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Pepperdine Caruso School of Law

Legal Summaries

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UNITED STATES COURT OF APPEALS

Boeing Company v. Secretary of Air Force, 983 F.3d 1321 **(Fed. Cir. 2020)**

Synopsis

The Armed Services Board of Contract Appeals (“Board”) entered a final judgment denying The Boeing Company’s (“Boeing”) motion for summary judgment. The initial issue stemmed from the legends Boeing marked on the technical data it delivered to the U.S. Air Force under government contracts. Following the Board’s ruling, Boeing appealed to the Federal Circuit Court of Appeals, who reversed the denial of summary judgment, vacated the Board’s entry of final judgment, and remanded the case back to the Board for further proceedings.

Facts and Analysis

The controversy in this case arose from a dispute involving “the allocation of technical data rights between the government and a contractor that delivered technical data to the government in performance of a government contract.”¹ Specifically, the dispute centered around “the legends that a contractor may mark on any such technical data pertaining to noncommercial items.”²

The relevant statutory framework provided that “the Secretary of Defense ‘shall prescribe regulations to define the legitimate interest of the United States and of a contractor or subcontractor in technical data pertaining to an item or process.’”³ However, “[s]uch regulations may not impair any right of the United States or of any contractor or subcontractor with respect to patents or copyrights or any other right in technical data otherwise established by law.”⁴ Additionally, the regulations must have foreseen development of technical data under different funding scenarios.⁵ The court noted that the relevant regulations there governed “the allocation of technical data rights between contractors and the government appear in [the Defense Federal Acquisition Regulation Supplement (“DFARS”)] parts 227 and 252.”⁶

DFARS 227.7103 “establishe[d] four government licenses for noncommercial technical data: (1) unlimited rights; (2) government purpose rights; (3) limited rights; and (4) specifically negotiated license rights.”⁷ This clause also allocated to the government the right to reject “nonconforming markings,” or any markings that are not authorized in the -7013 clause.⁸ Furthermore, the “regulation also mandates that the government incorporate a

¹ Boeing Co. v. Sec’y of Air Force, 983 F.3d 1321, 1323 (Fed. Cir. 2020).

² *Id.*

³ *Id.* (citing 10 U.S.C. § 2320, Rights in technical data).

⁴ *Id.* (citing 10 U.S.C. § 2320(a)(1)).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 1324.

⁸ *Id.*

particular contract clause into any contract in which noncommercial technical data will be delivered to the government.”⁹ The “-7013 clause” (known as such because the language of the contract clause is found in DFARS 252.227-7013) also states that any rights not granted to the government are retained by the contractor.¹⁰ This clause also contains the marking requirements relevant to the issue before the court—it requires contractors to provide instruction for the placement of restrictive markings, specifies which legends are authorized to be restricted, and authorizes markings that can be used.¹¹

The court then turned to the facts of the case at hand, noting that Boeing had entered into two contracts with the Air Force to work on the F-15 Eagle Passive/Active Warning Survivability System.¹² The government had ‘unlimited rights’ under both contracts, meaning “that the government has the right to ‘use, modify, reproduce, perform, display, release, or disclose [the] technical data in whole or in part, in any manner, and for any purpose whatsoever, and to have or authorize others to do so.’”¹³ However, Boeing retained ownership of the technical data under the contracts.¹⁴ Boeing submitted the technical data “with a legend that purports to describe Boeing’s rights in the data as they pertain to third parties.”¹⁵ The government rejected the data due to the legend and, while a final decision from a contracting officer was pending, Boeing submitted an alternative legend, which was also rejected.¹⁶ The final decision (known as a COFD, or a Contracting Officer Final Decision) rejected the data because Boeing’s legend was “a nonconforming marking because it is not a format authorized by the contracts pursuant to Subsection 7013(f).”¹⁷

Boeing appealed the COFDs to the Board, moving for an early summary judgment by claiming that Subsection 7013(f) only applied to “legends that restrict the government’s rights in technical data” and that the subsection was “categorically inapplicable to legends like Boeing’s that only restrict the rights of third parties.”¹⁸ The Board denied the summary judgment motion, finding that the subsection listed four specific legends and Boeing’s was not one of them.¹⁹ Following the Board’s entry of final judgment, Boeing appealed to the court.²⁰

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 1324–25.

¹³ *Id.* at 1325 (citing DFARS 252.227-7013(a)(16)).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 1326.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

The court noted that the question of the interpretation of Subsection 7013(f) was a question to be reviewed de novo.²¹ It began by examining the plain language of the subsection:

The Contractor, and its subcontractors or suppliers, may only assert restrictions on the Government's rights to use, modify, reproduce, release, perform, display, or disclose technical data to be delivered under this contract by marking the deliverable data subject to restriction . . . Except as provided in paragraph (f)(5) of this clause, only the following legends are authorized under this contract: the government purpose rights legend at paragraph (f)(2) of this clause; the limited rights legend at paragraph (f)(3) of this clause; or the special license rights legend at paragraph (f)(4) of this clause; and/or a notice of copyright as prescribed under 17 U.S.C. [§§] 401 or 402.²²

After a review of the language, the court agreed with Boeing's interpretation of the statute "that the two sentences together are describing the way in which a contractor "may assert restrictions on the Government's rights."²³ It found that if the Board's proposed interpretation of the statute were the case, the first sentence of the subsection would be entirely unnecessary and that "the fact that an authorized restriction might also restrict the rights of third parties in addition to the government's rights is immaterial."²⁴ The interpretation the court adhered to for the subsection "also remains faithful to the overall purpose of the -7013 clause and the broader technical data rights regulations in DFARS parts 227 and 252."²⁵ Based on a plain language reading of the statute, the court accepted that the subsection only applied when a contractor meant to restrict government rights, as opposed to those of third parties.²⁶

The court then addressed the government's remaining arguments based in other language in the DFARS and "the regulatory history of technical data rights regulations."²⁷ The court found that the choice of using the different words "marking" and "legends" in separate sentences in Subsection 7013(f) "was not sufficient to destroy the natural relationship between" the two sentences.²⁸ Furthermore, the court dismissed the government's argument that the "authorized" legends mentioned in Subsection 7013(f) were different from "nonconforming markings" in Subsection 7013(h)(2) because the court had already concluded that Subsection 7013(f) was not applicable to legends that only restrict third-party rights.²⁹ The government also attempted to relate the -7013 clause to clauses in DFARS 252.227, but the court responded that "the legends

²¹ *Id.*

²² *Id.* at 1327 (citing DFARS 252.227-7013(f)).

²³ *Id.*

²⁴ *Id.* at 1327–28.

²⁵ *Id.* at 1328.

²⁶ *Id.* at 1329.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 1329–30.

available for contractors to restrict the government's rights in commercial data do not inform the meaning of the two sentences in Subsection 7013(f),” particularly because “the default license rights that the government obtains in unmarked commercial data are far more limited to begin with . . . compared to the default ‘unlimited rights’ that the government obtains in unmarked noncommercial data.”³⁰

The government finally appealed to regulatory history and the court noted the extremely heavy burden the government had to meet to utilize regulatory history in appealing to the court.³¹ The court then concluded that the government failed to meet its burden, finding that its reliance on narrowly focused comments to infer a general principle to interpret other provisions was misplaced and that none of the regulatory history cited was sufficiently persuasive for the court to separate the first two sentences of Subsection 7013(f) for interpretation purposes as the government requested.³²

The court then addressed both sides’ policy arguments, noting that “neither party presents any policy arguments that would be sufficient to overcome the plain language of Subsection 7013(f)” and that it “decide[d] this case on the regulation, not policy.”³³ However, the court found that its interpretation of Subsection 7013 served to alleviate some of Boeing’s policy concerns by “allow[ing] Boeing a bare minimum of protection for the data, namely, the ability to notify the public of its ownership,” while “[a] contrary interpretation would result in Boeing de facto losing all rights in any technical data it delivers to the government.”³⁴ Furthermore, the implication of accepting the government’s reasoning would lead to contractors negotiating special licenses, rendering the standardized contract clauses in the DFARS useless.³⁵ The court concluded that the government’s policy concerns (that allowing contractors to use proprietary legends would lead to confusion that would significantly negative impact the government’s licensing rights) were not sufficient to impact the court’s plain language interpretation of Subsection 7013(f).³⁶

The government’s final argument claimed that Boeing’s legend restricted the government’s rights and therefore, it was improper.³⁷ The court noted that it could not make a decision on the issue because the Board did not address the factual question at issue in the case, nor could it at the summary judgment phase.³⁸

³⁰ *Id.* at 1330.

³¹ *Id.*

³² *Id.* at 1330–31.

³³ *Id.* at 1331.

³⁴ *Id.* at 1332.

³⁵ *Id.*

³⁶ *Id.* at 1332–33.

³⁷ *Id.* at 1333.

³⁸ *Id.*

Holding

The Court of Appeals for the Federal Circuit reversed the Board's denial of summary judgment and vacated the Board's entry of final judgment in this case.³⁹ The case was remanded back to the Board for further proceedings consistent with the court's opinion.⁴⁰ Following a plain language analysis of the subsection in question, the court concluded that Boeing's argument (that Subsection 7013(f) applied only where a contractor sought to restrict the rights of the government) was the correct interpretation of the subsection.⁴¹ Additionally the court dismissed the government's arguments on both language grounds and regulatory history grounds.⁴² The policy considerations brought by the government were insufficient to affect the court's interpretation of Subsection 7013(f).⁴³ The court reversed the denial of summary judgment, but remanded the case to the Board due to the remaining factual dispute about whether the legend in question restricted the rights of the government.⁴⁴

Impact

This case will prove instructive for how contractors deal with the government and vice versa. Protecting the rights of contractors in their work is important, but equally important is the government's interest in using the data they are given. In this case, the court takes a step toward clarifying the regulations found in the DFARS to give contractors more clarity into the marking requirements and what types of legends are or are not acceptable, but also to preserve the government's right to accept data as it sees fit.

³⁹ *Id.* at 1323.

⁴⁰ *Id.*

⁴¹ *Id.* at 1329.

⁴² *Id.* at 1329–31.

⁴³ *Id.* at 1333.

⁴⁴ *Id.*

Canfield Scientific, Inc. v. Melanoscan, LLC, 987 F.3d 1375
(Fed. Cir. 2021)

Synopsis

Canfield Scientific, Inc. (“Canfield”) filed a petition for review of a patent for an enclosed skin cancer detection system. The United States Patent and Trademark Office, Patent Trial and Appeal Board (PTAB) determined that the claims in question were patentable. Following Canfield’s appeal, the Federal Circuit Court of Appeals reversed PTAB’s decision, holding that the claims in the patent were unpatentable because they were obvious.

Facts and Analysis

U.S. Patent No. 7,359,748 (the ’748 patent), owned by Melanoscan, LLC, encompassed the diagnosis and detection of skin cancer, as well as treatment.⁴⁵ Specifically, the patent was meant to protect a device known as the ‘Apparatus for Total Immersion Photography,’ “an enclosure fitted with cameras and lights arranged in a manner that “allows for the imaging of total or subtotal non-occluded body surfaces in order to detect health and cosmetic conditions and involves the measurement and analysis of an optically depicted image of a patient's surfaces”⁴⁶ The device as patented contained an enclosure to contain a person or a part of their body, imaging devices, and lights that imaged a person to create precise measurements.⁴⁷ Canfield appealed the decision of the PTAB on an inter partes review (IPR) of the patent, claiming unpatentability based on obviousness, claiming that the Board did not consider evidence and arguments presented by Canfield and “that the Board misapplied the law of obviousness.”⁴⁸

The court noted that decisions of the PTAB are subject to de novo review based on the standard of the Administrative Procedure Act (APA).⁴⁹ Similarly, “patentability on the ground of obviousness is a question of law . . . and receives de novo determination on appeal.”⁵⁰ To determine whether a patent should be voided on the grounds of obviousness, the court examined four factors: “the scope and content of the prior art; the differences between the prior art and the claimed invention; the level of ordinary skill in the field of the invention; and objective considerations such as commercial success, long-felt need, and the failure of others.”⁵¹

To contest its claim, Canfield used five references.⁵² The court began by examining the Board’s decision on each of the references. The first, “Voigt,” described “an enclosure containing cameras and lights, for analyzing and measuring images on the skin of a patient.”⁵³ Canfield claimed that the only

⁴⁵ Canfield Sci., Inc. v. Melanoscan, LLC, 987 F.3d 1375, 1376 (Fed. Cir. 2021).

⁴⁶ *Id.* at 1377 (citing ’748 patent, col. 1, ll. 7–11).

⁴⁷ *Id.*

⁴⁸ *Id.* at 1376.

⁴⁹ *Id.* at 1378.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

element of Melanoscan's patent that was not present in Voigt was a plurality of cameras, therefore Melanoscan's patent should be considered obvious.⁵⁴ Melanoscan responded that Voigt placed the subject against a wall, so it cannot be "imaged from all sides," as occurred in their '748 patent.⁵⁵ When examining Voigt (along with other referenced pieces), the Board did not consider the subject matter in question obvious.⁵⁶

Canfield also brought "Hurley," a "a three-dimensional body-imaging system having six imaging sensors" positioned in such a way as to image a person's entire body.⁵⁷ When considering this evidence, the Board held that challenged claims were patentable because a person of ordinary skill would not combine Hurley and Voigt, as the two systems would not work well together.⁵⁸

"Crampton," another patent brought by Canfield, showed "an apparatus for imaging the surface of a person and creating an avatar of that person" using multiple cameras from different angles.⁵⁹ The Board again found that a person of ordinary skill would not combine Crampton with Voigt, as Voigt's system required participants to be placed against a wall.⁶⁰

"Daanen" described a "system that uses 16 to 24 cameras positioned around the subject, and stated that the use of multiple cameras increases resolution and reduces shadowing effects."⁶¹ Canfield asserted that this patent teaches about the use of a panel-camera array and therefore renders it obvious for the purpose of future patents.⁶² The Board disagreed, finding that Canfield did not successfully show how a person of ordinary skill would modify a combination of Hurley and Voigt to include Daanen's arrays or why a person of ordinary skill would use both Hurley's imaging sensors and Daanen's arrays.⁶³ Therefore, the claims were not unpatentable as obvious.⁶⁴

Canfield finally brought "Dye" "in combination with Voigt and Crampton to show obviousness of dependent claims 32 and 46 that recite the use of display devices to view two- and three-dimensional images and USB ports."⁶⁵ In addressing this particular claim, the Board chose not to discuss dependent claims separately in its analysis.⁶⁶

The court reviewed the Board's decision that the claims were not obvious. "A claimed invention is unpatentable if the differences between it and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the pertinent

⁵⁴ *Id.* at 1379.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 1380.

⁵⁸ *Id.*

⁵⁹ *Id.* at 1380–81.

⁶⁰ *Id.* at 1381.

⁶¹ *Id.*

⁶² *Id.* at 1381–82.

⁶³ *Id.* at 1382.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

art.”⁶⁷ In support of their positions, Canfield and Melanoscan presented experts: Canfield’s expert concluded that a person of ordinary skill would have been motivated to combine Voigt’s system with Hurley to create a better imaging system, while Melanoscan’s expert concluded that no motivation to make this change with a reasonable expectation of success existed.⁶⁸ The Board ultimately ruled for Melanoscan, finding that the patent was not barred by obviousness.⁶⁹

Canfield asserted that specific claims of the patent were preempted by “the combined teachings of the prior art” and therefore, “it would have been obvious to use known or obvious multiple imaging systems in known or obvious enclosures having the object being imaged at the center of the enclosure.”⁷⁰ The court noted that the references included various placements of the subject: against a wall, as in Voigt, or in the center of the machine, as in Hurley, Crampton, and Daanen.⁷¹ The prior art also shows the cameras both vertically and laterally spaced around the center.⁷²

The specific claims that Canfield challenged “place[d] the subject within the enclosure, as in the prior art, and place[d] multiple cameras and lights within the enclosure, as in the prior art.”⁷³ Based on the references presented by Canfield, the court concluded that the “subject matter described in claims 1 and 51 would have been obvious to a person of ordinary skill in the field of the invention.”⁷⁴ Therefore, the court reversed the Board’s ruling of patentability as to the claims in question.⁷⁵

Finally, the court further noted that the Board did not separately analyze the dependent claims after finding the independent claims patentable.⁷⁶ It therefore vacated the Board’s decision as to the dependent claims and remanded the case back to the Board.⁷⁷

Holding

The court reversed the Board’s decision in regard to the patent in question in this case.⁷⁸ When examining expert testimony from both parties in the case, as well as prior art in the same field, that court concluded that the subject matter in the contested claims “would have been obvious to a person of ordinary skill in the field of the invention,” and therefore, were unpatentable as obvious.⁷⁹ Furthermore, the court remanded the case to the Board to determine whether the challenged dependent claims were patentable.⁸⁰

⁶⁷ *Id.* (citing *Tokai Corp. v. Easton Enters., Inc.*, 632 F.3d 1358, 1366 (Fed. Cir. 2011)).

⁶⁸ *Canfield Sci., Inc.* at 1382–83.

⁶⁹ *Id.* at 1383.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 1384.

Impact

This case is an exhaustive review of the Board's prior decision on a contested claim of obviousness in a patent. It is particularly illustrative because of the court's thorough examination of the Board's previous analysis and its succinct review of the Board's ruling. The case offers a view of how a court can disagree with the Board on what a person of ordinary skill would consider non-obvious when developing a new piece of machinery, which is something individuals or other entities applying for patents should keep in mind.

City and County of San Francisco v. United States Citizenship and Immigration Services, 981 F.3d 742 (9th Cir. 2020)

Synopsis

Counties, cities, and states brought multiple separate actions against the Department of Homeland Security (DHS). These suits challenged the validity of DHS's rule that expanded the definition of "public charge" under the Immigration and Nationality Act (INA), a provision of which found public charges inadmissible. The District Court for the Northern District of California granted a preliminary injunction to enjoin immediate implementation of the rule and the District Court for the Eastern District of Washington similarly issued a nationwide preliminary injunction. DHS appealed to the Ninth Circuit Court of Appeals, who found that the plaintiffs had standing to challenge the rule and that the preliminary injunctions were properly issued.

Facts and Analysis

The term "public charge" as it is used in immigration law has historically barred entrance to those who are likely to depend on the government for some form of subsistence.⁸¹ In 2019, DHS issued a new rule that redefined public charge to include "those who are likely to participate, even for a limited period of time, in non-cash federal government assistance programs."⁸² These programs listed in the rule include those meant to assist in providing basic needs (including food, housing, and medical care) and the rule states that "[f]oreseeable participation for an aggregate of twelve months in any of the federal programs within a three-year span renders an immigrant inadmissible as a public charge and ineligible for permanent resident status."⁸³

Plaintiffs brought suit, claiming that the likely consequence of this rule would be increased assistance demands on state and local governments, as the rule effectively discouraged participation in their federal counterparts.⁸⁴ As a result of the litigation, preliminary injunctions were issued in many districts (both federal and state), with courts holding that the rule was arbitrary and capricious and contrary to law.⁸⁵ Both the Seventh Circuit and the Second Circuit affirmed the injunctions, holding that the rule's "definition was both outside any historic or commonly understood meaning of 'public charge,' and arbitrary and capricious, in concluding that short-term reliance on supplemental benefits made immigrants dependent on public assistance within the meaning of the statutory public charge immigration bar."⁸⁶ Conversely, the Fourth Circuit reversed the injunction.⁸⁷ The

⁸¹ *City and Cty. of San Francisco v. United States Citizenship and Immigration Servs.*, 981 F.3d 742, 749 (9th Cir. 2020).

⁸² *Id.*

⁸³ *Id.* at 750.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* See *Cook Cty. v. Wolf*, 962 F.3d 208, 229, 232–33 (7th Cir. 2020); *New York v. Dep't of Homeland Sec.*, 969 F.3d 42, 80–81 (2d Cir. 2020).

⁸⁷ *City and Cty. of San Francisco* at 750.

Ninth Circuit began its analysis by examining the historical and statutory background of the public charge provision.⁸⁸

Prior to 1996, no statute had ever formally defined the term ‘public charge.’⁸⁹ In 1996, Congress added five factors for agencies to consider when determining whether someone qualifies as a public charge, including age, health, family status, financial status, and educational level.⁹⁰ These changes occurred at the same time as major reforms of various public benefit programs that “made only non-citizens with five or more years of residency in the United States eligible for public benefits.”⁹¹ The courts were rarely called upon for guidance in defining ‘public charge,’ except to state that decisionmakers in this area should look “to the inherent characteristics of the individual rather than to external circumstances.”⁹² Due to confusion over the magnitude of change being implemented, the Immigration and Nationalization Service (INS) issued a regulatory guidance that defined public charge as a “non-citizen who depends on the government for survival, either by receipt of income or confinement in a public institution” and further defined persons “primarily dependent on the government for subsistence, as demonstrated by either (i) the receipt of public cash assistance for income maintenance or (ii) institutionalization for long term care at government expense.”⁹³ The Guidance additionally noted that evidence of primary dependance would consist of reliance on Supplemental Security Income (SSI), Temporary Assistance for Needy Families (TANF), any state or local cash assistance program, and programs supporting long-term care of institutionalized people, all the while excluding any non-cash benefits.⁹⁴

The court noted that the 2019 Public Charge Rule under review reverses this previous policy by “making receipt of supplemental benefits the very definition of a public charge.”⁹⁵ The current rule defines public charge as “an alien who receives one or more [specified] public benefits ... for more than 12 months in the aggregate within any 36-month period (such that, for instance, receipt of two benefits in one month counts as two months).”⁹⁶ Contrary to the previous public charge rule, the current Rule instructs that “[a]ny receipt of such a benefit [including most Medicaid benefits, SNAP benefits, Section 8 housing vouchers and rental assistance, and other forms of federal housing assistance], no matter how small, will factor into the public charge determination,”⁹⁷ as well as

⁸⁸ *City and Cty. of San Francisco* at 750.

⁸⁹ *Id.* at 751.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 751–52. See *Gegiow v. Uhl*, 239 U.S. 3 (1915).

⁹³ *City and Cty. of San Francisco* at 752 (citing 64 Fed. Reg. 28,269).

⁹⁴ *Id.* (citing 64 Fed. Reg. 28,269).

⁹⁵ *Id.* at 752–53.

⁹⁶ *Id.* at 753 (citing *Inadmissibility on Public Charge Grounds*, 84 Fed. Reg. 41,292 (Aug. 14, 2019)).

⁹⁷ *Id.* (citing *Inadmissibility on Public Charge Grounds*, 84 Fed. Reg. 41,292, 41,501 (Aug. 14, 2019)).

directing officials to consider proficiency with the English language in addition to other factors.⁹⁸

The court then considered the district court decisions currently on appeal.⁹⁹ The district courts consolidated challenges from many different states, finding that the rule was likely arbitrary and capricious, that “the plaintiffs had standing because they had shown that they would likely suffer economic harm and other costs and that their concerns were within the zone of interests of the statute,” and that the “new definition of “public charge” was likely not a permissible interpretation of the statute because it would depart from the longstanding, settled understanding that a person does not become a public charge by receiving short-term aid, and must instead demonstrate an inherent incapacity to provide subsistence.”¹⁰⁰ The court also noted that three other circuit courts have now considered the issues before them before turning to the appeal before them.¹⁰¹

In regard to plaintiffs’ capacity to maintain the action, DHS alleged that the injuries brought forth by the states (financial harm caused by immigrants turning to state and local aid programs as opposed to federal ones) were too speculative to provide standing.¹⁰² However, the court noted that the rule itself provided for indirect financial harm to state and local aid programs and that the record showed that federal entities were experiencing disenrollment at the current time.¹⁰³ Although DHS claimed that the rule would ultimately lead to cost savings, the court rejected that argument, finding that it did not adequately address the immediate financial injury the plaintiffs would suffer.¹⁰⁴

DHS also disputed the plaintiffs’ standing to bring a claim under the APA, claiming that the plaintiffs were not within the zone of interest of the statute as required by precedent.¹⁰⁵ However, the court noted that to accept DHS’s contention (that the entities within the zone of interest and therefore with standing to bring a claim include only the federal government and individuals looking to immigrate) would “practically insulate [permissible immigration litigation against the government] from many challenges to immigration policy and procedures, even those violating the Constitution or federal laws.”¹⁰⁶ The court concluded that the “interests of the plaintiffs in preserving immigrants’ access to supplemental benefits is within the zone of interests protected by the statute” and therefore, upheld the district courts’ decision that the plaintiffs had standing to bring suit.¹⁰⁷

⁹⁸ *Id.* (citing *Inadmissibility on Public Charge Grounds*, 84 Fed. Reg. 41,292, 41,503–04 (Aug. 14, 2019)).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 754.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 755 (citing *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224 (2012)).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

The court then moved to an analysis of whether the rule was contrary to law by hearing argument on whether the rule was a reasonable interpretation of ‘public charge.’¹⁰⁸ Applying a historical perspective, the court acknowledged that the plaintiffs were likely to succeed on this point, citing the holdings of other circuit courts on the same issue.¹⁰⁹ In its appeal before the court, DHS relied on “the affidavit of support provisions to contend that the Rule is consistent with the statutory public charge bar.”¹¹⁰ However, the public charge bar and the affidavit of support provisions are unrelated, as they are parts of two separate acts, so the court gave little merit to this argument.¹¹¹ Additionally, DHS identified a “provision that permits entry of battered women without regard to receipt” of public benefits, claiming that it reflects “Congress’s belief that the receipt of any public benefits would be a consideration in admission for most other public charge determinations.”¹¹² The court refuted this argument by noting that Congress could have enacted this directly, rather than through an ancillary provision, and ultimately concluded that “the plaintiffs have demonstrated a high likelihood of success in showing that the Rule is inconsistent with any reasonable interpretation of the statutory public charge bar and therefore is contrary to law.”¹¹³

The court then analyzed the district courts’ finding that the plaintiffs were likely to succeed on their claims that the rule was arbitrary and capricious.¹¹⁴ “The plaintiffs argue that DHS failed the test in three principal respects: It failed to take into account the costs the Rule would impose on state and local governments; it did not consider the adverse effects on health, including both the health of immigrants who might withdraw from programs and the overall health of the community; and it did not adequately explain why it was changing the policy that was thoroughly explained in the 1999 Guidance.”¹¹⁵

In regard to the financial costs, the court noted that during the comment period, “DHS provided no analysis of the effect of the Rule on governmental entities like the plaintiffs in these cases.”¹¹⁶ There was no reason for DHS not to engage the evidence or examine the data presented to them, as precedent states “that an agency may not, without analysis, cite even “‘substantial uncertainty’ ... as a justification for its actions.”¹¹⁷ Furthermore, the DHS ignored comments from health professionals detailing the negative impact the rule would have on public health as a whole, making the rule a decision that runs counter to evidence provided and therefore arbitrary and capricious.¹¹⁸ DHS also did not explain the

¹⁰⁸ *Id.* at 756.

¹⁰⁹ *Id.* See *New York v. United States Dep’t of Homeland Security*, 969 F.3d 42; *Wolf*, 962 F.3d 208.

¹¹⁰ *City and Cty. of San Francisco* at 758.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 759.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 759–60 (citing *Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 52 (1983)).

¹¹⁸ *Id.* at 760.

sudden change in policy as compared to the 1999 Guidance.¹¹⁹ The Supreme Court had previously rejected a reversal in policy without an explanation of why the change was necessary and the court noted that DHA was required to provide a “more detailed justification” for the rule.¹²⁰ For these reasons, the court concluded “that the Rule’s promulgation was arbitrary and capricious as well as contrary to law within the meaning of the APA.”¹²¹

The court then considered the remaining factors necessary for an injunction—irreparable harm and the balance of equities and public interest.¹²² With regard to the first factor, the court found that the economic harm suffered by immigrants’ dependence on state and local aid programs (as opposed to federal programs) constituted more than speculative harm or future injury, as claimed by DHS.¹²³ Similarly, in regards to the second factor, the court found the district courts did not err in finding that the public interest merited an injunction because of the adverse health consequences due to disenrollment from federal programs likely to be incurred by not only the immigrant population, but the population of the plaintiffs as a whole.¹²⁴

However, despite finding the injunction appropriate as a whole, the court declined to affirm the portion of the Eastern District’s injunction that applied it nationwide, reasoning that a nationwide injunction was inappropriate because “the impact of the Rule would fall upon all districts at the same time, and the same issues regarding its validity have been and are being litigated in multiple federal district and circuit courts.”¹²⁵ The court did not address the plaintiffs’ claim that the rule violated the Rehabilitation Act (banning discrimination based on disabilities) because it found that the rule violated the APA on its own.¹²⁶

Holding

The court concluded that the plaintiffs had standing to bring their claim because their injuries were not too speculative, as alleged by DHS.¹²⁷ Additionally, the plaintiffs’ interests properly rested within the zone of interests protected by the statute, giving them standing under the APA.¹²⁸ The court held that the plaintiffs were likely to succeed on their claim that the rule did not use a reasonable definition of the term ‘public charge.’¹²⁹ Furthermore, because “DHS adopted the Rule, reversing prior, longstanding public policy, without adequately taking into account its potential adverse effects on the public fisc and the public welfare,” the court concluded that the rule was both arbitrary and capricious and

¹¹⁹ *Id.* at 760–61.

¹²⁰ *Id.* at 761 (citing *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 515 (2009)).

¹²¹ *Id.* at 762.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 763.

¹²⁶ *Id.*

¹²⁷ *Id.* at 754.

¹²⁸ *Id.* at 755.

¹²⁹ *Id.* at 756.

contrary to law under the APA.¹³⁰ The court also found that the other two factors for granting an injunction – the presence of irreparable harm and the balancing of public interests – merited the granting of an injunction.¹³¹ Therefore, the orders granting the injunctions were affirmed.¹³² However, because the same issues before the court were still in litigation in other courts across the country, the court vacated the lower court’s decision to issue the injunction on a nationwide basis.¹³³

Impact

This case is one of many cases in the courts discussing the change to the definition of ‘public charge’ and the new rule putting it in place. If enacted, the new rule would undoubtedly have a drastic impact on the immigration process and the lives of immigrants already in the United States. The issues may resolve on their own with the change in administration, but until then, the injunction remains in place in the Ninth Circuit and the new rule cannot be utilized.

¹³⁰ *Id.* at 761.

¹³¹ *Id.* at 762.

¹³² *Id.* at 763.

¹³³ *Id.*

Consumer Financial Protection Bureau v. Seila Law LLC, 984 F.3d 715 (9th Cir. 2020)

Synopsis

Seila Law LLC was under investigation by the Consumer Financial Protection Bureau (CFPB) for alleged violations of the Telemarketing Sales Rule while providing debt-relief services to clients. The CFPB filed a petition to enforce a civil investigative demand (CID). The United States District Court for the Central District of California granted the petition and ordered Seila Law to comply with the CID and the Court of Appeals for the Ninth Circuit affirmed on appeal. The Supreme Court vacated and remanded the case, and on appeal once again, the Court of Appeals held that the current Director of the CFPB validly ratified the CID and that ratification adequately addressed all relevant constitutional injuries that the law firm may have suffered.

Facts and Analysis

The CFPB issued a CID to Seila Law LLC in February 2017, requesting the production of documents and answers to interrogatories.¹³⁴ After Seila Law refused to comply, the CFPB filed a petition to enforce the CID in June 2017.¹³⁵ The appeal made it up to the Supreme Court, who concluded that “the statute establishing the CFPB violated the Constitution’s separation of powers by placing leadership of the agency in the hands of a single Director who could be removed only for cause.”¹³⁶ However, the Supreme Court concluded that “the for-cause removal provision could be severed from the rest of the statute and thus did not require invalidation of the agency itself.”¹³⁷ The case was then remanded back to the Ninth Circuit to determine “whether the civil investigative demand was validly ratified’ by former Acting Director Mick Mulvaney during his year-long stint in that office.”¹³⁸

Seila Law’s main assertion of constitutional injury stemmed from agency structure: namely, “that the agency issued the CID and pursued its enforcement while headed by a Director who was improperly insulated from the President’s removal authority.”¹³⁹ However, this issue was addressed by the validation of CFPB’s current director, Kathleen Kraninger, who was properly aware that she could be removed from her position by the President at will.¹⁴⁰ Seila Law then asserted two additional arguments challenging the validity of the ratification.¹⁴¹

Seila Law first attempted to contend that the Director “could not validly ratify the CFPB’s earlier actions because the agency lacked the authority to take

¹³⁴ Consumer Fin. Prot. Bureau v. Seila Law LLC, 984 F.3d 715, 717 (9th Cir. 2020) (“*Seila I*”).

¹³⁵ *Id.*

¹³⁶ *Id.* See Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2197 (2020) (“*Seila I*”).

¹³⁷ *Seila II* at 717. See *Seila I* at 2209–11.

¹³⁸ *Seila II* at 717 (citing *Seila I* at 2208, 2211).

¹³⁹ *Id.* at 718.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

those actions back in 2017.”¹⁴² Seila Law cited precedent in *Federal Election Commission v. NRA Political Victory Fund*, where the Supreme Court held that “it is essential that the party ratifying should be able not merely to do the act ratified at the time the act was done, but also at the time the ratification was made.”¹⁴³ Seila Law claimed that with the for-cause removal provision remaining in place, the CFPB was unlawfully utilizing executive power, rendering all prior agency actions void and incapable of being ratified.¹⁴⁴

The Ninth Circuit found that another case, *CFPB v. Gordon*, forecloses Seila Law’s reasoning here.¹⁴⁵ In a similar set of circumstances, the court held that any constitutional defect was limited to an appointed official, rather than the agency as a whole.¹⁴⁶ Therefore, CFPB retained the authority to bring enforcement actions.¹⁴⁷ The court concluded that the same was true in this case, as noted by the Supreme Court when hearing this case.¹⁴⁸ “Nothing in the Court’s decision suggests that it believed this defect rendered all of the agency’s prior actions void. Indeed, had that been the Court’s view, it presumably would have ordered the dismissal of this proceeding rather than remanding for us to consider whether the agency’s actions relating to the CID had been validly ratified.”¹⁴⁹ *Gordon*, taken together with another case on the same issue, *Federal Election Commission v. Legi-Tech, Inc.*, affirmed that ratification is appropriate to remedy both structural, separation-of-powers defects and defects involving the Appointments Clause.¹⁵⁰ Thus, the court concluded that a constitutional defect in CFPB’s composition did not force all agency actions to be void.¹⁵¹

Seila Law’s second argument asserted that Director Kraninger’s ratification (which occurred in July 2020) occurred “outside of the limitations period for bringing an enforcement action against Seila Law.”¹⁵² In support of this point, Seila Law relied on *NRA Political Victory Fund*, which held “that the Solicitor General could not validly ratify the filing of an unauthorized petition for certiorari when the attempted ratification occurred after the time for filing the petition had already run.”¹⁵³

When considering the relevant statute of limitations regulations (here, three years after the date of discovery of the violation), the court dismissed this argument on the grounds that the statutory limitation period in question applied only to bringing an enforcement action, which had not yet occurred.¹⁵⁴ At that point in the CFPB’s investigation, it was impossible to determine whether an

¹⁴² *Id.*

¹⁴³ *Id.* (citing *Federal Election Comm’n v. NRA Political Victory Fund*, 513 U.S. 88, 98 (1994)).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 719.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* See *Federal Election Comm’n v. Legi-Tech, Inc.*, 75 F.3d 704 (D.C. Cir. 1996).

¹⁵¹ *Seila II* at 719.

¹⁵² *Id.*

¹⁵³ *Id.* (citing *NRA Political Victory Fund* at 98).

¹⁵⁴ *Id.*

action would be timely and, regardless, whether or not a valid statute-of-limitations defense would apply to a future enforcement action “has no bearing on the validity of Director Kraninger’s ratification.”¹⁵⁵ Because Seila Law raised the potential statute-of limitations issue prematurely, it could not be considered in the case before the court.¹⁵⁶

Holding

Upon review, the Ninth Circuit concluded that the CID and any ongoing attempts to enforce it was validly ratified by Kathleen Kraninger, the CFPB’s current director, while knowing that she could be removed from her position with or without cause.¹⁵⁷ Kraninger’s proper ratification of the CID effectively remedies constitutional injuries that Seila Law may have suffered due to the structure of the CFPB.¹⁵⁸ The court dismissed Seila Law’s argument that the improperly appointed Director negated the agency’s authority as a whole, citing numerous cases to the contrary.¹⁵⁹ Seila Law’s second argument, that the ratification of the CID occurred outside of the limitations period for bringing an enforcement action, was also dismissed, as no enforcement action had actually been brought, so there was no statute of limitations issue in this case.¹⁶⁰

Impact

This case further illuminates principles first addressed in cases mentioned here, such as *Gordon* and *NRA Political Victory*. The court emphasizes here that although agency structure may pose a constitutional problem for certain actions the agency takes, it does not per se invalidate a later ratification of those actions. Because an agency retains the authority to take actions even when a certain official in the agency does not, agencies can continue their day-to-day routines without fear that their actions will be entirely voided later on, provided they are confident of a ratification of those actions from a newly-appointed official when the time comes.

¹⁵⁵ *Id.* at 719–20.

¹⁵⁶ *Id.* at 720.

¹⁵⁷ *Id.* at 718.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 719.

¹⁶⁰ *Id.*

France v. United States, 981 F.3d 1318 (Fed. Cir. 2020)

Synopsis

Dillinger, a foreign exporter, filed suit to challenge the Department of Commerce's ("Commerce") conclusion in an antidumping investigation. The products involved were alloy steel and carbon cut-to-length ("CTL") plates imported from France. After the Court of International Trade ("Trade Court") remanded and later sustained the remand redetermination, Dillinger appealed. On review, the Court of Appeals for the Federal Circuit found that the costs were improperly allocated during a calculation of normal value, that the reliance on the method of average-to-transaction was permissible here, and that the level of trade adjustment present was not warranted.

Facts and Analysis

In commerce, "[d]umping occurs when a foreign firm sells a product in the United States at a price lower than the product's normal value."¹⁶¹ When there is evidence that dumping is occurring, "Commerce is required to impose antidumping duties on imported merchandise that is being sold, or is likely to be sold, in the United States as less than fair value to the detriment of a domestic industry."¹⁶²

Commerce began an antidumping duty investigation into carbon and alloy steel CTL plates from France in April of 2016.¹⁶³ In the course of this investigation, Commerce selected Dillinger (a producer of CTL plate from Europe) as a mandatory importer respondent and assigned the company a 6.15% antidumping margin.¹⁶⁴ Dillinger appealed to the Trade Court, which on review sustained Commerce's decision but remanded issues to Commerce.¹⁶⁵ The Trade Court then sustained the remand results and the antidumping margin.¹⁶⁶ Dillinger appealed the judgment, claiming that Commerce erred in its antidumping determination.¹⁶⁷

The Federal Circuit Court reviewed the Trade Court's decision *de novo*.¹⁶⁸ It addressed Dillinger's three issues on appeal, beginning with the "argument that, in calculating normal value, Commerce improperly allocated costs between Dillinger's non-prime and prime products based on Dillinger's books and records, which allocate cost based on likely selling price rather than actual cost."¹⁶⁹ Dillinger's products consisted of two types of plates, prime (plate sold with a warranty) and non-prime (plates that do not meet the standard of prime and thus,

¹⁶¹ *France v. United States*, 981 F.3d 1318, 1320 (Fed. Cir. 2020) (citing *Home Prods. Int'l, Inc. v. United States*, 633 F.3d 1369, 1372 (Fed. Cir. 2011).)

¹⁶² *Id.* (referencing 19 U.S.C. § 1673).

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 1321.

cannot be sold with a warranty).¹⁷⁰ In its books, Dillinger reported costs of non-prime plate as “equal to the average actual cost of all plate” because it is not any less costly to produce, despite the inability to sell it at full price.¹⁷¹ Upon review, Commerce “adjusted Dillinger’s reported costs for non-prime plate . . . and allocated the differences to the costs for Dillinger’s prime plate,” which effectively reduced the cost of non-prime plate and increased the cost of prime plate.¹⁷² In response, Dillinger “argue[d] that Commerce’s reliance on Dillinger’s books and records was improper because the books and records were not based on the costs associated with the production of its products.”¹⁷³

After an analysis of the relevant statutory language of 19 U.S.C. § 1677b(f)(1)(A), the court concluded that the section required “‘that reported costs must ‘normally’ be used’ only if (1) ‘they are “based on the records ... kept in accordance with the [GAAP]”’ and (2) “‘reasonably reflect” the costs of producing and selling the merchandise.’”¹⁷⁴ The court noted that the dual nature of the test was apparent from the plain language of the statute and cited precedential cases that instructed its actions in this area.¹⁷⁵ Because “Commerce relied on the likely selling price of non-prime plate in its determination of costs,” its reliance was therefore impermissible.¹⁷⁶

Commerce responded by claiming that the *IPSCO* case should not govern because the Tariff Act has since been amended.¹⁷⁷ However, the court noted that during the amendment process, Congress did not repeal either section the court relied on in deciding *IPSCO* or intended in any way for the additions made to overrule *IPSCO*.¹⁷⁸ Rather, the legislative history indicated that Congress intended for Commerce to continue to calculate costs as it normally did, despite the amendments to the Tariff Act.¹⁷⁹ Specifically, Congress directed Commerce to “rely on a producer or exporter’s books and records if they . . . reasonably reflect the costs of production.”¹⁸⁰ Here, Commerce relied on Dillinger’s books based on the ‘likely selling price,’ rather than the costs of production.¹⁸¹ Due to this, the court ultimately vacated the Trade Court’s ruling and remanded for further proceedings “[b]ecause Dillinger’s books and records did not reasonably reflect the costs associated with the production and sale of the merchandise as required by 19 U.S.C. § 1677b(f).”¹⁸²

Dillinger’s second argument asserted that “Commerce’s use of the average-to-transaction method in determining the dumping margin was

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.* (citing *Thai Plastic Bag Indus. Co. v. United States*, 746 F.3d 1358, 1365 (Fed. Cir. 2014) (quoting 19 U.S.C. § 1677b(f)(1)(A)).

¹⁷⁵ *Id.* at 1321–22. See *IPSCO, Inc. v. United States*, 965 F.2d 1056 (Fed. Cir. 1992).

¹⁷⁶ *France* at 1322.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 1323.

¹⁸¹ *Id.* at 1324.

¹⁸² *Id.* at 1321.

improper.”¹⁸³ Commerce determines the dumping margin (the amount that the normal value exceeds the export price of merchandise) by using one of three methods: the average-to-transaction method, the transaction-to-transaction method, or the average-to-average method.¹⁸⁴ Commerce applied the average-to-transaction method here, which is used if ““there is a pattern of export prices . . . for comparable merchandise that differ significantly among purchasers, regions, or periods of time.””¹⁸⁵ This provision largely addresses situations where there is targeted dumping, or where an exporter sells a product at low prices to specific customers or regions, while also selling at a higher price to others.¹⁸⁶ The court noted that Commerce typically used a barrage of standard tests to determine whether a pattern of export prices that differed significantly existed, including Cohen’s *d* test (which compared the weighted-average prices of a test group and a comparison group) and the ratio test (which calculated sales value for any test groups that passed the Cohen’s *d* test), and that it did the same in this case.¹⁸⁷ Here, Commerce concluded that there was a pattern of prices that differed among time periods, regions, or purchasers, which merited the use of the average to transaction method.¹⁸⁸

Dillinger challenged this determination in two ways.¹⁸⁹ It first claimed that Commerce’s ratio test aggregated sales across categories, which cannot be done in establishing a pattern.¹⁹⁰ However, the court found that aggregation is not inconsistent with the relevant statutory language, which does not say how Commerce should determine a pattern.¹⁹¹ Because *Chevron* permits agencies to answer in a reasonable manner when the statutory language is silent in regard to a specific issue, the court concluded the Commerce’s interpretation of ‘pattern’ was reasonable.¹⁹² Dillinger’s reliance on an opposite conclusion from the World Trade Organization (WTO) was improper because the WTO’s decisions are not binding on the United States, nor its courts.¹⁹³

Dillinger also argued that Commerce’s use of the Cohen *d* test was improper because it failed to consider that Dillinger’s products were custom-made, which should have required the use of the average-to-average test.¹⁹⁴ However, the court found that there was no obligation in the statute for Commerce to consider custom products different, provided that a comparison is made between comparable merchandise.¹⁹⁵ As Dillinger failed to show that

¹⁸³ *Id.* at 1324.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* (citing 19 U.S.C. § 1677f-1(d)(1)(B)).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 1324–25.

¹⁸⁸ *Id.* at 1325.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.* at 1325–26.

¹⁹⁴ *Id.* at 1326.

¹⁹⁵ *Id.*

Commerce failed to use ‘comparable merchandise’ in making its determination, the court found no error in Commerce’s choice of test in this case.¹⁹⁶

Dillinger’s final argument asserted that “that Commerce erred in determining that Dillinger’s factory sales and sales from its affiliated service centers constituted a single level of trade in France and thus concluding that a level of trade adjustment was not warranted.”¹⁹⁷ Specifically, Dillinger claimed that because it makes sales from its factories to distributors and from affiliated service centers to other customers, Commerce erred in finding “that inventory maintenance performed on service center sales did not require a finding of a separate level of trade.”¹⁹⁸ However, the court found that Commerce’s determination that “inventory maintenance alone did not make a substantial difference between the selling activities commonly performed by Dillinger’s factories and service centers” was in accordance with relevant law and statutory language.¹⁹⁹ Furthermore, Commerce properly determined that any additional activities performed at Dillinger’s service centers (such as cutting and sawing plate) were not selling functions and should have no impact on its analysis.²⁰⁰

Holding

When looking at the Trade Court’s decision, the court affirmed in part, vacated in part, and remanded the decision.²⁰¹ Because Dillinger’s books did not reflect costs of production and sale of their products, but rather the ‘likely selling price’ of the plate they produced, the court vacated the Trade Court’s decision on this issue.²⁰² However, the court concluded that Commerce’s use of the average-to-transaction method was appropriate in this case, despite Dillinger’s attempts to argue otherwise.²⁰³ Finally, the court found that Dillinger’s inventory management activities did not make a sufficient difference in Commerce’s analysis.²⁰⁴ However, the court remanded the case to the Trade Court to “recalculate the dumping margin consistent with this opinion.”²⁰⁵

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 1327.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.* at 1320.

²⁰² *Id.* at 1324.

²⁰³ *Id.* at 1326.

²⁰⁴ *Id.* at 1327.

²⁰⁵ *Id.*

Impact

This case illustrates the relationship between foreign companies under investigation and the Department of Commerce. Although the court gives deference under *Chevron* to many decisions made by the Department of Commerce, their analyses are not impervious to challenge. The antidumping investigations conducted by the Department of Commerce are undoubtedly complex, but the court's relationship with the Trade Court and with the Department itself allows challenges to be analyzed fairly and succinctly, as illustrated in this opinion.

Hassan v. Rosen, 985 F.3d 587 (8th Cir. 2021)

Synopsis

Plaintiff was a noncitizen of the United States and a native of Somalia. He petitioned for review of the Board of Immigration Appeals' (BIA) affirmation of an immigration judge's (IJ) denial of his request to defer his removal under the Convention Against Torture (CAT). The Court of Appeals for the Eighth Circuit held that the IJ and BIA properly considered the aggregate risk of torture to Hassan in denying his CAT relief, and that substantial evidence supported the conclusion that Hassan was unlikely to be tortured by the Somali government or terrorist organizations and that the Somali government was unlikely to participate in any torture of Hassan. Based on these findings the Court of Appeals denied the petition.

Facts and Analysis

In 2001, Mohamud Mohamed Hassan, a Somali native, used a false passport to enter the United States, causing the Department of Homeland Security to seek his removal.²⁰⁶ Following an order from an IJ to remove Hassan to Somalia and an affirmative decision from the BIA, the court denied Hassan's petition for review.²⁰⁷ The BIA granted a motion to reopen the case, where Hassan argued that if removed to Somalia, he was likely to be tortured.²⁰⁸ He petitioned for a deferral of removal under CAT, which the IJ denied and the BIA affirmed.²⁰⁹ Hassan then petitioned the court to review the decisions.²¹⁰

Hassan claimed that "the Somali government would torture him for belonging to a minority clan and that Al-Shabaab (a terrorist organization) would torture him for minority-clan membership, being 'westernized,' and having been on a failed repatriation flight."²¹¹ However, the IJ and BIA found that torture of Hassan was unlikely and "alternatively found that any torture by Al-Shabaab would not trigger CAT relief because it would not be done with the Somali government's acquiescence and that Hassan could avoid any risk of torture from Al-Shabaab by relocating to Mogadishu."²¹²

Hassan challenged these findings on multiple fronts.²¹³ He first claimed that the IJ's and BIA's conclusions that his clan, the Begadi, was not a minority clan was incorrect.²¹⁴ However, the court found that substantial evidence existed that "the Begadi clan is actually a sub-clan of a 'noble' clan with major representation in the Somali government." Because the evidence Hassan cited to the contrary was not sufficiently compelling (he cited only his own testimony and

²⁰⁶ Hassan v. Rosen, 985 F.3d 587, 589 (8th Cir. 2021).

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.* at 589–90.

inapposite affidavits), the court found that the IJ's and BIA's conclusion on this point was reasonable.²¹⁵

Hassan next challenged "the IJ's and BIA's conclusions that any torture by Al-Shabaab does not qualify for CAT relief because the Somali government would not acquiesce in such torture."²¹⁶ The court noted that the standard for government acquiescence in torture "centers upon the willfulness of a government's non-intervention" and that "[a] government does not acquiesce in the torture of its citizens merely because it is aware of torture but powerless to stop it, but it does cross the line into acquiescence when it shows willful blindness toward the torture of citizens by third parties."²¹⁷ When applying those concepts to the current case, the court found that the Somali government was not ignoring the torture, but was rather attempting to combat it.²¹⁸ It found Hassan's arguments—first that the government's amnesty program for Al-Shabaab members demonstrated acquiescence, and second that the government worked together with Al-Shabaab to torture people—unconvincing.²¹⁹ Furthermore, Hassan did not explain how the Somali government was likely to acquiesce in his own torture, as required to attain CAT relief.²²⁰ Hassan's assertion "that the Somali government has been unable to control Al-Shabaab" was alone insufficient to establish acquiescence.²²¹

Hassan's final argument asserted that the "IJ and BIA applied the wrong legal standard by failing to consider his aggregate risk of torture and, instead, denied him relief solely because no single risk factor demonstrated a likelihood of torture."²²² The court disagreed with his claim, finding that the IJ and BIA properly considered all evidence of the potential for future torture and that because the IJ and BIA considered all factors together, addressing factors individually was not inconsistent with analyzing risk in the aggregate.²²³ Because "precedent does not require a separate or lengthy aggregation analysis," the court found that the BIA and IJ properly considered the risk of torture, and thus, denied Hassan's petition.²²⁴

Holding

The court upheld the decision of the IJ and the BIA in regard to Hassan's case.²²⁵ The court first concluded that the conclusion that Hassan's clan was not considered a minority clan in Somalia was backed by sufficient evidence.²²⁶ Furthermore, the court disagreed with Hassan's various arguments that the Somali

²¹⁵ *Id.* at 590.

²¹⁶ *Id.*

²¹⁷ *Id.* (citing *Ramirez-Peyro v. Holder*, 574 F.3d 893, 899 (8th Cir. 2009)).

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.* at 591.

²²³ *Id.* (referencing *Moallin v. Barr*, 980 F.3d 1207, 1210 (8th Cir. 2020)).

²²⁴ *Id.*

²²⁵ *Id.* at 589.

²²⁶ *Id.* at 590.

government actively acquiesced in torture to the extent that he qualified for CAT relief.²²⁷ Finally, because there was no requirement that the IJ or BIA consider the aggregate risk of torture in a separate analysis, the court was convinced that their consideration of the relevant risk factors was proper in their denial of Hassan's petition.²²⁸

Impact

This case provides further guidance on interpretation of immigration decisions involving CAT. Specifically in this opinion, the court elaborates that no separate aggregation analysis of all risk factors is required, provided that all factors are analyzed sufficiently in the decision, as well as addressing the standard of evidence required to prove any factual bases required for CAT relief. This case will undoubtedly come into play when future CAT decisions are appealed in the 8th Circuit.

²²⁷ *Id.*

²²⁸ *Id.* at 591.

***Innova Solutions, Inc. v. Baran*, 983 F.3d 428 (9th Cir. 2020)**

Synopsis

Plaintiff, a technology company, appealed a decision of the United States Citizenship and Immigration Services (USCIS) that denied their petition for a specialty occupation visa for an Indian citizen. The citizen was a computer programmer with a bachelor's degree and USCIS denied the specialty occupation visa, finding that a bachelor's degree was not normally required for computer programmers. Following the district court's grant of summary judgment to USCIS, the Court of Appeals for the Ninth Circuit reversed the ruling on the ground that the denial was arbitrary and capricious.

Facts and Analysis

Plaintiff, a technology company operating in areas such as data analytics and cloud storage, wanted to hire Dilip Dodda (an Indian citizen) to work as a computer programmer.²²⁹ They thereafter petitioned for an H-1B "specialty occupation" visa for Dodda, which required plaintiff "to establish that the position required 'theoretical and practical application of a body of highly specialized knowledge' and that '[a] baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.'"²³⁰ In evaluating the petition, "USCIS relied on the Department of Labor's Occupational Outlook Handbook (OOH) as an 'authoritative source' to determine whether Dodda's position "normally" requires a bachelor's degree."²³¹ The OOH provided that a bachelor's degree is the typical level of education for a computer programmer, but some employers hire workers with an associate's degree only.²³² However, USCIS found that the plaintiff did not show that "a computer programmer qualified as a specialty position."²³³ They stated:

While the OOH indicates that most computer programmers obtain a degree (either a bachelor's or an associate degree) in computer science or a related field, the OOH does not state that at least a bachelor's degree or its equivalent in a specific specialty is normally the minimum required for entry into the occupation. Further, the OOH also indicates that employers value computer programmers who have experience, which can be obtained through internships.²³⁴

Upon receiving the denial, the plaintiff challenged it under section 706 of the Administrative Procedure Act (APA), claiming that the denial was arbitrary and capricious.²³⁵ The district court granted summary judgment for USCIS,

²²⁹ *Innova Sols., Inc. v. Baran*, 983 F.3d 428, 429–30 (9th Cir. 2020).

²³⁰ *Id.* at 430 (citing 8 U.S.C. § 1184(i)(1)).

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.* at 431.

finding that “‘the OOH description for the Computer Programmer occupation does not describe the normal minimum educational requirements of the occupation in a categorical fashion’ because ‘at least some Computer Programmer positions may be performed by someone with an associate's degree.’”²³⁶ The plaintiff then appealed to the Ninth Circuit.²³⁷

The Ninth Circuit reviewed the district court’s ruling *de novo*, noting that under the APA, its task on appeal was to determine whether an agency action was arbitrary, capricious, or not in accordance with law.²³⁸ Upon examination, the court concluded that USCIS’s decision in light of the OOH’s guidance was arbitrary and capricious.²³⁹ USCIS’s decision stated that “the OOH does not state that at least a bachelor's degree or its equivalent in a specific specialty is normally the minimum required for entry into the occupation.”²⁴⁰ The court acknowledged that the OOH did not use the exact language in the H-1B regulation (as it was written by a different agency), but reasoned that the OOH clearly stated that a “bachelor’s degree is not only common but typically needed.”²⁴¹ Because there is no rational relation between USCIS’s source and USCIS’s decision in this case, the court found that “USCIS’s contrary reasoning is beyond saving.”²⁴² The court dismissed USCIS’s argument that there was ‘space’ (a difference in meaning) between the words “normally, most, and typically,” finding that “that space is at best molecular and nowhere near big enough for the doublespeak freight train that USCIS tries to drive through it.”²⁴³

USCIS also attempted to cite OOH language stating that “some employers hire workers with an associate’s degree.”²⁴⁴ However, the court found that “the fact that some computer programmers are hired without a bachelor's degree is entirely consistent with a bachelor's degree ‘normally [being] the minimum requirement for entry.’”²⁴⁵ The court noted that “[w]hile agencies are entitled to deference in interpreting their own ambiguous regulations, this regulation is not ambiguous and deference to such an implausible interpretation is unwarranted.”²⁴⁶ Here, the court found USCIS’s interpretation of the language unreasonable, rendering the decision arbitrary and capricious.²⁴⁷

USCIS also argued that the OOH alone was not an authoritative source on whether an occupation can be considered a specialty occupation because in instances such as here, it was not a sufficient source of information.²⁴⁸ The court rejected these arguments for two reasons.²⁴⁹ First, it noted that USCIS improperly

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.* at 431–32.

²⁴² *Id.* at 432.

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.* (citing 8 C.F.R. § 214.2(h)(4)(iii)(A)(1)).

²⁴⁶ *Id.* at 433 (citing *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414 (2019)).

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

equates the term ‘normally’ with the term ‘always’ by “demanding additional proof anytime *some* positions within an occupation require less than a bachelor's degree.”²⁵⁰ Second, the court said that by USCIS’s own standard, no additional proof about whether a position falls into a specialized sub-group is required.²⁵¹

[T]he district court's ruling functionally requires visa petitioners to demonstrate that their particular position actually requires a bachelor's degree. That approach is plainly inconsistent with the language of the first regulatory criterion and USCIS practice. Moreover, it conflates the first criterion, which only asks whether the position normally requires a bachelor's degree, and the third criterion, which asks whether the employer normally requires a bachelor's degree for the position.²⁵²

The court additionally found that USCIS’s decision ran contrary to the evidence presented to it, rendering it arbitrary and capricious.²⁵³ The decision by USCIS mischaracterized the OOH by stating that “‘the OOH indicates that most computer programmers obtain a degree (either a bachelor's or an associate's degree) in computer science or a related field.’”²⁵⁴ However, “[t]he OOH did not state that most computer programmers have either a bachelor's or an associate's degree, but rather that most ‘have a bachelor's degree in computer science or a related subject.’”²⁵⁵ The court noted that although a purely factual error is not necessarily enough to render a decision arbitrary and capricious on its own, in this case, “this serious misconstruction of the only source considered was arbitrary and capricious.”²⁵⁶

Finally, USCIS did not consider key evidence in coming to its decision.²⁵⁷ The court stated that language in the OOH listing “‘bachelor’s degree’ as the ‘[t]ypical level of education that most workers need to enter this occupation’” was not found anywhere in USCIS’s decision.²⁵⁸ “USCIS's failure to consider evidence so central to the inquiry” also led the court to conclude that its decision in this case was arbitrary and capricious.²⁵⁹

Holding

The Ninth Circuit reversed the lower court’s denial of the plaintiff’s challenge to USCIS’s refusal of an H-1B temporary worker visa and remanded the case back to the lower court.²⁶⁰ It did so because the decision of USCIS in this case was arbitrary and capricious when examining the relevant guidelines in

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.* at 433–34.

²⁵³ *Id.* at 434.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 434–35.

²⁵⁹ *Id.* at 435.

²⁶⁰ *Id.* at 430.

the OOH.²⁶¹ Because the court found that USCIS's interpretation of the relevant language of the OOH was unreasonable, it found that the decision rendered here was arbitrary and capricious.²⁶² It additionally ruled the decision arbitrary and capricious because in evaluating the case, USCIS's decision ran counter to the evidence presented to it and in coming to that decision, USCIS failed to consider key evidence.²⁶³ For these reasons, the court reversed the lower court's grant of summary judgment.²⁶⁴

Impact

The Ninth Circuit expressed in this opinion an attitude of strictness in regard to this and future USCIS decisions. Decisions that play on semantics and that mischaracterize and ignore key evidence will not be upheld by the court. This decision should give hope both to companies applying for H-1B visas for employees and to immigrants applying for visas of varying types that a court is ready and willing to hear their appeal should the decision rest on grounds that are seemingly dubious.

²⁶¹ *Id.* at 431.

²⁶² *Id.* at 430.

²⁶³ *Id.* at 434.

²⁶⁴ *Id.* at 435.

***Zellweger v. Saul*, 984 F.3d 1251 (7th Cir. 2021)**

Synopsis

Zellweger brought an action for judicial review of the denial of his application for disability insurance benefits by the Commissioner of Social Security. Upon initial review, the district court reversed the denial. Following an appeal by the Commissioner, the Court of Appeals for the Seventh Circuit held that the Commissioner's analysis was adequate and reversed the decision of the lower court.

Facts and Analysis

Michael Zellweger, a man suffering from a spinal disorder, applied for Social Security disability benefits under Listing 1.04 in the Listing of Impairments used by the Social Security agency.²⁶⁵ He was suffering from cervical and lumbar degenerative disc disease that required two spinal surgeries, in 2007 and 2010, respectively.²⁶⁶ The Listing in question identified “impairments that are considered to be so severe as to be per se disabling.”²⁶⁷ Upon review, an administrative law judge (ALJ) utilized a five-step decision-making process to determine whether Zellweger could receive benefits.²⁶⁸

At step one the ALJ determines whether the claimant has engaged in gainful employment between his alleged disability-onset date and the expiration of his insurance. At step two the ALJ considers whether the claimant suffers from a serious impairment or combination of impairments. At step three the ALJ decides whether the claimant has an impairment that meets or equals one of the categories listed in the agency's Listing of Impairments at 20 C.F.R. pt. 404, subpt. P, app. 1. If the criteria for a listing are met, the claimant is per se disabled. If not, the decision process moves on and the ALJ considers the claimant's residual functional capacity (“RFC”)—that is, his ability to work despite his impairments. At step four the ALJ determines whether the applicant can perform his past relevant work in light of his RFC. Finally, at step five the ALJ decides whether the claimant can do some other work that exists in significant numbers in the national economy.²⁶⁹

When examining Zellweger's case for steps one and two, the ALJ properly concluded that he had not worked since his onset date and suffered from diabetes, carpal tunnel syndrome, and cervical and lumbar degenerative disc disease.²⁷⁰ In step three, the ALJ concluded that the evidence provided did not establish the criteria in Listing 1.04A. Proceeding under this analysis, the court found that

²⁶⁵ Zellweger v. Saul, 984 F.3d 1251, 1252 (7th Cir. 2021)

²⁶⁶ *Id.* at 1253.

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

Zellweger had the “residual functional capacity to perform light physical labor.”²⁷¹ The ALJ concluded in step four that Zellweger’s past work exceeded his residual functional capacity but, in step five, determined that there were other jobs in the economy that Zellweger could perform.²⁷² Based on this analysis, the ALJ denied Zellweger’s claim for benefits.²⁷³

Following the denial, Zellweger sought review of the decision from the court.²⁷⁴ The magistrate judge reversed the denial, ruling that “the ALJ’s discussion was too cursory at step three of the sequential analysis prescribed in the agency regulations . . . the step in the decision process at which the ALJ is tasked with assessing whether the claimant has an impairment that meets or medically equals one of the Listings.”²⁷⁵ The magistrate noted that the ALJ explained his reasoning in greater detail later in the decision, but noted that the *Chenery* doctrine barred him from considering it.²⁷⁶ After a motion for reconsideration under Rule 59(a) of the Federal Rules of Civil Procedure was denied, the Commissioner appealed to the Seventh Circuit.²⁷⁷

The court determined that the only issue in this case was whether the magistrate properly applied the *Chenery* doctrine when reaching his decision.²⁷⁸ It concluded that he did not because, although “*Chenery* generally confides a reviewing court to the agency’s actual rationale for its decision, not an after-the-fact justification . . . nothing in *Chenery* prohibits a reviewing court from reviewing an ALJ’s step-three determination in light of elaboration and analysis appearing elsewhere in the decision.”²⁷⁹ The court compared the present case to *Jeske*, a very similar case of a per se disability claim where the ALJ analyzed step 3 briefly but continued his discussion in the next part of the decision.²⁸⁰ In *Jeske*, the court concluded that “a reviewing court does ‘not violat[e] *Chenery*’s command by looking at the ALJ’s more thorough discussion of the evidence’ elsewhere in the decision” because “the five-step decision process ‘comprises sequential determinations that can involve overlapping reasoning,’ and ‘[t]his is certainly true of step three and the RFC determination that takes place between steps three and four.’”²⁸¹

Applying the same reasoning to the current case, the court found that the discussion in the RFC determination in Zellweger’s claim was detailed enough to support the rejection of Zellweger’s per se disability claim.²⁸² Because there was no substantive flaw in the analysis, the court dismissed Zellweger’s arguments.²⁸³

²⁷¹ *Id.* at 1254.

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.* See SEC v. *Chenery Corp.*, 318 U.S. 80 (1943).

²⁷⁷ *Zellweger* at 1254.

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Zellweger* at 1254–55. See *Jeske v. Saul*, 955 F.3d 583, 589 (7th Cir. 2020).

²⁸¹ *Id.* at 1255 (citing *Jeske* at 590).

²⁸² *Zellweger* at 1255.

²⁸³ *Id.*

Holding

The Court of Appeals for the Seventh Circuit reversed the magistrate's decision based on recent precedent.²⁸⁴ The court noted that in a similar case involving the same listing, "the sequential process is not so rigidly compartmentalized, and nothing in the *Chenery* doctrine prohibits a reviewing court from reading an ALJ's decision holistically."²⁸⁵ In this case, there was ample evidence that the ALJ appropriately analyzed all relevant medical evidence and elaborated on his cursory initial analysis in the step that addressed Zellweger's residual functional capacity.²⁸⁶ As there were no other issues with the ALJ's decision, the Seventh Circuit reversed the district court's decision.²⁸⁷

Impact

This case provides further support to *Jeske* in promoting a less strict reading of *Chenery* that allows ALJs flexibility in writing their opinions. Previously, *Chenery* was fairly constrictive in forcing ALJs to fully explain their reasoning for each step of their analysis, rather than allowing them to rely on later reasoning to justify prior points. The common-sense approach exemplified in these two cases will allow ALJs to write their decisions on these matters in a more logical way, permitting them to be understood more readily by both courts and the general public.

²⁸⁴ *Id.* at 1252.

²⁸⁵ *Id.* See *Jeske*, 955 F.3d 583 (7th Cir. 2020).

²⁸⁶ *Zellweger* at 1252.

²⁸⁷ *Id.*