

1 UNITED STATES COURT OF APPEALS

2
3 FOR THE SECOND CIRCUIT

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5
6 August Term 2007

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8
9 Argued: March 25, 2008

Decided: July 8, 2008

10
11 Docket No. 07-0283-ag

12
13 -----X

14
15 Horacio H. Garcia-Villeda,

16
17 Petitioner,

18
19 - against -

20
21 Michael B. Mukasey,* Attorney General of the United States,

22
23 Respondent.

24
25 -----X

26
27 Before: JACOBS, Chief Judge, and FEINBERG and HALL, Circuit
28 Judges.

29
30 Petitioner Horacio H. Garcia-Villeda seeks review of a decision
31 of the U.S. Immigration and Customs Enforcement reinstating a prior
32 order of deportation for illegal entry. We deny petitioner's request
33 for vacatur of the reinstatement order and hold that (1) 8 C.F.R. §
34 241.8 constitutes a valid interpretation of the reinstatement of
35 removal statute, 8 U.S.C. § 1231(a)(5); (2) petitioner failed to show
36 prejudice resulting from the reinstatement of his prior deportation
37 order; (3) the reinstatement of removal statute precludes any
38 collateral review of the underlying deportation proceeding; and (4)
39 reinstatement of the prior deportation order without prior
40 adjudication of petitioner's pending petitions for Waiver of Grounds
41 of Excludability and for Permission to Reapply for Admission was
42 proper, because, as an illegal reentrant, petitioner was ineligible

* Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Michael B. Mukasey is substituted for Alberto Gonzales as Respondent.

1 for any discretionary relief under the immigration laws and could
2 only apply for permission to reapply for admission after having
3 resided outside the U.S. for a minimum of ten years.

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5 MICHAEL P. DiRAIMONDO, DiRaimondo & Masi, LLP, Melville, NY, for
6 Petitioner.

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8 SCOTT REMPELL, Trial Attorney, Office of Immigration Litigation,
9 JEFFREY S. BUCHOLTZ, Acting Assistant Attorney General, Civil
10 Division, LINDA S. WERNERY, Assistant Director, U.S. Department
11 of Justice, Washington, DC, for Respondent.

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14 FEINBERG, Circuit Judge:

15 Petitioner Horacio H. Garcia-Villeda seeks review of a December
16 28, 2006 order of the Department of Homeland Security ("DHS"),
17 Immigration and Customs Enforcement ("ICE"), reinstating a prior
18 order of deportation for illegal entry, entered against petitioner in
19 August 1996. The issues before us are whether elimination of the
20 requirement of a hearing before an immigration judge, pursuant to 8
21 C.F.R. § 241.8 (2001), is consistent with the reinstatement of
22 removal statute, 8 U.S.C. § 1231(a)(5); whether the reinstatement of
23 removal procedure set forth in 8 C.F.R. § 241.8, both as applied in
24 this case and on its face, comports with the Due Process Clause of
25 the Fifth Amendment; whether the original deportation order could be
26 constitutionally reinstated despite allegations of due process
27 violations in the original proceeding; and whether the ICE properly
28 reinstated the underlying deportation order without first
29 adjudicating petitioner's pending applications for Waiver of Grounds
30 of Excludability and for Permission to Reapply for Admission.

1 **I. BACKGROUND**

2 Petitioner, a native and citizen of Honduras, was apprehended
3 for entering the United States (hereafter "U.S.") without inspection
4 in August 1996. On August 27, 1996, he was ordered deported by an
5 immigration judge, a ruling he did not appeal to the Board of
6 Immigration Appeals ("BIA") or contest in a federal court. A warrant
7 for removal was issued, and petitioner was deported on September 5,
8 1996.

9 Petitioner reentered the U.S. illegally in May 1997. In June
10 1998, he married Martha Vienna Paz, a U.S. citizen, with whom he now
11 has two children.

12 On December 28, 2006, petitioner appeared for an interview
13 before an ICE officer to discuss his immigration status. During the
14 interview, petitioner admitted both his illegal reentry into the U.S.
15 and his earlier deportation in September 1996. On the same day, after
16 the interviewing officer verified petitioner's statements and his
17 identity, the Acting Supervisory Deportation Officer reinstated the
18 prior deportation order. Since then, petitioner has been detained in
19 Elizabeth, New Jersey.

20 In January 2007, petitioner was interviewed to determine whether
21 he had a reasonable fear of persecution in his country of origin,
22 which would entitle him to withholding of removal and protection
23 under the Convention Against Torture. After a hearing, in March 2007,

1 an immigration judge ruled against petitioner. The BIA affirmed in
2 July 2007, and petitioner did not seek review of the BIA's decision.

3 Thereafter, petitioner filed a timely petition for review of the
4 December 28, 2006 reinstatement of removal order.

5

6 **II. DISCUSSION**

7 In 1996, as part of a sweeping overhaul of the immigration laws,
8 Congress enacted the Illegal Immigration Reform and Immigrant
9 Responsibility Act, Pub. L. No. 104-208, div. C, 110 Stat. 3009
10 ("IIRIRA"). The IIRIRA, among other things, repealed § 242(f) of the
11 Immigration and Nationality Act ("INA"), 8 U.S.C. § 1252(f) (repealed
12 1996), and adopted INA § 241(a)(5), 8 U.S.C. § 1231(a)(5) (hereafter
13 "INA § 241(a)(5)" or the "reinstatement of removal statute").¹ This
14 section became effective on April 1, 1997.

15 In 1997, the Attorney General aligned the implementing
16 regulations with the new statutory language, by replacing 8 C.F.R. §
17 242.23(b) (repealed 1997) -- which required a reinstatement hearing
18 before an immigration judge -- with 8 C.F.R. § 241.8, which changes

¹ INA § 241(a)(5), 8 U.S.C. § 1231(a)(5) provides:

If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry.

1 the hearing requirement.² Under 8 C.F.R. § 241.8, once the immigration
2 officer has established that the alien is indeed an illegal reentrant
3 subject to the reinstatement of removal statute, the officer must
4 order the alien "removed under the previous order of exclusion,
5 deportation, or removal in accordance with section 241(a)(5) of the
6 [INA]." 8 C.F.R. § 241.8(c).

7 Petitioner argues that the regulation is an impermissible
8 construction of the statute, because it contravenes the explicit
9 mandate of INA § 240, 8 U.S.C. § 1229a(a)(1), that removal
10 proceedings be conducted before an immigration judge. Petitioner also
11 challenges the regulation on constitutional grounds, alleging that,
12 both on its face and as applied in his case, it violates the Due
13 Process Clause of the Fifth Amendment. In addition, petitioner claims
14 that the underlying deportation order itself deprived him of due
15 process and thus was not subject to reinstatement. Finally,
16 petitioner contends that, even if the regulation is valid, the ICE
17 was precluded from reinstating the earlier order without first

² 8 C.F.R. § 241.8 states in pertinent part:

(a) Applicability. An alien who illegally reenters the United States after having been removed, or having departed voluntarily, while under an order of exclusion, deportation, or removal shall be removed from the United States by reinstating the prior order. The alien has no right to a hearing before an immigration judge in such circumstances. In establishing whether an alien is subject to this section, the immigration officer shall determine the following: (1) Whether the alien has been subject to a prior order of removal. . . . (2) The identity of the alien, i.e., whether the alien is in fact an alien who was previously removed . . . [and] (3) Whether the alien unlawfully reentered the United States.

1 adjudicating petitioner's then-pending petitions for Waiver of
2 Grounds of Excludability and for Permission to Reapply for Admission,
3 which, he believes, would have been successful. We address each
4 argument in turn.

5

6 **A. Challenge to the Validity of 8 C.F.R. § 241.8.**

7 Section 240 of the INA, entitled "Removal proceedings," requires
8 that "[a]n immigration judge shall conduct proceedings for deciding
9 the inadmissibility or deportability of an alien." 8 U.S.C. §
10 1229a(a)(1). The section further provides:

11 Unless otherwise specified in this chapter, a proceeding
12 under this section shall be *the sole and exclusive*
13 *procedure* for determining whether an alien may be
14 admitted to the United States or, *if the alien has been*
15 *so admitted*, removed from the United States.

16
17 8 U.S.C. § 1229a(a)(3) (emphasis added). Petitioner claims that this
18 language clearly expresses congressional intent to extend the
19 requirement of a hearing before an immigration judge to all
20 proceedings -- including reinstatement of prior deportation orders --
21 that result in removal of an alien from the U.S. Petitioner argues
22 that, since Congress has not specifically exempted reinstatement
23 proceedings from the hearing requirement, and since a hearing was
24 provided to aliens subject to reinstatement for over four decades
25 under the prior statute and the implementing regulations, the
26 procedure prescribed by INA § 240 is the "sole and exclusive
27 procedure for determining" whether an earlier deportation order

1 should be reinstated. In petitioner's view, the implementing
2 regulation that confers upon immigration officers, not judges, the
3 authority to reinstate without a hearing a prior deportation order
4 against an illegal reentrant is in direct conflict with INA § 240 and
5 thus invalid.

6 To assess the validity of the regulation at issue, we apply the
7 two-prong test enunciated in *Chevron, U.S.A., Inc. v. Natural Res.*
8 *Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). Under the first
9 prong of *Chevron*, we determine "whether Congress has directly spoken
10 to the precise question at issue," *id.* at 842, i.e., here, whether a
11 prior removal order may be reinstated without a full hearing before
12 an immigration judge. "If the intent of Congress is clear, that is
13 the end of the matter . . ." *Id.* However, if the statute is found to
14 be ambiguous, the question for us under the second prong "is whether
15 the agency's answer is based on a permissible construction of the
16 statute." *Id.* at 843.

17 The validity of the regulation implementing the reinstatement of
18 removal statute is a matter of first impression in this circuit, but
19 we are not without guidance on the question. Every other circuit that
20 has considered the issue has upheld the regulation as a valid
21 interpretation of the INA. See *Lorenzo v. Mukasey*, 508 F.3d 1278,
22 1283-84 (10th Cir. 2007); *Morales-Izquierdo v. Gonzales*, 486 F.3d
23 484, 489-95 (9th Cir. 2007) (en banc); *De Sandoval v. U.S. Att'y*
24 *Gen.*, 440 F.3d 1276, 1280-83 (11th Cir. 2006); *Ochoa-Carrillo v.*

1 *Gonzales*, 437 F.3d 842, 846 (8th Cir. 2006); *Lattab v. Ashcroft*, 384
2 F.3d 8, 17-20 (1st Cir. 2004); see also *Tilley v. Chertoff*, 144 F.
3 App'x 536, 539-40 (6th Cir. Aug. 15, 2005) (unpublished).

4 **(1) Chevron Step One.** Petitioner correctly points out that INA §
5 241(a)(5) does not specify the procedures to be followed by the
6 Attorney General in reinstating an earlier deportation order.
7 However, petitioner errs in assuming that, because Congress did not
8 explicitly specify those procedures, it intended that reinstatement
9 proceedings be governed by INA § 240.

10 Petitioner's primary reliance on the direction of INA § 240 that
11 a full-fledged hearing before an immigration judge "be the sole and
12 exclusive procedure for determining whether an alien" will be
13 deported from the U.S., 8 U.S.C. § 1229a(a)(3),³ is misplaced. This
14 provision requires a formal hearing in removal proceedings that
15 concern only aliens already admitted to the U.S. Petitioner has twice
16 entered the U.S. illegally, but has never been "admitted" to this
17 country. In any event, such a hearing is not "the sole and exclusive
18 procedure" for removability determinations, when Congress has
19 "otherwise specified." For reinstatement, Congress *did* in fact
20 specify otherwise: in INA § 241(a)(5), it authorized the Attorney
21 General to reinstate prior removal orders based on the simple finding
22 that an alien entered the U.S. illegally after having been deported.⁴

³ The language is quoted in full *supra* at p. 6.

⁴ See *supra* note 1.

1 In addition, the placement of the reinstatement of removal
2 statute in INA § 241, under the title "Detention and removal of
3 aliens ordered removed," separate from INA § 240, which is entitled
4 "Removal proceedings," indicates "a congressional intention to treat
5 reinstatement determinations differently from first-instance
6 determinations of removability." *Lattab*, 384 F.3d at 18 (citing
7 *Alexander v. Sandoval*, 532 U.S. 275, 288-91 (2001)). As the Ninth
8 Circuit sitting *en banc* put it, it is unlikely that "Congress would
9 have bothered with the detailed provisions of INA § 241 if it
10 intended to give an alien subject to reinstatement of a prior removal
11 order exactly the same rights and procedural protections as an alien
12 facing removal for the first time." *Morales-Izquierdo*, 486 F.3d at
13 491. It is, accordingly, fair for us to infer that the reinstatement
14 of removal statute was introduced as an alternative to the otherwise
15 applicable procedure mandated by INA § 240 for first instance
16 determinations of removability.

17 Our finding that INA § 240's requirement of a comprehensive
18 hearing before an immigration judge does not apply to illegal
19 reentrants is consistent with the legislative history of the portion
20 of the IIRIRA dealing with reinstatement of a removal order. That
21 history evinces unequivocal congressional intent to rectify the
22 defects of the pre-IIRIRA procedures for reinstatement of removal
23 orders and "make the removal of illegal reentrants more expeditious."
24 *Lattab*, 384 F.3d at 20; see also H.R. Rep. No. 104-469(I), at 13

1 (1996) (explaining that if “[a]liens who are ordered removed . . .
2 seek reentry they are subject to *immediate* removal under the prior
3 order” (emphasis added)); *id.* at 107 (characterizing the removal
4 procedures then in effect as “cumbersome and duplicative” and
5 expressing frustration because the “[r]emoval of aliens who enter the
6 United States illegally, even those who are ordered deported after a
7 full due process hearing, is an all-too-rare event”). Congress was
8 concerned with the inefficiencies of the previous scheme and sought
9 to modernize it by narrowing the range of defenses available to
10 recidivist illegal aliens and, most importantly, by eliminating any
11 duplication between removal and reinstatement proceedings. It is
12 clear that Congress enacted INA § 241(a)(5) to effect a “substantive
13 change” in the prior regime. See 62 Fed. Reg. 10312, 10326 (Mar. 6,
14 1997). Quite simply, “Congress replaced [the] reinstatement provision
15 with one that toed a harder line . . .” *Fernandez-Vargas v.*
16 *Gonzales*, 548 U.S. 30, 34 (2006).

17 We cannot nullify the unambiguous intent of Congress to
18 streamline the reinstatement process and distinguish it from removal
19 proceedings under INA § 240. “There is a presumption against
20 construing a statute as containing superfluous or meaningless words
21 or giving it a construction that would render it ineffective.” *United*
22 *States v. Blasius*, 397 F.2d 203, 207 n.9 (2d Cir. 1968). Petitioner
23 urges us to do just that, i.e., render INA § 241(a)(5) superfluous,
24 by reinventing reinstatement of prior removal orders as a sub-

1 category of removal proceedings subject to the hearing requirement
2 under INA § 240. The only way to bestow meaning on both provisions is
3 to conclude that Congress intended to exempt reinstatement of removal
4 from the procedural requirements of INA § 240.

5 Concluding that INA § 240 is inapplicable here does not end our
6 inquiry of "whether Congress has directly spoken to the precise
7 question at issue," *Chevron*, 467 U.S. at 842, i.e., whether Congress
8 explicitly empowered the executive branch to design as summary a
9 procedure for reinstatement as the one set forth in 8 C.F.R. § 241.8.
10 Although the legislative history and the reinstatement of removal
11 statute itself clearly reflect general congressional intent that a
12 simplified procedure be employed for the swift removal of illegal
13 reentrants, the statutory scheme "neither explicates nor endorses any
14 particular procedures for reinstating removal orders." *Lattab*, 384
15 F.3d at 19 (also noting that the legislative history "does not
16 address procedural questions with either clarity or specificity").
17 Like most of the circuits that have decided the issue before us, we
18 conclude that INA §§ 240 and 241(a)(5) "are at best ambiguous
19 regarding the procedures applicable to aliens who reenter the United
20 States in violation of an existing removal order." *De Sandoval*, 440
21 F.3d at 1281; see also *Lorenzo*, 508 F.3d at 1284; *Lattab*, 384 F.3d at
22 19. We, therefore, proceed with the second step of our analysis.

23 **(2) Chevron Step Two.** In examining the permissibility of 8
24 C.F.R. § 241.8, we are heedful of the Supreme Court's direction that

1 the reasonable construction of a statutory provision be affirmed,
2 even if it is not the one "the court would have reached if the
3 question initially had arisen in a judicial proceeding." *Chevron*, 467
4 U.S. at 843 n.11.

5 We would surely be hard-pressed to conclude that the Attorney
6 General's implementation of the reinstatement of removal statute is
7 impermissible. First, the text of the reinstatement of removal
8 statute itself "assumes the use of summary, rather than judicial,
9 proceedings." *Lorenzo*, 508 F.3d at 1283. The inquiry in a
10 reinstatement proceeding is limited to whether the "alien has
11 reentered the United States illegally after having been removed." 8
12 U.S.C. § 1231(a)(5). The summary procedure set forth in 8 C.F.R. §
13 241.8 is, therefore, "quite appropriate when the only issues to be
14 determined are those establishing the agency's right to proceed under
15 [INA] § 241(a)(5) -- the alien's identity, the existence of a prior
16 removal order, and whether the alien has unlawfully reentered."
17 *Alvarez-Portillo v. Ashcroft*, 280 F.3d 858, 867 (8th Cir. 2002). This
18 bare investigation "can be performed like any other ministerial
19 enforcement action" by an immigration officer, in lieu of an
20 immigration judge. *Morales-Izquierdo*, 486 F.3d at 491.

21 Furthermore, as we discuss below in parts II.C and II.D of the
22 opinion, illegal reentrants are now categorically declared ineligible
23 for any relief from removal and are barred from seeking any
24 collateral review of the reinstated order. This is a significant

1 change from the previous regime and further simplifies the inquiry.
2 Compare 8 U.S.C. § 1231(a)(5) with 8 U.S.C. § 1252(f) (repealed
3 1996). “[T]he elimination of any exogenous defense to reinstatement
4 significantly narrows the range of issues to be adjudicated, thereby
5 limiting the value of additional procedures.” *Lattab*, 384 F.3d at 20.

6 The regulation is, therefore, “entirely consistent,” *id*, with
7 the IIRIRA’s stated purpose to “enable . . . the prompt exclusion or
8 removal of those who are not . . . entitled” to admission. See H.R.
9 Rep. No. 104-469(I), at 111. Deference to the Attorney General’s
10 interpretation is even more imperative “in the immigration context
11 where officials ‘exercise especially sensitive political functions
12 that implicate questions of foreign relations.’” *INS v. Aguirre-*
13 *Aguirre*, 526 U.S. 415, 425 (1999) (quoting *INS v. Abudu*, 485 U.S. 94,
14 110 (1988)). We, like our sister circuits,⁵ have “little difficulty”
15 in deferring to the government’s reasonable interpretation of INA §
16 241(a)(5). *Lattab*, 384 F.3d at 20.

17 Invoking the doctrine of constitutional avoidance, petitioner
18 invites us to find the regulation an impermissible interpretation of
19 the statute. The doctrine requires that when given a choice between
20 “two plausible statutory constructions,” we avoid adopting the one

⁵ With the exception of the Ninth Circuit, all other circuits that have addressed the validity of 8 C.F.R. § 241.8 have resolved the issue on the second step of *Chevron*, upholding the regulation as a permissible construction of the reinstatement of removal statute. See *Lorenzo*, 508 F.3d at 1283; *De Sandoval*, 440 F.3d at 1283; *Ochoa-Carillo*, 437 F.3d at 846; *Lattab*, 384 F.3d at 20. The Sixth Circuit also resolved the issue on the first step of *Chevron* in an unpublished summary order. See *Tilley*, 144 F. App’x at 540.

1 that "would raise a multitude of constitutional problems." *Clark v.*
2 *Martinez*, 543 U.S. 371, 380-81 (2005). Nevertheless, the doctrine is
3 unavailing to petitioner, because, as the Ninth Circuit held, once an
4 ambiguous statute has been interpreted by the agency in charge of its
5 implementation, we lack the "authority to re-construe the statute,
6 even to avoid potential constitutional problems." *Morales-Izquierdo*,
7 486 F.3d at 493. Our role here is confined to deciding "whether the
8 agency's interpretation reflects a plausible reading of the statutory
9 text." *Id.* We hold that it does.

10 **B. Due Process Challenges.**

11 Petitioner's constitutional challenges to the reinstatement
12 procedure, as laid down in 8 C.F.R. § 241.8 and as applied in his
13 case, likewise are without merit. Parties claiming denial of due
14 process in immigration cases must, in order to prevail, "allege some
15 cognizable prejudice fairly attributable to the challenged process."
16 *Lattab*, 384 F.3d at 20; see also *Zerrei v. Gonzales*, 471 F.3d 342,
17 347 (2d Cir. 2006) (*per curiam*).

18 Petitioner fails to demonstrate how the alleged shortcomings
19 have prejudiced the outcome of his case. He "has admitted" before the
20 ICE and before us "all of the facts necessary to warrant
21 reinstatement" under INA § 241(a)(5), i.e., that he is an alien who
22 reentered the U.S. illegally after being previously deported. *De*
23 *Sandoval*, 440 F.3d at 1285. Thus, petitioner concededly "satisfie[d]
24 the statutory predicates for reinstatement." *Morales-Izquierdo*, 486

1 F.3d at 495. None of the additional procedural protections he
2 demands, including the presence of counsel, would have changed this.
3 We therefore need not determine the constitutional adequacy of the
4 existing procedures as to aliens who would dispute the factual bases
5 for reinstatement. *Id.*

6 The absence of the requisite prejudice further precludes
7 petitioner from challenging the constitutionality of 8 C.F.R. § 241.8
8 on its face. Our role is "to provide relief to claimants . . . who
9 have suffered . . . actual harm." *Lewis v. Casey*, 518 U.S. 343, 349
10 (1996). We therefore reject petitioner's due process claims.

11 We note, however, that despite the lack of a formal hearing, the
12 fast-track reinstatement process under 8 C.F.R. § 241.8 is not devoid
13 of procedural safeguards. First, "[t]he immigration officer must
14 obtain the prior order of . . . deportation relating to the alien."
15 *Id.* § 241.8(a)(1). Second, if the alien's identity is disputed, the
16 officer must compare the alien's fingerprints with those of the
17 previously deported alien; "[i]n the absence of fingerprints in a
18 disputed case the alien shall not be removed pursuant to [the
19 reinstatement regulation]." *Id.* § 241.8(a)(2). Third, in making the
20 crucial finding that the alien reentered the U.S. unlawfully, the
21 officer must "consider all relevant evidence, including statements
22 made by the alien and any evidence in the alien's possession." *Id.* §
23 241.8(a)(3). If the alien claims lawful admission, "the officer shall
24 attempt to verify" the claim by checking the available ICE databases.

1 *Id.* Last, even when the officer finds that the alien is subject to
2 removal, the alien must be notified in writing of this adverse
3 determination and be advised of the right to submit "a written or
4 oral statement contesting the determination," which the officer must
5 then take into account. *Id.* § 241.8(b). "If the alien expresses a
6 fear of returning to the country designated in [the reinstatement]
7 order, the alien shall be immediately referred to an asylum officer
8 for an interview." *Id.* § 241.8(e). The alien may also challenge the
9 reinstatement order in a court of appeals. 8 U.S.C. § 1252(a).

10 **C. Collateral Review of the Underlying Deportation Order.**

11 Petitioner asks us to vacate the reinstatement order also on the
12 ground that the underlying deportation proceeding deprived him of due
13 process. However, the reinstatement of removal statute expressly
14 prohibits us from giving petitioner a second bite at the apple. See 8
15 U.S.C. § 1231(a)(5) ("[T]he prior order of removal . . . is not
16 subject to being reopened or reviewed"); *Fernandez-Vargas*,
17 548 U.S. at 34-35. Petitioner had the right to challenge the validity
18 of the original deportation proceeding in a direct appeal to the BIA,
19 but he did not exercise it.

20 This outcome does not offend due process because, "regardless of
21 the process afforded in the underlying order," reinstatement of the
22 prior deportation order does not alter petitioner's legal condition.
23 *Morales-Izquierdo*, 486 F.3d at 497. The statute "does not penalize an
24 alien for the reentry (criminal and civil penalties do that)."

1 *Fernandez-Vargas*, 548 U.S. at 44. It merely gives effect to a final
2 order issued after a formal hearing before an immigration judge. The
3 purpose is to "stop an indefinitely continuing violation that the
4 alien himself could end . . . by voluntarily leaving the country."
5 *Id.* As the Ninth Circuit put it, "[w]hile aliens have a right to fair
6 procedures, they have no constitutional right to force the government
7 to re-adjudicate a final removal order by unlawfully reentering the
8 country." *Morales-Izquierdo*, 486 F.3d at 498.

9 In seeking to set aside the reinstated deportation order,
10 petitioner relies on *United States v. Mendoza-Lopez*, 481 U.S. 828
11 (1987). However, that case recognized an alien's right to attack
12 collaterally a prior deportation order only in the context of a
13 subsequent criminal proceeding for illegal reentry where the prior
14 deportation is an element of the crime, and where direct judicial
15 review of the original proceeding was not available due to procedural
16 defects. *Id.* at 838-39 & 839 n.17.

17 **D. Waiver of Inadmissibility.**

18 Finally, petitioner argues that, before the reinstatement order
19 could be issued, he was entitled to adjudication on the merits of his
20 applications for Waiver of Grounds of Excludability and for
21 Permission to Reapply for Admission, filed with the DHS on September
22 30, 2005, before the reinstatement order was issued.⁶ This Court,

⁶ In September 2005, petitioner's wife filed a petition for Alien Relative and petitioner applied for adjustment of his immigration status; petitioner also filed petitions for (1) Waiver of Grounds of Excludability and (2) Permission to Reapply for Admission. On April 5, 2006, former

1 however, recently rejected this argument in *Tenesaca Delgado v.*
2 *Mukasey*, 516 F.3d 65 (2d Cir. 2008). In *Tenesaca Delgado*, we
3 “accorde[d] *Chevron* deference to the BIA’s holding [in *In re Torres-*
4 *Garcia*, 23 I. & N. Dec. 866 (B.I.A. 2006)] that an applicant who is
5 inadmissible [as a result of having reentered this country illegally
6 after having been removed] is ineligible to apply for adjustment of
7 status from within the United States and is bound by the consent to
8 reapply provision, which requires that he seek permission to reapply
9 for admission from outside of the United States after ten years have
10 passed since his most recent departure from the United States.”
11 *Tenesaca Delgado*, 516 F.3d at 73.

12 We understand petitioner’s situation, yet we cannot disregard
13 the statutory text.⁷ An illegal reentrant “is not eligible and *may not*
14 *apply for any relief*” under the INA. 8 U.S.C. § 1231(a)(5) (emphasis
15 added).⁸ Petitioner was permanently inadmissible and could seek the

counsel for petitioner and his wife withdrew, on behalf of his clients, the petitions for Alien Relative and Adjustment of Immigration Status, yet, significantly, not the applications for Waiver of Grounds of Excludability and Permission to Reapply for Admission. The latter two petitions were not decided until May 29, 2007, after petitioner sought a writ of mandamus against the DHS in the U.S. District Court for the Southern District of New York.

⁷ See *supra* note 1.

⁸ 8 C.F.R. § 241.8 does allow an alien subject to reinstatement to (1) “express[] a fear of returning to the country designated in [the reinstatement] order”; or (2) apply for adjustment of status under either the Haitian Refugee Immigrant Fairness Act of 1998 or the Nicaraguan Adjustment and Central American Relief Act. In both those instances, reinstatement proceedings halt until there is a final determination on the reasonable fear or adjustment of status claims. See 8 C.F.R. § 241.8(d)-(e). Petitioner did indeed express fear of returning to Honduras while in custody and was referred first to an asylum officer and then to an immigration judge, who dismissed the claim in March 2007. Petitioner did

1 consent of the Homeland Security Secretary to a new application for
2 admission only after having resided outside the U.S. for a minimum of
3 10 years. See 8 U.S.C. § 1182(a)(9)(C)(i)(II) & (ii). Petitioner
4 admittedly did not satisfy these requirements.

5

6 **III. CONCLUSION**

7 We have considered all of petitioner's arguments and find them
8 to be without merit. Accordingly, we DENY the petition.

not seek review of the BIA's ruling that affirmed the dismissal in July 2007. Thus, the reinstatement order may be properly enforced at the present juncture.

