FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HECTOR MONTERO-MARTINEZ;
GREGORIO PEDRO MONTERO-
HERNANDEZ,
Petitioners,

No. 99-70596

COUNSEL

Nicholas Marchi, Carney & Marchi, P.S., Seattle, Washington, for the Petitioners.

David W. Ogden, Acting Assistant Attorney General, Karen Fletcher Torstenson, Assistant Director, and Robbin K. Blaya,

not have a qualifying relative under § 1229b(b)(1)(D). Although Montero-Hernandez had an adult daughter who was a lawful permanent resident, he acknowledged that she was too old to qualify as a child under the INS regulations.

The IJ found Petitioners statutorily ineligible for cancellation of removal and allowed them to voluntarily depart within

60 days. Petitioners appealed to the BIA arguing that they were entitled to cancellation of removal. The BIA found them statutorily ineligible on the same grounds as did the IJ--because neither had a qualifying relative for the purposes of § 1229b(b)(1)(D).

Petitioners now ask this Court to review the BIA's decision. They argue in their petition that the BIA and IJ erred in of § 1229b(b)(1he BIition that tid the

Curiae in this case.

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a "child" under § 1229b(b)(1)(D) because such a determination is not a discretionary decision but a "pure question of

order to reach the merits of the appeal. In re Grand Jury Subpoena Issued to Bailin, 51 F.3d 203, 206 (9th Cir. 1995). We only do so if: (1) the jurisdictional question is difficult; (2) the merits of the appeal are insubstantial; (3) the appeal will be resolved againstiparty asserting the jurisdic; e Gr(4)l be reing nsticase estach the meraeripposIssueddismissing forl be

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that's not what the statute says. Instead, § 242(a)(2)(B)(i) eliminates our jurisdiction over "judgment[s] regarding the granting of [the enumerated forms of] relief. " Why did Congress use the word "judgment" in this provision? It turns out that Congress uses the word "determination" or"decision" in almost every single other jurisdiction-limiting provision in the

went into effect, an alien could accrue time towards this continuous physi-

United States. See INA § 240B(b), 8 U.S.C. § 1229c(b). Only the "good moral character" requirement calls for the IJ to exercise discretion, and even a good moral character determination can be non-discretionary because the INA lists categories of individuals who are per se ineligible for a good moral character determination. See INA § 101(f), 8 U.S.C.

legal standards, and often require an IJ or the BIA to engage in statutory interpretation. The majority casually surrenders our jurisdiction over these purely legal issues that arise when an IJ or the BIA make eligibility determinations -- even though the statute does not clearly divest our jurisdiction.

Appellate courts should guard every scrap of jurisdiction not clearly divested by Congress, particularly in immigration law, where the consequence of a mistake below is deportation.[6] See Lenni B. Benson, The New World of Judicial Review of Removal Orders, 12 Geo. Immigr. L.J. 233, 233 (1998) ("The ability of Congress to insulate administrative decisions from

on the political process for protection." Id.

question realization

construing . . . ambiguities in deportation statutes in favor of the alien").

With these principles in mind, I turn to the language of § 242(a)(2)(B)(i). The majority asserts that this provision, "by its plain terms, appears to encompass all decisions regarding cancellation of removal, including determinations of statutory eligibility." It is well established that if the"language at issue has a plain and unambiguous meaning . . . . [o]ur inquiry must cease . . . ." Robinson v. Shell Oil Co.

alien, having been convicted by a final

states in her decision that the alien has met every other discretionary and non-discretionary statutory requirement for both cancellation of removal and for a § 237(a)(1)(H) waiver, and that she would, in her discretion, grant the alien both forms

tion still remains: if Congress wanted to eliminate review over
only discretionary decisions by the BIA, why did it divide
§ 242(a)(2)(B) into two subsections? Unfortunately, neither
the statutory language nor the legislative history **11** helps us
answer this question. Thus, like the majority, I am unsure why
Congress created two subsections in § 242(a)(2)(B). I can,

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11 **See infra** for a discussion of the legislative history behind
§ 242(a)(2)(B).

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however, think of an alternative explanation for the presence
of § 242(a)(2)(B)(ii) that is at least as convincing as the
majority's bifurcated-judicial-review explanation: subsection
(ii) might be a catch-all provision, meant to encompass any

certain circumstances of a person who has a disease of public health sig-
nificance or fails to obtain vaccination or has a physical or mental disorder

§ 208(b)(2)(D), 8 U.S.C. § 1158(b)(2)(D) ("There shall be no judicial review of a determination of the Attorney General under subparagraph (A)(v).") (emphasis added). Why would Congress use the word "determination" in all of these other contexts to refer to a decision of the Attorney General, but use the word "judgment" only

To summarize: The meaning of "judgment" in
§ 242(a)(2)(B)(i) is unclear because the statute does not