISDICTION**

This is an immigration case in which petitioner, Eduardo Solis-Espinoza (“petitioner” or “Solis-Espinoza”), a native and citizen of Mexico, seeks judicial review of a final order of the Board of Immigration Appeals (“Board” or “BIA”), dated February 5, 2003, in which it affirmed without opinion the Immigration Judge’s denial to terminate removal proceedings against petitioner, an aggravated

felon who claims derivative United States citizenship A.R. 2.<sup>1</sup> Pursuant to 8 C.F.R. § 3.1 (b)(2002), the Board had jurisdiction.

The Court's jurisdiction arises under §242(b) of the Immigration and Nationality Act (“Act” or “INA”), 8 U.S.C. § 1252(b) (2002), which confers exclusive jurisdiction in the Court of Appeals to review final orders of removal. The Board entered its order on February 5, 2003. The petition for review was timely filed on February 11, 2003. See Narayan v. INS, 105 F.3d 1335, 1335 (9th Cir. 1997); Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”) § 309(c)(4)(C), 110 Stat. at 3009-626. Venue is proper in this Court because the removal proceedings were completed in San Diego, California. See § 242(b)(2) (petition must be filed in court of appeals for judicial circuit in which the proceedings before the Immigration Judge were completed).

### STATEMENT OF THE ISSUE

Whether the administrative authorities properly found that petitioner, born out of wedlock, is subject to removal as an aggravated felon despite his claim that he acquired derivative United States citizenship through his father’s wife, a United States citizen, who is not petitioner’s biological mother.

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<sup>1</sup> The abbreviation “A.R.” refers to the Certified Administrative Record on file with the Court; “Pet. Br.” refers to petitioner’s opening brief.

## STATEMENT OF THE CASE

### A. Nature Of The Case, Course Of Proceedings, Disposition Below and Statement of the Facts

On October 9, 2001, the Immigration and Naturalization Service ("INS") commenced proceedings against petitioner by issuing a Notice to Appear, charging him as subject to removal under section 237(a) (2) (A) (iii) of the Act as an alien convicted of an aggravated felony for drug trafficking and under section 237(a) (2) (B) (i) of the Act, as an alien convicted of a controlled substance offense. A.R. 218. On January 03, 2001, petitioner was convicted in the Superior Court of California, County of Santa Clara, for the offense of "Possession of Methamphetamine for Sale". Id. On April 02, 2002, an abstract of judgment and prison commitment was submitted to the Immigration Judge in support of the charge. A.R. 137. On April 02, 2002, respondent admitted that he was convicted of the drug trafficking and controlled substance offense alleged in the Notice to Appear but denied that he was subject to removal from the United States as an aggravated felon. A.R. 92. Petitioner claimed that he was not removable because he is a citizen of the United States. Id. He claimed that he acquired United States citizenship through a woman, Stella Cruz-Dominguez, who is not his biological mother, but who was married to his father at the time Solis-Espinoza was born.

A.R. 5.

Solis-Espinoza was born in Tijuana, Mexico on October 15, 1967. A.R. 173. Petitioner admitted that neither his biological mother nor his father were United States citizens. A.R. 5, 30-31. His biological father, Refugio Solis, now deceased, was born in Salvatierra Guanajuato, Mexico in 1926. A.R. 174. His biological mother, Maria Luisa Cardoza, was a Mexican woman. A.R. 113-14; Pet. Br. 5. Petitioner's mother and father were not married to each other when petitioner was born out of wedlock. Pet. Br. 5. Refugio Solis, petitioner's father, was apparently married to Stella Cruz-Dominguez a United States citizen, when petitioner was born.<sup>2</sup> At the time of petitioner's birth in Mexico, his father was living in California; Cruz-Dominguez testified that she picked Solis-Espinoza up in Mexico as an infant, although petitioner admitted allegation number six that he was admitted to the United States at San Ysidro, California on April 22, 1977 as an immigrant. A.R. 92, 99, 110, 218. There is no dispute that a birth certificate which lists Cruz-Dominguez as petitioner's mother is not accurate since Maria

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<sup>2</sup> Stella Cruz-Dominguez testified at the hearing that she married Refugio Solis twice, first in 1954 or 1957 or 1958 and then again in 1963 when she learned that their first marriage was not valid because Refugio Solis was still married to another woman at the time she thought he had married her. A.R. 100, 102. According to her testimony, Refugio Solis' first wife was Lucia Casalla. A.R. 103-04. Cruz-Dominguez also testified that Refugio Solis was her third husband. A.R. 112.

Luisa Cardoza was his birth mother. A.R. 109, 188; Pet. Br. 5. Cruz-Dominguez sought to have petitioner's birth certificate changed to show her name as his mother instead of his birth mother. A.R. 108-09.

**B. Prior Administrative Proceedings**

On April 02, 2002, relying on the decision in Scales v. INS, 232 F.3d 1159 (9<sup>th</sup> Cir. 2000) and section 301(g) of the Act, 8 U.S.C. § 1401(g), the Immigration Judge determined that petitioner had presented a colorable claim to acquired United States citizenship through his father's United States citizen wife, who is not his birth mother. A.R. 72-77. Accordingly, the judge terminated the proceedings against Solis-Espinoza, finding that the INS failed to sustain its burden of proving alienage. Id. The INS filed a timely appeal of the Immigration Judge's April 02, 2002 decision. A.R. 64-66.

On August 08, 2002, the Board sustained the Service's appeal and remanded the matter for the Immigration Judge to render a new decision consistent with the Board's decision. A.R. 47-48. The Board discussed the relevant facts, that petitioner was born in Mexico to his birth mother, Maria Luisa Cardoza of Mexico and his father, Refugio Solis, a citizen of Mexico who had lawful permanent resident status in the United States and who was married to Stella Cruz-Dominguez, a United States citizen, at the time of petitioner's birth. A.R. 48.

It found that petitioner was born out of wedlock. Id. The Board determined that Solis-Espinoza failed to establish a blood relationship with a citizen parent, as required by section 309 of the Act, 8 U.S.C. § 1409, which provides citizenship to those born out of wedlock in limited circumstances. Id. Accordingly, it vacated the Immigration Judge's decision and remanded for a new decision consistent with its opinion. Id.

**C. Decision of the Immigration Judge**

On September 4, 2002, the Immigration Judge discussed the Board's finding that petitioner was not a citizen by derivation because he bore no blood relationship to a United States citizen parent and ruled in accordance with the Board's instructions. A.R. 33-35. The judge denied petitioner's motion to terminate the proceedings and ordered Solis-Espinoza removed to Mexico.

**D. Decision of the Board**

On February 5, 2003, the Board affirmed the decision of the Immigration Judge without opinion pursuant to 8 C.F.R. § 3.1(e)(4). A.R. 2. This petition for review followed.

On appeal to this Court, Solis-Espinoza argues, as he did below, that he is not subject to removal as an aggravated felon because he derived citizenship from Stella Cruz-Dominguez, a non-blood relative. Pet. Br. 6-9. He urges that the

Board's holding that a blood relationship is required for derivative citizenship to attach is inconsistent with section 301(g) of the Act, 8 U.S.C. § 1401(g), and this Court's decision in Scales v. INS, 232 F.3d 1159.

### **SUMMARY OF ARGUMENT**

The INS had the burden to prove the petitioner's alienage by clear, convincing and unequivocal evidence and established in this case that Solis-Espinoza was born in Mexico. Having been born in a foreign country, petitioner is presumed to be an alien and bears the burden of going forward with the evidence to establish his claim to United States citizenship.

The record demonstrates conclusively that petitioner's birth father, Refugio Solis, was not a United States citizen at the time of petitioner's birth. The record also establishes, and petitioner does not dispute, that his birth mother, Maria Luisa Cardoza, was not a United States citizen at the time of his birth. What the evidence does show is that petitioner was born out of wedlock. His sole argument is that at the time of his birth, his father was married to Stella Cruz-Dominguez, a United States citizen. Petitioner argues that he derived United States citizenship from Cruz-Dominguez, not his biological mother, but who is erroneously listed as his mother on his birth certificate.

The sole issue before this Court is whether petitioner can claim derivative citizenship from his father's wife, merely because she was married to his father at the time of petitioner's birth, despite the fact that his father's wife is not his birth mother. Neither INA § 301(g) of the Act, which describes nationals and citizens of the United States at birth, nor INA § 101(c)(1), which defines "child" for purposes of INA § 301, expressly state whether a child can claim derivative citizenship from a parent's spouse. In such a case, the court must defer to the reasonable interpretation of an agency charged with administering the statute. Here, as the Board determined, section 309 of the Act, 8 U.S.C. § 1409 requires that a person born out of wedlock who claims citizenship by birth actually share a blood relationship with the American citizen. Judicial deference to the agency's interpretation reflects a recognition of the proper roles of the political and judicial branches. Deference should be given in light of the Board's expertise and the fact that its statutory interpretations are driven by important policy considerations.

## ARGUMENT

### PETITIONER HAS NOT SATISFIED HIS BURDEN OF ESTABLISHING DERIVATIVE UNITED STATES CITIZENSHIP

#### A. Burden of Proof

It is well-established that the INS had the burden to prove petitioner's alienage by clear, convincing, and unequivocal evidence. See Woodby v. INS, 385 U.S. 276 (1966); Murphy v. INS, 54 F.3d 605, 608 (9th Cir. 1995); Section 240(c)(3) of the Act, 8 U.S.C. § 1229a(c)(3). Once a petitioner's birth in a foreign country is established, there is a presumption of alienage. INS v. Pangilinan, 486 U.S. 875, 886 (1988) (quoting Berenyi v. District Director, INS, 385 U.S. 630, 637 (1967)); Lim v. Mitchell, 431 F.2d 197, 198 (9th Cir. 1970). Once established, alienage is presumed to continue absent countervailing evidence to establish a claim of citizenship. United States ex rel. Bilokumsky v. Tod, 263 U.S. 149 (1923); Farrell v. United States, 381 F.2d 368 (9th Cir. 1967), cert. denied, 389 U.S. 963 (1967); Matter of A-M-, 7 I. & N. Dec. 332, 336 (BIA 1956). To establish such a claim, petitioner has the burden to demonstrate United States citizenship by a preponderance of the evidence sufficient to overcome the presumption of alienage that attached by virtue of his birth in Mexico. 8 C.F.R. § 341.2(c); INS v. Pangilinan, 486 U.S. at 886; Lim v. Mitchell, 431 F.2d at 198;

Matter of Leyva, 16 I. & N. Dec. 118 (BIA 1977); Matter of Vergara, 15 I. & N. Dec. 388 (BIA 1975); Matter of Tijerina-Villareal, 13 I. & N. Dec. 327 (BIA 1969).

Judicial review of a claim of derivative citizenship is governed by INA § 242(b)(5)A), 8 U.S.C. § 1252(b)(5)(A), which confers jurisdiction for the Court to review petitioner's citizenship claim where the facts are not in dispute. Hughes v. Ashcroft, 255 F.3d 752, 755 (9<sup>th</sup> Cir. 2001).

Here, petitioner's birth in Mexico raised a presumption of alienage. Thereafter, he failed to produce sufficient evidence that would have required, under Rule 65 of the Federal Rules of Civil Procedure, a trial on the issue of his citizenship claim. The record demonstrates conclusively, and petitioner unequivocally admits, that Stella Cruz-Dominguez is not his birth mother; therefore, petitioner did not derive United States citizenship from her. In light of the clear and convincing evidence of the petitioner's alienage and his failure to produce sufficient evidence to support his claim, he has failed to satisfy his burden of establishing derivative citizenship.

#### **B. Standard of Review**

The sole question, whether petitioner can derive United States citizenship from his father's wife, who is not his natural mother, is a legal issue that is

properly decided by this Court. The Court reviews de novo legal questions regarding the Act, including a claim of citizenship. See Hughes v. Ashcroft, 255 F.3d at 755; Scales v. INS, 232 F.3d at 1162.

In this case, the Board affirmed, without opinion, the results of the Immigration Judge's decision below. The regulation, 8 C.F.R. § 3.1(e)(4), designates the decision of the Immigration Judge, and not the Board's summary affirmance, as the proper subject of judicial review. See 64 Fed. Reg. 56,137 (“[t]he decision rendered below will be the final agency decision for judicial review purposes”); 64 Fed. Reg 56,138. However, in light of the previous Board decision, dated August 8, 2002, which remanded the case to the Immigration Judge for proceedings consistent with its opinion and entry of a new decision, the Board's decision of August 8, 2002 is also relevant. A.R. 47-48.

### **C. Petitioner's Citizenship Claim Fails**

The record evidence includes an application for a certificate of citizenship for petitioner. A.R. 173-75. As noted, an individual who is born abroad is presumed to be an alien until he or she shows otherwise. Corona-Palomera v. INS, 661 F.2d 814 (9th Cir. 1981); United States ex rel. Rongetti v. Neelly, 207 F.2d 281 (7th Cir. 1953); Matter of Benitez, 19 I. & N. Dec. 173 (BIA 1984); Matter of Velasco, 16 I. & N. Dec. 281 (BIA 1977); Matter of Ponco, 15 I. & N. Dec. 120

(BIA 1974); Matter of Tijerina-Villarreal, 13 I. & N. Dec. 327; Matter of A--M--, 7 I. & N. Dec. 332 (BIA 1956). The record evidence demonstrates that petitioner was born in Mexico and that he, his natural mother Maria Luisa Cardoza, and his father Refugio Solis, now deceased, are natives and citizens of Mexico. A.R. 48, 74, 109, 113-14, 173-75. Petitioner was born out of wedlock to his mother and father; at the time of his birth, his father was married to Stella Cruz-Dominguez, a United States citizen. Pet. Br. 3-4.

On January 3, 2001, Solis-Espinoza was convicted in the Superior Court of California, County of Santa Clara, of Possession of Methamphetamine for Sale. A.R. 137-41. Thereafter, on October 9, 2001, the INS placed him in removal proceedings as an aggravated felon for the drug trafficking and controlled substance offense. A.R. 218. Not until January 29, 2002 did petitioner apply for a certificate of citizenship. A.R. 173-75.<sup>3</sup> The defense that he raised in response to the removal proceedings was that he is a derivative United States citizen and, on

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<sup>3</sup> As noted, Solis-Espinoza conceded during the proceedings that he was admitted to the United States on or about April 2, 1977 as an immigrant. A.R. 92, 218. However, in his application for a certificate of citizenship, he claimed that he arrived in the United States in December 1967. A.R. 173. In the citizenship application, he also stated that his only departure from the United States was on April 4, 1972. A.R. 173. That application does not show a departure from or reentry into the United States on April 22, 1977, as petitioner admitted in pleading to the Notice to Appear. A.R. 92, 173, 218.

that basis, was not subject to removal. A.R. 93; Pet. Br. 4.

Petitioner conceded that he is a native and citizen of Mexico. As noted, having admitted birth in a foreign country, he is presumed to be an alien and bears the burden of going forward with the evidence to establish his claim to United States citizenship. Petitioner relies on section 301(g) of the Act, which endows a child born outside of the United States with derivative citizenship if one of his parents is a United States citizen. See INA § 301(g), 8 U.S.C. § 1401(g). Pet. Br. 6-9. In furtherance of this argument, he claims that Stella Cruz-Dominguez is his “legal mother.” Id. However, petitioner completely ignores section 309 of the Act, 8 U.S.C. § 1409, upon which the Board relied, A.R. 48, which provides citizenship to those born out of wedlock only in limited circumstances. Indeed, section 309 of the Act plainly requires that an individual born out of wedlock who claims citizenship by birth must share a blood relationship with the United States citizen. See Miller v. Albright, 523 U.S. 420, 423-24, 435 (1998) (individual not born in the United States can acquire citizenship at birth only as provided by Congress).

This Court’s decision in Scales v. INS, 232 F.3d 1159, on which Solis-Espinoza exclusively relies, does not mandate a different result here. That decision states that there is “no requirement of a blood relationship between

Petitioner and his citizen father, as there is for an illegitimate child.” Id. at 1166 (emphasis added). Furthermore, the Court in Scales depended much upon the presumption of legitimacy of a child born during a marriage. This presumption is to avoid “paternity” issues as disfavored in law. Where there is no issue of paternity, but clearly a birth outside of the marriage, the policy choice to avoid these challenges no longer is applicable. The instant case involves an illicit birth relationship that does not transmit citizenship through acquisition. In Scales, the Court found the record uncontroverted that petitioner was born to Topaz and Scales during their marriage. The petitioner in Scales desired to acquire citizenship through the married United States citizen father. Unlike Scales, however, Solis-Espinoza was not born to his alien father and his father’s United States citizen wife during the marriage. Neither his mother nor father were married to a United States citizen from whom he desires to acquire citizenship. When petitioner was born to his mother in Mexico, his father and his United States citizen wife were living in the United States. A.R. 115-16.

The difference between the instant case and the case in Scales is clear. Solis-Espinoza was born out of wedlock to a non-citizen father and non-citizen mother. In Scales, petitioner was born in wedlock to a United States citizen father and alien mother. Indeed, for a child to claim derivative citizenship based upon a

parent's citizenship, the eligible parent must be the child's natural parent. In this case, Solis-Espinoza attempts to claim United States citizenship through his father's wife, despite the record evidence showing conclusively that Cruz-Dominguez is not his natural mother.<sup>4</sup>

Although Cruz-Dominguez referred to herself as petitioner's mother, A.R. 97, the presumption that she is his natural mother is rebuttable with clear, cogent, and convincing evidence. The evidence that Cruz-Dominguez is not and could not be petitioner's natural mother is uncontroverted. Indeed, she testified that Maria Luisa Cardoza was petitioner's birth mother and that Cruz-Dominguez went to Mexico and took Solis-Espinoza from "a lady. . .who had taken off with some man." A.R. 109-10. Cruz-Dominguez fully acknowledged that Maria Luisa Cardoza was petitioner's birth mother. A.R. 113-14. She indicated that she clearly understood that, despite her willingness to raise petitioner as her son, he was not her natural child. *Id.* Although Cruz-Dominguez referred to petitioner as her son in testimony before the Immigration Judge, A.R. 96-125, she never claimed that he is her natural child. Indeed, she clearly testified that he is not. A.R. 113-14.

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<sup>4</sup> Nor has petitioner established that Cruz-Dominguez is his "legal mother" as claimed or his adoptive mother. Furthermore, unlike the facts in Scales v. INS, 232 F.3d at 1163, petitioner does not rely on state law to support his claim.

Neither INA § 301(g), which describes nationals and citizens of the United States at birth, nor INA § 101(c)(1), which defines "child" for purposes of INA § 301, expressly state whether a child can claim derivative citizenship from a parent's spouse who is not his natural mother. Furthermore, as the Board and the Immigration Judge determined, INA § 309 plainly requires that an individual born out of wedlock, like Solis-Espinoza, who claims citizenship by birth, must share a blood relationship with the citizen parent.

When reviewing an agency's interpretation of a statute, established canons of statutory construction apply. INS v. Cardoza-Fonseca, 480 U.S. 421, 431 (1987). The words used are to be given their ordinary meaning, Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) and the language in question is to be construed in harmony with related provisions as well as the statute as a whole. K Mart Corp. v. Cartier Inc., 486 U.S. 281, 291 (1988).

"If 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." Chevron, 467 U.S. at 843-44. In this context, the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), and Chevron direct the Court to affirm the agency's construction unless it is arbitrary, capricious, or manifestly contrary to law. If, however, "the legislative delegation to an agency . . . is implicit rather

than explicit," Chevron directs the Court to affirm an agency's interpretation of a statute it is entrusted to administer provided that it is "reasonable." Chevron, 467 U.S. at 844; see also Whirlpool Corp. v. Marshall, 445 U.S. 1, 11 (1980).

Deference in this context, no less than in the case of explicit delegation, reflects the deep institutional premise that it is for the agency in its capacity as delegate of the legislative branch, not the courts, to make policy within the boundaries assigned to it by Congress. Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 565 (1979).

Furthermore, judicial deference to an administering agency's interpretation of ambiguous statutory provisions reflects a sensitivity to the proper roles of the political and judicial branches. Pauley v. Bethenergy Mines, Inc., 501 U.S. 680, 696 (1991) (citing Chevron, 467 U.S. at 866). This deference is a natural consequence of the agencies' expertise and the fact that their statutory interpretations are driven by important policy considerations. Pauley, 501 U.S. at 681. The resolution of a statutory ambiguity is often a question of policy rather than of law. Id. at 696. "When Congress, through express delegation or the introduction of an interpretative gap in the statutory structure, has delegated policy-making authority to an administrative agency, the extent of judicial review of the agency's policy determination is limited. Id.

Chevron deference is particularly appropriate in the immigration context where the Act and its amendments have produced a complex regulatory scheme. See, e.g., Pauley, 501 U.S. at 697; Martin v. Occupational Safety and Health Review Comm'n, 499 U.S. 144, 152-53 (1991) (deference to Secretary of Labor's interpretation of OSHA regulations); Aluminum Co. of America v. Central Lincoln Peoples' Utility Dist., 467 U.S. 380, 390 (1984) (deference to administrator's interpretation of the Pacific Northwest Electric Power Planning and Conservation Act) .

The Board has interpreted the acquisition of United States citizenship through a parent to require a blood relationship between the child born out of wedlock and the parent through whom the child claims citizenship. The Court should defer to that interpretation and conclude that petitioner has failed to demonstrate derivative citizenship through his father's wife who is not his natural parent. As the United States Supreme Court recognized in Miller v. Albright, 523 U.S. at 436, "there is no doubt that ensuring reliable proof of a biological relationship between the potential citizen and its citizen parent is an important governmental objective." (citations omitted).

CONCLUSION

For the foregoing reasons, the Board's decision should be affirmed and the petition for review denied.

Respectfully submitted,

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**STATEMENT OF RELATED CASES AND PROCEEDINGS**

Pursuant to the Ninth Circuit Rule 28-2.6, undersigned counsel of record for the Respondent states that, through a survey of attorneys within the Office of Immigration Litigation, Civil Division, Department of Justice, there are no cases pending in this Court which present the same facts and issues raised herein.

  
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JOAN E. SMILEY  
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**CERTIFICATE OF COMPLIANCE WITH BRIEF FORMAT**

Pursuant to Ninth Circuit Rule 32-1, I certify that the attached brief is double spaced, proportionately spaced 14 point Times New Roman, and footnotes are single spaced proportionately spaced 14 point Times New Roman, the brief contains 3,989 words and 379 lines of text.

  
\_\_\_\_\_  
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 15th day of October, 2003 two copies of the foregoing Brief of Respondent were served upon petitioner, through counsel, by Federal Express addressed to:

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