

3-1-2010

## Chevron's Ambiguity Hurdle: Delgado v. Holder and the Proper Interpretation of the Particularly Serious Crime Exception to Deportation Relief

William M. Hains

Follow this and additional works at: <https://digitalcommons.law.byu.edu/lawreview>



Part of the [Immigration Law Commons](#)

---

### Recommended Citation

William M. Hains, *Chevron's Ambiguity Hurdle: Delgado v. Holder and the Proper Interpretation of the Particularly Serious Crime Exception to Deportation Relief*, 2010 BYU L. Rev. 81 (2010).

Available at: <https://digitalcommons.law.byu.edu/lawreview/vol2010/iss1/7>

This Note is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

## *Chevron's* Ambiguity Hurdle: *Delgado v. Holder* and the Proper Interpretation of the Particularly Serious Crime Exception to Deportation Relief

### I. INTRODUCTION

Immigration policy involves interplay between the interests of society and those of the individual immigrant. Public rhetoric during the 2006 U.S. immigration reform debates illustrates this interplay: Proponents of liberal reform seem to focus on the impact of deportation on individuals and families, while proponents of restrictive reform emphasize the necessity of securing society against immigrants involved in criminal activity, or even terrorism.<sup>1</sup> Official policy often reflects these competing interests as well, but unlike public debate, it must attempt to do so with a unified voice. Recognizing the security concerns of society, Congress has established certain deportation grounds as a basis for removal of aliens<sup>2</sup> who previously have been admitted to the United States.<sup>3</sup> Yet Congress has also provided for a number of special forms of relief from deportation, including asylum and withholding of removal. This relief allows otherwise deportable aliens to avoid removal by showing that upon returning to their home country they may be persecuted because of race, religion, nationality, membership in a

---

1. See generally, e.g., Sonia Nazario, *Man Fights Deportation by Invoking His Former Gang Ties*, L.A. TIMES, June 3, 2007, at B1; Jay Root, *Officials Testify of Crisis at the Border*, FORT WORTH STAR-TELEGRAM (Tex.), Aug. 17, 2006, at State and Regional News Section; Rubén Rosario, *'I Want to Go with You,'* SAINT PAUL PIONEER PRESS (Minn.), July 24, 2006, at A1.

2. This Note will use the term "alien" as it is defined by the Immigration and Nationality Act (INA): "any person not a citizen or national of the United States." INA § 101(a)(3), 8 U.S.C. § 1101(a)(3) (2006). The INA was passed in 1952 and has since been amended several times. Pub. L. No. 82-414, 66 Stat. 163, available as amended at <http://www.uscis.gov/portal/site/uscis/menuitem.f6da51a2342135be7e9d7a10e0dc91a0/?vgnextoid=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&vgnnextchannel=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&CH=act>. Immigration law scholarship often refers to the INA, as amended, rather than to the statute as codified in Title 8 of the United States Code. See THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY xiii (6th ed. 2008). Because the courts typically refer to the Code, this Note will provide citations to both, though it will refer solely to INA sections in the body of the Note.

3. See INA § 237(a), 8 U.S.C. § 1227(a) (2006) (classes of deportable aliens).

particular social group, or political opinion.<sup>4</sup> Further illustrating the interplay of interests, Congress has stipulated that this relief is not available to any alien who has been convicted of a “particularly serious crime” and is thus a danger to the community.<sup>5</sup> Despite these attempts by Congress to balance the competing interests of the individual and the community in a consistent way, federal courts of appeal are split in their interpretation of what constitutes a particularly serious crime under the withholding of removal statute.

In *Delgado v. Holder*,<sup>6</sup> the Ninth Circuit addressed the particularly serious crime exception to asylum and withholding. In so doing, the court misconstrued the asylum provision by holding that the Attorney General, or one acting under his authority, could designate crimes as particularly serious *on a case-by-case basis*, rather than solely through the rule-making process. Yet this misconception is consistent with the only other circuit to have addressed the issue. Regarding withholding, the dissent provided a compelling analysis that the statute, correctly interpreted, requires particularly serious crimes to be aggravated felonies. The dissent’s analysis, however, is rooted in a subtle but significant misapplication of the *Chevron* doctrine. Correctly applying the *Chevron* doctrine, the majority examined the reasonableness, rather than the correctness, of the executive agency’s interpretation of the statute and deferred to the agency’s interpretation that particularly serious crimes need not be aggravated felonies under the withholding provision. *Delgado* illustrates that the proper application of the *Chevron* doctrine requires an initial inquiry into whether a statute is ambiguous; if followed, this approach may resolve the circuit split

---

4. See INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2006) (incorporating the above-mentioned five protected groups into the definition of “refugee”); INA § 208(b)(1), 8 U.S.C. § 1158(b)(1) (2006) (stipulating that an asylee must first qualify as a refugee); INA § 241(b)(3)(A), 8 U.S.C. § 1231(b)(3)(A) (setting forth requirements for withholding). There are significant differences between eligibility for asylum and withholding, including the requisite level of threat posed to the alien to qualify for relief. These differences are discussed briefly below in Part III.

5. INA § 208(b)(2)(A)(ii), 8 U.S.C. § 1158(b)(2)(A)(ii) (asylum); INA § 241(b)(3)(B)(ii), 8 U.S.C. § 1231(b)(3)(B)(ii) (withholding). See Marisa Silenzi Cianciarulo, *Terrorism and Asylum Seekers: Why the Real ID Act Is a False Promise*, 43 HARV. J. ON LEGIS. 101, 110 (2006) (“Over the next twenty-five years [after the passage of the Refugee Act of 1980], asylum would emerge as a unique, complex body of law and a lightning rod for the national immigration debate, forcing the country to balance traditional humanitarian interests against weighty national security concerns.”).

6. 563 F.3d 863 (9th Cir. 2009).

and lead to a more consistent application of the deportation relief scheme enacted by Congress.

## II. FACTS AND PROCEDURAL HISTORY

Hernan Ismael Delgado, a native citizen of El Salvador, entered the United States in 1980 on a ninety-day non-immigrant visitor visa.<sup>7</sup> Delgado was ten years old at the time.<sup>8</sup> According to Delgado, his grandmother brought him and his sister to the United States after their mother and step-father had been tortured and killed by government death squads and threats had been made against the remaining family members.<sup>9</sup> Delgado overstayed his ninety-day visa; when he was twenty-two he petitioned for asylum, but the petition went unanswered.<sup>10</sup>

In 2001, the Immigration and Naturalization Service (INS) initiated removal proceedings against Delgado for overstaying his visa.<sup>11</sup> Among the various forms of relief available to aliens about to be deported, Delgado sought asylum, withholding of removal, Convention Against Torture (CAT) withholding, and CAT deferral.<sup>12</sup> While each of these forms of relief is distinct, they are all based upon the risk of persecution an alien faces if sent to a particular country upon removal. The Immigration Judge determined that Delgado's three felony DUIs, one of which had led to serious bodily injury, constituted particularly serious crimes.<sup>13</sup> Therefore, Delgado was statutorily ineligible for asylum, withholding of removal, and

---

7. *Id.* at 866; Appellant's Opening Brief at 5–6 (June 6, 2004), *Delgado*, 563 F.3d 863 (No. 03-74442).

8. Appellant's Opening Brief, *supra* note 7, at 6.

9. *Id.* at 6, 15–18.

10. *Id.* at 8.

11. Brief for Respondent at 4–5, *Delgado*, 563 F.3d 863 (No. 03-74442). The INS also asserted that Delgado was deportable because one of his previous DUI convictions constituted an aggravated felony. During the deportation proceedings, however, the INS dropped this charge. *Id.*

12. *Delgado*, 563 F.3d at 866. Apart from withholding of removal provided under INA § 241(b)(3), CAT provides independent grounds for relief by withholding or deferring removal. 8 C.F.R. § 1208.16(c)(4) (2008). An alien is only eligible for relief under CAT if the Immigration Judge “determines that the alien is more likely than not to be tortured” upon deportation to a particular country. *Id.*

13. *Delgado*, 563 F.3d at 866; *id.* at 876 (Berzon, J., concurring in part, dissenting in part).

CAT withholding.<sup>14</sup> The Immigration Judge also determined that Delgado was ineligible for CAT deferral because he had not proven that it was more likely than not that he would be tortured if returned to El Salvador.<sup>15</sup> The Board of Immigration Appeals (BIA) affirmed the decision and issued an unpublished *per curiam* decision signed by one member.<sup>16</sup>

### III. SIGNIFICANT LEGAL BACKGROUND

At issue in this case is the scope of the Attorney General's authority to limit two forms of relief for aliens subject to deportation or removal: asylum and withholding of removal. While the basis for relief (persecution) and the immediate result (no deportation) are the same for both asylum and withholding, there are a number of important differences between the two forms of relief. Asylum grants a refugee legal status as an asylee and provides for a number of benefits, including a formal mechanism for adjusting his or her status to that of a legal permanent resident.<sup>17</sup> On the other hand, withholding grants no official status upon an alien and provides no formal mechanism for adjustment of status; rather, it is simply an agreement by the government not to deport the alien.<sup>18</sup> The two forms of relief require differing levels of proof that persecution will occur: while a "well-founded fear" is sufficient for asylum, the alien must prove that persecution is "more likely than not" for withholding.<sup>19</sup> Despite these differences, withholding is desirable for the alien because the government must grant this relief to any alien who qualifies, whereas the government has discretion whether to grant a qualifying refugee's asylum claim.<sup>20</sup> Under both asylum and

---

14. *Id.* at 866 (majority opinion). Aliens otherwise eligible for one of these forms of relief are disqualified if they have been convicted of a particularly serious crime. *See infra* Part III. While separate INA provisions govern the particularly serious crime exception for asylum and withholding relief, regulations incorporate the INA withholding provision in determining whether an alien is eligible for CAT withholding. *See* 8 C.F.R. § 1208.16(d)(2) (2008).

15. *Delgado*, 563 F.3d at 866.

16. *Id.*

17. ALEINIKOFF, *supra* note 2, at 847–49. Asylum is governed by INA §§ 208–09, 8 U.S.C. §§ 1158–59 (2006), while withholding is governed by INA § 241(b)(3), 8 U.S.C. § 1231(b)(3).

18. ALEINIKOFF, *supra* note 2, at 847–49.

19. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 423–24 (1987).

20. INA § 208(b)(1)(A), 8 U.S.C. § 1158(b)(1)(A) (2006) (asylum); INA § 241(b)(3)(A), 8 U.S.C. § 1231(b)(3) (withholding). Having a mandatory withholding provision is also important because it ensures compliance with the government's international treaty

withholding, however, an otherwise eligible alien can be disqualified if found to have committed a particularly serious crime. While this exception applies to both forms of relief, asylum and withholding each have distinct provisions determining what constitutes a particularly serious crime.

#### A. *Exception to Eligibility for Asylum*

Section 208 of the INA provides that the Attorney General or Secretary of Homeland Security *may* grant asylum to an alien who qualifies as a refugee under § 101.<sup>21</sup> Section 101 defines “refugee” as follows:

any person . . . who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, [his or her country of nationality or habitual residence] because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.<sup>22</sup>

A refugee is disqualified, however, if, among other exceptions, “the Attorney General determines that . . . the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States.”<sup>23</sup> The statute then declares that for purposes of this exception, “an alien who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime.”<sup>24</sup> Furthermore, “[t]he Attorney General may designate by regulation offenses that will be considered to be a crime described in clause (ii) [particularly serious crimes] . . . .”<sup>25</sup> The exception to eligibility for asylum thus creates a clear designation of all aggravated felonies as

---

obligations under Article 33 of the 1967 Protocol Relating to the Status of Refugees. *See* ALEINIKOFF, *supra* note 2, at 848–49; United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267, Art. 33, *reprinted in* 19 U.S.T. 6223.

21. INA § 208(b)(1)(A), 8 U.S.C. § 1158(b)(1)(A) (2006).

22. INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2006).

23. INA § 208(b)(2)(A)(ii), 8 U.S.C. § 1158(b)(2)(A)(ii) (2006). “The BIA has interpreted this exception to require only a determination of whether an alien’s crime is ‘particularly serious’; according to the BIA, an alien convicted of a particularly serious crime necessarily constitutes a danger to the community.” *Choeum v. INS*, 129 F.3d 29, 40 (1st Cir. 1997).

24. INA § 208(b)(2)(B)(i), 8 U.S.C. § 1158(b)(2)(B)(i) (2006).

25. INA § 208(b)(2)(B)(ii), 8 U.S.C. § 1158(b)(2)(B)(ii) (2006).

particularly serious and authorizes the Attorney General to designate additional crimes by regulation.<sup>26</sup>

In *Ali v. Achim*,<sup>27</sup> the Seventh Circuit classified these two approaches as two per se categories of particularly serious crimes—those identified by statute and those identified by regulation—but refused to interpret them as the *exclusive* means of determining particularly serious crimes.<sup>28</sup> *Ali* held that the Attorney General was allowed to determine that an alien’s crimes were particularly serious not only by regulation, with its formal requirements of promulgation and public comment, but also on a case-by-case basis.<sup>29</sup> To hold otherwise, the court reasoned, would be to place an “onerous burden” on the Attorney General, requiring him or her to scour each state’s penal code and anticipate every possible particularly serious crime.<sup>30</sup>

### *B. Exception to Eligibility for Withholding of Removal*

Withholding of removal is governed by § 241 of the INA: “[T]he Attorney General *may not* remove an alien to a country if the Attorney General decides that the alien’s life or freedom would be threatened in that country because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion.”<sup>31</sup> As with asylum, however, relief through withholding of removal is not available “if the Attorney General decides that . . . the alien, having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States.”<sup>32</sup> The statute then provides a distinct explanation of what shall be considered a particularly serious crime:

---

26. INA § 208(b)(2)(B), 8 U.S.C. § 1158(b)(2)(B) (2006).

27. 468 F.3d 462 (7th Cir. 2006).

28. *Id.* at 468–69. “Congress named two categories of per se ‘particularly serious’ crimes, but it did not say these were the *only* categories of crimes that would bring an alien’s case within the statutory bar.” *Id.* at 469.

29. *Id.*

30. *Id.*

31. INA § 241(b)(3)(A), 8 U.S.C. § 1231(b)(3)(A) (emphasis added). The Supreme Court has held that an alien must show that it is more likely than not that his or her life or freedom would be threatened upon deportation—a higher burden of proof than that required by the asylum provision’s more subjective showing of a “well-founded fear of persecution.” *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446–50 (1987); *INS v. Stevic*, 467 U.S. 407, 429–30 (1984).

32. INA § 241(b)(3)(B)(ii), 8 U.S.C. § 1231(b)(3)(B)(ii).

an alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. The previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime.<sup>33</sup>

Thus, the *per se* category of particularly serious crimes is narrower for withholding than for asylum: only aggravated felonies resulting in sentencing to an aggregate of at least five years' imprisonment. The question then arises: Can the Attorney General determine that *any* crime outside this *per se* category is particularly serious, or only *aggravated felonies* outside this *per se* category?

*Ali* addressed the issue of withholding in addition to its ruling on the asylum provisions. The Seventh Circuit held that a crime need not be an aggravated felony to be designated as particularly serious by the Attorney General.<sup>34</sup> "Congress specified that the Attorney General may extend the 'particularly serious' designation to aggravated felonies producing prison terms of less than five years. But the absence of a similar provision for nonaggravated-felony crimes does not imply that only aggravated felonies can qualify as 'particularly serious' crimes."<sup>35</sup> Yet in *Alaka v. Attorney General*,<sup>36</sup> the Third Circuit interpreted the statute to mean that a particularly serious crime *must* be an aggravated felony under the withholding provisions.<sup>37</sup> The court reasoned that because the second sentence in question "is clearly tied to the first," the Attorney General's discretion was similarly limited to the realm of the first sentence: aggravated felonies.<sup>38</sup>

In 2007, the BIA issued *In re N-A-M*,<sup>39</sup> following the interpretation of the Seventh Circuit in *Ali*. As noted above, § 241(b)(3)(B) provides a *per se* category of particularly serious crimes: aggravated felonies for which the alien is sentenced to an

---

33. INA § 241(b)(3)(B), 8 U.S.C. § 1231(b)(3)(B).

34. *Ali v. Achim*, 468 F.3d 462, 470 (7th Cir. 2006).

35. *Id.*

36. 456 F.3d 88 (3d Cir. 2006).

37. *Id.* at 105.

38. *Id.* at 104–05.

39. 24 I. & N. Dec. 336 (B.I.A. 2007).

aggregate term of five years' imprisonment.<sup>40</sup> But the following sentence in the statute states that particularly serious crimes are not limited to that per se category. The BIA declared that the second sentence in question "means only that aggravated felonies for which sentences of less than 5 years' imprisonment were imposed *may* be found to be 'particularly serious crimes,' not that *only* aggravated felonies may be found to be such crimes."<sup>41</sup>

In support of this interpretation, the BIA pointed to "[a] plain reading of the Act," its "consistent practice in numerous [non-precedential] decisions," and an analysis of the legislative history of the particularly serious crime exception.<sup>42</sup> The BIA explained that with the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"),<sup>43</sup> which amended the definition of particularly serious crimes, "Congress intentionally withdrew much of its prior equation of particularly serious crimes with aggravated felonies in the withholding of removal context in order to allow a more flexible analysis in determining whether an offense is a particularly serious crime."<sup>44</sup> To hold otherwise, the BIA reasoned, would create a "loophole for particularly serious crimes that happen to escape classification as aggravated felonies"—a result that "would be inconsistent with the goal of protecting the public."<sup>45</sup>

After *N-A-M-*, the Second Circuit addressed the withholding issue in *Nethagani v. Mukasey*,<sup>46</sup> and acknowledged that the two competing interpretations were both viable, but in light of the ambiguity, the court deferred to the BIA's decision in *N-A-M-*.<sup>47</sup>

#### IV. THE COURT'S DECISION

In *Delgado v. Holder*, the Ninth Circuit held that the Attorney General could determine by adjudication as well as by regulation that certain crimes were particularly serious under the asylum provision

---

40. INA § 241(b)(3)(B)(ii), 8 U.S.C. § 1231(b)(3)(B)(ii) (2006).

41. *N-A-M-*, 24 I. & N. Dec. at 341 (first emphasis added).

42. *Id.* at 338–39.

43. Pub. L. No. 104-208, 110 Stat. 3009-546.

44. *N-A-M-*, 24 I. & N. Dec. at 340–41.

45. *Id.* at 341.

46. 532 F.3d 150 (2d Cir. 2008).

47. *Id.* at 156–57 (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–44 (1984)).

and that particularly serious crimes did not have to be aggravated felonies under the withholding provision.<sup>48</sup> The court also held that it had jurisdiction to review the merits of the Immigration Judge's decision denying asylum, but not withholding.<sup>49</sup> Considering the merits of the decision denying asylum, the court found that the Immigration Judge had erred in determining that Delgado's three DUIs were particularly serious.<sup>50</sup> The court upheld, however, the determination that Delgado was not eligible for relief under CAT.<sup>51</sup>

#### A. *Asylum*

In its analysis of whether the Attorney General had authority to designate crimes as particularly serious by adjudication for purposes of asylum, the court sought to ascertain what authority the Attorney General had before the asylum provision was enacted.<sup>52</sup> The Immigration Act of 1990 introduced the aggravated felony designation of a category of per se particularly serious crimes.<sup>53</sup>

---

48. *Delgado v. Holder*, 563 F.3d 863, 865 (9th Cir. 2009).

49. *Id.* Delgado's case was previously decided by the Ninth Circuit under the name of *Delgado v. Mukasey*, 546 F.3d 1017 (9th Cir. 2008). Delgado petitioned for and was granted a rehearing, the result of which is the present case that supplies the subject matter for this Note. In *Delgado v. Mukasey*, the court reached the opposite jurisdictional holding regarding asylum, finding that it could not review the merits of whether the Immigration Judge correctly held that Delgado's three DUIs constituted particularly serious crimes. *Id.* at 1023–25. Unlike the present case, *Delgado v. Mukasey* did not address the jurisdictional issue concerning withholding. A circuit split exists as to whether a jurisdiction-stripping statute in § 242(a)(2)(B) divests the courts of authorization to review the merits of an agency's determination that aliens are ineligible for withholding because their convictions constituted particularly serious crimes. *Ali* held that the jurisdiction-stripping statute applied, while *Alaka* and *Nethagani* held that it did not apply to withholding. *Nethagani*, 532 F.3d at 154–55; *Ali v. Achim*, 468 F.3d 462, 465 (7th Cir. 2006); *Alaka v. Att'y Gen.*, 456 F.3d 88, 94–101 (3d Cir. 2006). In *Delgado v. Holder*, the court stated that it was bound by prior precedent, namely *Matsuk v. INS*, 247 F.3d 999, 1002 (9th Cir. 2001), which found that the court had no jurisdiction to review the merits of withholding decisions. Judge Berzon's dissent criticized the reasoning of *Matsuk* but concurred in the majority's holding that it controlled the issue of jurisdiction. *Delgado*, 563 F.3d at 887–89 (Berzon, J., concurring in part, dissenting in part). The majority acknowledged, however, that “Judge Berzon's concurring and dissenting opinion here offers trenchant and, to us, persuasive criticisms of this ruling of *Matsuk*. As her opinion recognizes, however, we are bound as a three-judge panel to follow *Matsuk*.” *Id.* at 871 n.12 (majority opinion).

50. *Delgado*, 563 F.3d at 865.

51. *Id.* at 865–66. This Note focuses on the court's analysis of the particularly serious crime exception to withholding and asylum and will not address further the court's limited examination of Delgado's CAT claims.

52. *Id.* at 870.

53. Pub. L. No. 101-649, 104 Stat. 4978.

Previously, the Attorney General determined which crimes were particularly serious on a case-by-case basis, using the factors set forth in *Matter of Frentescu*.<sup>54</sup> Thus, the court reasoned that the purpose of the 1990 amendment was “only to ensure that certain crimes (aggravated felonies) would be *categorically* determined to be ‘particularly serious,’ regardless of the circumstances of their commission,” and that the Attorney General would be given *additional* authority to categorically designate crimes as particularly serious by regulation.<sup>55</sup> “The provision simply does not speak to the ability of the Attorney General to determine in an individual case that the circumstances of an alien’s commission of a crime made that crime particularly serious . . . .”<sup>56</sup>

### *B. Withholding of Removal*

The court acknowledged the circuit split regarding whether a particularly serious crime had to be an aggravated felony under the withholding provision, but it noted that the BIA had issued a precedential decision after *Ali* and *Alaka* had been decided.<sup>57</sup> Acknowledging the *Chevron* deference owed to the BIA’s decision, the court thus examined *N-A-M-* to determine if the BIA’s decision was reasonable.<sup>58</sup> The court first noted that the statute did not “expressly require” the Attorney General to limit designations of particularly serious crimes to aggravated felonies.<sup>59</sup> Then, the court examined the legislative history as set forth in *N-A-M-* and found that

nothing in the legislative history indicates that Congress intended, by creating a categorical bar and by later relaxing that categorical bar, to eliminate the Attorney General’s pre-existing discretion [in applying the *Frentescu* factors] to determine that, under the circumstances presented by an individual case, a crime was

---

54. 18 I. & N. Dec. 244, 247 (B.I.A. 1982) (“[T]he record in most proceedings will have to be analyzed on a case-by-case basis. In judging the seriousness of a crime, we look to such factors as the nature of the conviction, the circumstances and underlying facts of the conviction, the type of sentence imposed, and, most importantly, whether the type and circumstances of the crime indicate that the alien will be a danger to the community.”).

55. *Delgado*, 563 F.3d at 870.

56. *Id.*

57. *Id.* at 867.

58. *Id.* at 868.

59. *Id.*

“particularly serious,” whether or not the crime was an aggravated felony. We therefore find the BIA’s interpretation of the statute reasonable . . . .<sup>60</sup>

### *C. Dissent*

In her dissent, Judge Berzon challenged the majority’s interpretation of both the asylum and withholding provisions.

#### *1. Asylum*

Looking at the language of the asylum provision and applying common canons of statutory construction, Judge Berzon concluded that the Attorney General is authorized to designate non-aggravated felonies as particularly serious crimes *only by regulation*.<sup>61</sup> According to Judge Berzon, the plain language of the statute authorizes the Attorney General to issue regulations.<sup>62</sup> The majority’s conclusion that the authority is also retained to make such determinations through case-by-case adjudication is an “implication from silence.”<sup>63</sup> Moreover, the INA already provided a general power to establish regulations under the Act; thus, the language in the asylum provision would be superfluous if, rather than being read to designate the exclusive mode of determining particularly serious crimes, it was read to grant additional rule-making authority.<sup>64</sup> Furthermore, the Ninth Circuit has read similar language in other statutes as requiring regulations in place of case-by-case adjudication.<sup>65</sup>

In contrast, the withholding provision is silent as to the Attorney General’s methodology in designating particularly serious crimes. In such scenarios, Judge Berzon continued, ““agencies are free to choose . . . between rule making and adjudication.””<sup>66</sup> Differences in structure also suggest that case-by-case determinations of eligibility for asylum are unnecessary because individualized decisions will ultimately be made in the granting of asylum. On the other hand, case-by-case determinations, if they are ever to be made for

---

60. *Id.* at 869.

61. *Id.* at 887 (Berzon, J., dissenting).

62. *Id.* at 886.

63. *Id.*

64. *Id.*

65. *Id.* (citing *Davis v. EPA*, 348 F.3d 772, 785 (9th Cir. 2003)).

66. *Id.* (quoting *Davis*, 348 F.3d at 785).

withholding, must be made at the eligibility stage because of the mandatory nature of withholding.<sup>67</sup>

## 2. *Withholding of removal*

Regarding withholding, Judge Berzon again turned to canons of construction, criticizing the majority's analysis in several points and ultimately concluding that particularly serious crimes must be aggravated felonies under the withholding provisions.<sup>68</sup> First, the majority's broad interpretation of the statute renders superfluous the limiting phrase of the second sentence: "notwithstanding the length of sentence imposed."<sup>69</sup> Second, the withholding provision expressly refers to aggravated felonies; silence as to non-aggravated felonies suggests that Congress did not intend for them to be considered particularly serious crimes.<sup>70</sup> Third, the majority interpreted the Attorney General's authority in both asylum and withholding provisions as "identically broad" despite several differences in the scope of the two forms of relief.<sup>71</sup> Finally, the majority's interpretation rendered the statute "hopelessly internally inconsistent" with section 241(b)(3)(B)(iii), which states that aliens who have committed a "serious nonpolitical crime" before entering the United States are also ineligible for withholding.<sup>72</sup> Serious nonpolitical crimes "typically fall well within the current definition of aggravated felony," yet the BIA has interpreted such crimes as less serious than particularly serious crimes.<sup>73</sup>

Judge Berzon also challenged the majority's interpretation of the legislative history. The origin of the particularly serious crime exception was the 1951 U.N. Convention Relating to the Status of

---

67. *Id.* at 886–87.

68. *Id.* at 880–83.

69. *Id.* at 881 ("We simply don't read statutes as throwing around loose, meaningless language for no discernible reason.") (citing *United States v. Novak*, 476 F.3d 1041, 1048 (9th Cir. 2007)). This canon is commonly known as the rule against surplusage.

70. *Id.* ("[T]he inclusion of one item ordinarily excludes similar items that could have been, but were not, mentioned.") (citing *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003)). This canon is commonly known as *expressio unius*.

71. *Id.* at 882 ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (quoting *Tang v. Reno*, 77 F.3d 1194, 1197 (9th Cir. 1996) (internal quotation marks omitted))).

72. *Id.* (citing *Padash v. INS*, 358 F.3d 1161, 1170–71 (9th Cir. 2004)).

73. *Id.* (citing *In re Frentescu*, 18 I. & N. Dec. 244, 247 (B.I.A. 1982)).

Refugees<sup>74</sup> (“Convention”) and the 1967 U.N. Protocol relating to the Status of Refugees<sup>75</sup> (“Protocol”).<sup>76</sup> Changes to the particularly serious crime provisions, the dissent argued, should thus be read as attempts to bring U.S. law into compliance with its obligations under the Convention and Protocol, which required the withholding of removal for aliens whose life or liberty was threatened upon removal to a particular country.<sup>77</sup> As Congress expanded the statutory definition of aggravated felonies under the INA, it relaxed a previously categorical definition of all aggravated felonies as particularly serious crimes for purposes of withholding.<sup>78</sup> Otherwise, the law could have led to the violation of the Convention and Protocol by disqualifying aliens for withholding because of “fairly minor offenses.”<sup>79</sup>

Thus, applying traditional canons of construction to interpret the text, structure, legislative history, and purpose of the asylum and withholding provisions, Judge Berzon concluded that the Attorney General could determine only by regulation that non-aggravated felonies were particularly serious crimes for purposes of asylum, and the Attorney General could designate only aggravated felonies as particularly serious crimes for purposes of withholding.

## V. ANALYSIS

While the dissent presented the more compelling interpretation of the asylum and withholding provisions, it misapplied the *Chevron* doctrine with regard to withholding. The majority appropriately concluded that the withholding statute is ambiguous and accordingly

---

74. United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, available at <http://www.unhcr.org/protect/protection/3b66c2aa10.pdf>.

75. United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267, reprinted in 19 U.S.T. 6223.

76. *Delgado*, 563 F.3d at 883. The exception was added to the INA by the Refugee Act of 1980. Pub. L. No. 96-212, § 200, 94 Stat. 102 (1980).

77. *Delgado*, 563 F.3d at 883–85; see also *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436–37 (1987) (“If one thing is clear from the legislative history of the new definition of ‘refugee,’ and indeed the entire 1980 [Refugee] Act, it is that one of Congress’ primary purposes was to bring United States refugee law into conformance with the 1967 [Protocol], to which the United States acceded in 1968.” (internal citations omitted)).

78. *Delgado*, 563 F.3d at 883–85.

79. *Id.* at 884 (quoting Sen. Kennedy, *Mark-up on S. 1664 Before the Senate Comm. on the Judiciary*, 104th Cong. 60–61 (1996) (internal quotation marks omitted)).

limited its analysis to the reasonableness, rather than the correctness, of the BIA's interpretation.

*A. Divining the Meaning of a Particularly Serious Exception*

Judge Berzon's dissent offers a convincing analysis of the meaning of the asylum and withholding provisions in the INA. Regarding asylum, the statute clearly specifies the Attorney General's authority to designate by regulation while remaining silent as to authority to adjudicate. Comparison with the withholding provisions, which are silent as to the Attorney General's method of designation, suggests that Congress intended the reference to rule-making authority to designate the exclusive method of determining particularly serious crimes for asylum. The majority emphasizes the impracticability of requiring the Attorney General to designate particularly serious crimes only by regulation; yet, this possibly inconvenient policy does not override the plain meaning and structure of the statute. As the Seventh Circuit noted in the context of another immigration provision, "any unease with the policy implications of the statute in question are matters within the province of Congress and not the judicial branch."<sup>80</sup> Congress has clearly spoken on the method by which the Attorney General may decide which non-aggravated felonies are particularly serious crimes for purposes of asylum. The majority in *Delgado*, therefore, incorrectly held that the Attorney General can determine through case-by-case adjudication that non-aggravated felonies constitute particularly serious crimes. As the court notes, however, *Delgado*'s challenge on this issue is now moot given the court's reversal on the merits of the Immigration Judge's determination that his crimes were particularly serious for purposes of asylum.<sup>81</sup>

Concerning withholding, the text of the statute strongly suggests that particularly serious crimes must be aggravated felonies. Again, the text states that

an alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. The previous sentence shall not preclude the Attorney General from determining that,

80. *Guerrero-Perez v. INS*, 242 F.3d 727, 737 (7th Cir. 2001).

81. *Delgado*, 563 F.3d at 865 (majority opinion).

notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime.<sup>82</sup>

The second sentence operates within the realm of the first as a modification of a per se category: the Attorney General is authorized to designate additional crimes as particularly serious, but the first sentence is only modified in terms of “the length of sentence imposed,” not whether the crime is an aggravated felony. This interpretation is solidified by the canons of construction applied by Judge Berzon in analyzing the text, structure, legislative history, and purpose of the particularly serious crime exemption.

### *B. Clearly Ambiguous*

The majority noted that its decision regarding withholding was controlled by the *Chevron* doctrine.<sup>83</sup> The *Chevron* doctrine requires courts to defer to an agency's interpretation of an ambiguous statute that generally has been entrusted to that agency to administer.<sup>84</sup> *Chevron* thus directs courts to determine first “whether Congress has directly spoken to the precise question at issue.”<sup>85</sup> If Congress has clearly spoken, “that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”<sup>86</sup> “[I]f the statute is silent or ambiguous with respect to the specific issue,” the court must determine whether the agency's interpretation is reasonable and, if so, defer to that interpretation.<sup>87</sup>

There is disagreement as to whether the withholding provision at issue in *Delgado* clearly expresses the intent of Congress. Judge Berzon simply declared that her interpretation of the withholding provision was commanded by “a plain reading of the text.”<sup>88</sup> *Alaka* also stated that its result was dictated by the “plain language and structure (i.e., context) of the statute.”<sup>89</sup> Even *N-A-M-* stated that its decision rested, in part, upon “[a] plain reading of the Act.”<sup>90</sup> *Ali*

---

82. INA § 241(b)(3)(B), 8 U.S.C. § 1231(b)(3)(B) (2006).

83. *Delgado*, 563 F.3d at 867.

84. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984).

85. *Id.* at 842.

86. *Id.* at 842–43.

87. *Id.* at 843.

88. *Delgado*, 563 F.3d at 880 (Berzon, J., concurring in part, dissenting in part).

89. *Alaka v. Att'y Gen.*, 456 F.3d 88, 104 (3d Cir. 2006).

90. *In re N-A-M-*, 24 I. & N. Dec. 336, 338 (B.I.A. 2007).

implied a plain and unambiguous statute, yet it also stated that the BIA's decision then under review was reasonable should the statute be deemed ambiguous.<sup>91</sup> After *N-A-M-* was decided, however, *Nethagani* acknowledged that “[w]e cannot find that [§ 241(b)(3)(B)] . . . speaks clearly to the question raised in this petition because its second sentence admits of at least two readings . . . .”<sup>92</sup> *Nethagani* also challenged *Alaka*'s designation of the statute as plain because it “had no occasion to consider whether the statute was ambiguous because there was not yet a BIA opinion on point.”<sup>93</sup> Reflecting the divergence among the circuits as to the clarity of the statute, the majority in *Delgado* could not seem to decide; it declared simply that the “plain text” of the statute “naturally” raises two alternative interpretations.<sup>94</sup> Given the majority's subsequent application of *N-A-M-*, this statement must be read as a finding of ambiguity.

While Judge Berzon's interpretation of the withholding provision is more convincing than that of the majority in *Delgado*, the provision is susceptible to competing interpretations. The grammatical and statutory structure favors Berzon's interpretation, yet, as the majority notes, the statute does not expressly state that the Attorney General is limited to aggravated felonies in determining particularly serious crimes; therefore, the statute raises two plausible interpretations.<sup>95</sup>

### C. Statutory Interpretation under the Chevron Doctrine

There is a tension inherent in the *Chevron* doctrine: To what extent may canons of construction be employed by the court to determine the clear intent of Congress? *Chevron* states that “[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at

91. See *Ali v. Achim*, 468 F.3d 462, 470 (7th Cir. 2006).

92. *Nethagani v. Mukasey*, 532 F.3d 150, 156 (2d Cir. 2008).

93. *Id.*

94. *Delgado v. Holder*, 563 F.3d 863, 867 (9th Cir. 2009) (“The question that naturally arises from this plain text is whether the last sentence is meant to limit the Attorney General to the universe of aggravated felonies described in the preceding sentence or, conversely, whether the last sentence simply preserves the Attorney General's authority to determine a crime to be particularly serious regardless of the penalty *or its designation or non-designation as an aggravated felony.*”).

95. *Id.* at 868.

issue, that intention is the law and must be given effect.”<sup>96</sup> Yet the Court declared that when legislative intent is ambiguous, “a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”<sup>97</sup> When reviewing an agency interpretation of a statute, there is a fine distinction between appropriate and inappropriate application of canons of construction.

Justice Scalia’s concurrence in *INS v. Cardoza-Fonseca* highlighted this tension. Scalia chided the majority for its “excessive” foray into the legislative history after having determined that the plain text and structure clearly demonstrated a particular meaning.<sup>98</sup> *Chevron* only condoned turning to legislative history, Scalia explained, if the statute had been found to be silent or ambiguous, and then only to confirm a decision that the agency’s interpretation had been reasonable.<sup>99</sup> Scalia criticized the majority for implying “that courts may substitute their interpretation of a statute for that of an agency whenever, ‘[e]mploying traditional tools of statutory construction,’ they are able to reach a conclusion as to the proper interpretation of the statute.”<sup>100</sup> Such an approach, Scalia said, was an “unjustifiable” misreading of *Chevron*.<sup>101</sup>

The proper use of tools of statutory construction in the *Chevron* context, then, is to determine, first, whether congressional intent clearly and unambiguously speaks to the issue.<sup>102</sup> In other words, the court should use canons of construction to determine as a threshold matter whether the statute is susceptible to competing interpretations—not which interpretation is correct. If the statute is susceptible to only one interpretation, “that is the end of the matter,” and the court and agency are controlled by that plain

---

96. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

97. *Id.* at 844. “If . . . the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute . . . .” *Id.* at 843.

98. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452–53 (1987) (Scalia, J., concurring).

99. *Id.*; see also *Chevron*, 467 U.S. at 845 (citing *United States v. Shimer*, 367 U.S. 374, 382, 383 (1961)); *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 233 (1986).

100. *Cardoza-Fonseca*, 480 U.S. at 454 (Scalia, J., concurring) (quoting majority opinion).

101. *Id.*

102. *Chevron*, 467 U.S. at 843–44.

meaning.<sup>103</sup> If the statute is ambiguous—that is, reasonably susceptible to more than one interpretation—the canons of construction should not be used to determine whether a particular interpretation is correct, but whether the agency’s interpretation is reasonable and thus entitled to deference. Only then should legislative history be used to verify a reasonable interpretation.<sup>104</sup> While it may seem like an interpretive nicety, it is critical for the court to approach the issue through the prism of determining clarity rather than correctness. This approach ensures that a court does not inappropriately “substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”<sup>105</sup>

The dissent in *Delgado* reached the correct interpretation of the *asylum* provisions, judging that the express language of the statute dictated the precise methods available for the Attorney General to designate non-aggravated felonies as particularly serious crimes. The dissent’s extensive analysis of the *withholding* provisions also presented the more convincing interpretation of the meaning of the statute, yet such an analysis was irrelevant. Given a proper understanding of the *Chevron* doctrine, the question of whether the BIA was correct in its interpretation of the statute is beside the point. The dissent got the threshold issue wrong, determining that the statute is clear when, in fact, it is ambiguous. It missed the mark because it focused its analysis on the correctness rather than the viability of the competing interpretations.<sup>106</sup> Furthermore, part of the persuasive value of the dissent’s interpretation lies in its analysis of

---

103. *Id.* at 842–43.

104. *See Cardoza-Fonseca*, 480 U.S. at 452–53 (Scalia, J., concurring).

105. *Chevron*, 467 U.S. at 844.

106. Judge Berzon suggests that the BIA’s interpretation in *N-A-M-* should not be given deference because the BIA believed its interpretation was compelled by Congress. *Delgado v. Holder*, 563 F.3d 863, 883 (9th Cir. 2009) (Berzon, J., concurring in part, dissenting in part) (citing *Peter Pan Bus Lines, Inc. v. Fed. Motor Carrier Safety Admin.*, 471 F.3d 1350, 1354 (D.C. Cir. 2006)). While the BIA did rest its decision upon “[a] plain reading of the Act,” its reliance on the legislative history, the agency’s “consistent practice,” and ultimately a policy determination that its interpretation was consistent with “the goal of protecting the public” reveals that it did not feel its decision was *compelled* by the text of the statute. *See In re N-A-M-*, 24 I. & N. Dec. 338, 341 (B.I.A. 2007). Yet even if the BIA mistakenly believed that its interpretation was compelled by the text, the appropriate response for the court would be to remand the proceedings for an agency reassessment of the ambiguous language as such, not for the court to impose its interpretation of the ambiguous language. *See Peter Pan Bus Lines*, 471 F.3d at 1354.

the legislative history—an analysis that should only be used to verify a *reasonable* interpretation of the language if the statute is ambiguous, not to ascertain the correct interpretation. In contrast, the majority first acknowledged, though somewhat obliquely, that the statute is susceptible to two interpretations and then appropriately proceeded to address not the correctness of the BIA's interpretation, but its reasonableness in light of traditional tools of statutory construction and the legislative history.<sup>107</sup>

Given the BIA's recent decision in *N-A-M-*, other circuits should reach the same result as *Delgado* if they properly apply the *Chevron* analysis when faced with the withholding issue. If reasonable susceptibility to competing interpretations is taken as the test for ambiguity, the practical implication is that *Chevron* deference will often be required whenever there is a genuine circuit split—a likely sign of ambiguity.<sup>108</sup> Thus, if an agency were to interpret an ambiguous issue in the midst of a circuit split, it would potentially obviate the need for resolution by the Supreme Court.

## VI. CONCLUSION

The Ninth Circuit majority in *Delgado* perpetuates a misinterpretation of the asylum provisions of the INA by declaring that the Attorney General is free to designate by adjudication non-aggravated felonies as particularly serious, despite the statute's plain language granting authority only to make such designations by regulation in this matter. Regarding withholding of removal, however, the majority appropriately applied the *Chevron* doctrine in limiting its construction of the statute to a determination of its clarity and the reasonableness of the BIA's interpretation. The dissent provides an example of a subtle, yet serious, misapplication of the *Chevron* doctrine by inappropriately using canons of construction and legislative history to determine the correct reading of the statute rather than determine whether the statute is susceptible to multiple interpretations. In so doing, it reaches a cursory—and mistaken—conclusion as to the ambiguity of the statute and whether the BIA's interpretation in *N-A-M-* should be accorded deference. In light of

---

107. *Delgado*, 563 F.3d at 867–68.

108. It is possible, of course, that one or more courts of appeal could patently misinterpret a clear statute.

*N-A-M-*, therefore, a correct application of *Chevron* offers a chance to resolve the circuit split regarding the withholding exception.

*William M. Hains\**

---

\* J.D. candidate, April 2011, J. Reuben Clark Law School, Brigham Young University. The author would like to thank Professor Carolina Nuñez for reading a draft and providing helpful guidance and also the staff of the BYU Law Review for their excellent editorial assistance. The author would also like to thank his wife for her support and encouragement.