

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT



3
4 August Term 2004

5 (Argued October 8, 2004

Decided August 8, 2005)

6 Docket Nos. 03-4395 (L), 03-40027 (CON), 03-40497 (CON)

7
8 -----x
9 JOSE NAPOLEON MARQUEZ-ALMANZAR,

10
11 Petitioner,

12
13 -- v. --

14
15 IMMIGRATION AND NATURALIZATION SERVICE,

16
17 Respondent.

18
19 -----x
20
21 B e f o r e : WALKER, Chief Judge, MINER and CABRANES, Circuit
22 Judges.

23 Petition for review of an order of the Board of Immigration
24 Appeals. Marquez-Almanzar claims that he cannot be removed from
25 the United States because he qualifies as a U.S. national under
26 section 101(a)(22)(B) of the Immigration and Nationality Act, 8
27 U.S.C. § 1101(a)(22)(B).

28
29 **DENIED.**

30
31 PETER MARKOWITZ, The Bronx
32 Defenders, Bronx, NY, for
33 Petitioner.

1 PATRICIA BUCHANAN, Assistant
2 United States Attorney (David
3 N. Kelley, United States
4 Attorney for the Southern
5 District of New York; Megan L.
6 Brackney and Meredith E.
7 Kotler, Assistant United
8 States Attorneys, on the
9 brief), New York, NY, for
10 Respondent.
11
12

13 JOHN M. WALKER, JR., Chief Judge:

14 This case was transferred to our court by an order of the
15 United States District Court for the Southern District of New
16 York (Gerard E. Lynch, Judge), which found, pursuant to 8 U.S.C.
17 § 1252(b)(5), that the district court lacked jurisdiction over
18 the nationality claim made in Jose Napoleon Marquez-Almanzar's §
19 2241 habeas corpus petition. As we explain below, resolution of
20 the complex procedural and jurisdictional questions originally
21 presented by the case is no longer necessary in light of the
22 enactment, on May 11, 2005, of the REAL ID Act of 2005, Pub. L.
23 No. 109-13, 119 Stat. 231. The REAL ID Act eliminates habeas
24 corpus review of orders of removal and requires that any § 2241
25 petition pending in the district court at the time of its
26 enactment be transferred to the court of appeals in which the
27 petition could have been properly brought as a petition for
28 review from a final order of removal under 8 U.S.C. § 1252. We
29 thus construe Marquez-Almanzar's case as a petition for review
30 from the January 31, 2003, order of the Board of Immigration

1 Appeals ("BIA") and reach the merits of Marquez-Almanzar's claim
2 without considering the district court's jurisdictional ruling.¹

3 Marquez-Almanzar seeks to avoid removal by arguing that he
4 can demonstrate that he owes "permanent allegiance" to the United
5 States and thus qualify as a U.S. national under section
6 101(a)(22)(B) of the Immigration and Nationality Act ("INA"), 8
7 U.S.C. § 1101(a)(22)(B). That provision defines "national of the
8 United States" as "a person who, though not a citizen of the
9 United States, owes permanent allegiance to the United States."
10 We hold that § 1101(a)(22)(B) itself does not provide a means by
11 which an individual can become a U.S. national, and deny Marquez-
12 Almanzar's petition accordingly.

13 14 BACKGROUND

15 In April 1976, Marquez-Almanzar, a native of the Dominican
16 Republic, was admitted to the United States as a lawful permanent
17 resident. In November 1984, he voluntarily enlisted in the U.S.
18 Army. Marquez-Almanzar served from 1985 to 1993, for three years
19 as a regular and for five years as a reservist. While in the

1 ¹ We also have before us, consolidated with the transferred
2 case, Marquez-Almanzar's petition for direct review of the BIA's
3 January 31, 2003, order, which dismissed, for lack of
4 jurisdiction, a motion Marquez-Almanzar filed with the BIA
5 seeking termination of removal proceedings on the grounds that he
6 is a U.S. national. Because we construe Marquez-Almanzar's
7 transferred habeas petition as a petition for review from this
8 same order, the two petitions effectively merge for purposes of
9 our disposition of the case.

1 Army, he submitted an application for U.S. citizenship, but the
2 application apparently was never processed.² Several years after
3 finishing his military service, in May 1998, Marquez-Almanzar was
4 convicted in New York state court of possessing and attempting to
5 sell cocaine, for which he was sentenced to three concurrent
6 terms of imprisonment, the longest of which was a term of seven
7 years to life. In May 1999, the Immigration and Naturalization
8 Service ("INS") served Marquez-Almanzar with a Notice to Appear,
9 charging that he was subject to removal from the United States
10 both because he was an alien who had been convicted of a
11 controlled-substance offense, see 8 U.S.C. § 1227(a)(2)(B)(i),
12 and because he was an alien who had been convicted of an
13 "aggravated felony," as that term is defined in 8 U.S.C. §
14 1101(a)(43), see 8 U.S.C. § 1227(a)(2)(A)(iii). In December
15 1999, hearings commenced in immigration court, at which Marquez-
16 Almanzar was represented by an Accredited Immigration
17 Representative. In his defense, Marquez-Almanzar claimed that
18 the convictions that provided the basis for his removal were
19 still pending on direct appeal. On December 16, 1999, the
20 immigration judge ("IJ") agreed to suspend removal proceedings in
21 order to determine whether this claim was true.

1 ² There is no record of this application having been filed
2 or adjudicated. Marquez-Almanzar asserts that "due to a clerical
3 error on the part of United States government personnel," the
4 application was never processed, but offers no evidence
5 supporting this claim.

1 While the proceedings were suspended, in January 2000,
2 Marquez-Almanzar applied to the INS for naturalization,
3 indicating on his application form that he qualified for
4 citizenship based on his service in the U.S. Army. On June 19,
5 2000, when Marquez-Almanzar's removal hearings resumed, the IJ
6 determined that Marquez-Almanzar's convictions were not pending
7 on appeal. Marquez-Almanzar then asked that removal proceedings
8 be terminated pursuant to former 8 C.F.R. § 239.2(f) (2000),³
9 stating that he had applied for naturalization and claiming that
10 he could demonstrate prima facie eligibility for citizenship.
11 The IJ held that Marquez-Almanzar was not prima facie eligible
12 because his drug convictions precluded him from showing the "good
13 moral character" required for naturalization, and, further,
14 because there were no "unusual or compelling humanitarian
15 reasons" to terminate the proceedings under 8 C.F.R. § 239.2(f).
16 The IJ then ordered Marquez-Almanzar removed to the Dominican
17 Republic.

1 ³ The regulation, which was repealed in 2003, provided as
2 follows:
3

4 An immigration judge may terminate removal proceedings to
5 permit the alien to proceed to a final hearing on a pending
6 application or petition for naturalization when the alien
7 has established prima facie eligibility for naturalization
8 and the matter involves exceptionally appealing or
9 humanitarian factors; in every other case, the removal
10 hearing shall be completed as promptly as possible
11 notwithstanding the pendency of an application for
12 naturalization during any state of the proceedings.

1 On July 3, 2000, Marquez-Almanzar appealed the IJ's decision
2 to the BIA, arguing that the IJ erred in finding him prima facie
3 ineligible for naturalization. On July 7, 2000, the BIA rejected
4 his appeal on the grounds that he had failed to attach proof of
5 service. Marquez-Almanzar resubmitted his papers on July 27,
6 2000, only to have the BIA, on October 18, 2000, dismiss his
7 appeal as untimely. He thereafter filed numerous motions for
8 reconsideration, all of which were rejected on procedural
9 grounds.

10 On December 20, 2001, Marquez-Almanzar filed a pro se habeas
11 corpus petition in the United States District Court for the
12 Southern District of New York, claiming for the first time that
13 he was a national of the United States, not an alien, and thus
14 could not be removed. The district court appointed counsel to
15 represent Marquez-Almanzar, and, upon receiving a joint
16 "Stipulation and Order of Settlement and Withdrawal" from
17 Marquez-Almanzar and the government, allowed Marquez-Almanzar to
18 withdraw his habeas petition without prejudice, vacated all of
19 the BIA's previous orders, and remanded the case to the BIA for
20 consideration on the merits of the claim of U.S. nationality
21 raised in Marquez-Almanzar's habeas petition. See Marquez v.
22 INS, No. 02 Civ. 311 (S.D.N.Y. Nov. 1, 2002).

23 Following the district court's order, Marquez-Almanzar
24 submitted to the BIA a "motion to terminate" removal proceedings,

1 arguing that his service in the Army, efforts to acquire U.S.
2 citizenship, and other evidence, demonstrated that he "owed
3 permanent allegiance" to the United States, and was thus a
4 national of the United States as defined by 8 U.S.C. §
5 1101(a)(22)(B). On January 31, 2003, the BIA rejected Marquez-
6 Almanzar's submission, construing it as a motion to reopen, and
7 finding that since its October 18, 2000, order had dismissed
8 Marquez-Almanzar's appeal of the IJ's order of removal as
9 untimely, jurisdiction over a motion to reopen still lay with the
10 IJ. The BIA's order did not address the fact that the district
11 court's remand order had purported to vacate the BIA's October
12 18, 2000, order, or otherwise refer to the district court's
13 remand.

14 On February 21, 2003, Marquez-Almanzar petitioned our court
15 for review of the BIA's January 31, 2003, order, characterizing
16 it as a "final order of removal." Additionally, on March 9,
17 2003, Marquez-Almanzar filed a new habeas corpus petition in the
18 district court pursuant to 28 U.S.C. § 2241, asserting that he
19 could not be removed from the United States, because (1) he was a
20 U.S. national and (2) the IJ had erroneously found that he was
21 not prima facie eligible for naturalization as a U.S. citizen
22 based on his aggravated felony conviction. On May 28, 2003, the
23 district court held that, under 8 U.S.C. § 1252(b)(5), only the
24 court of appeals could hear Marquez-Almanzar's nationality claim,

1 and that the district court therefore did have not jurisdiction
2 to entertain this claim as part of a § 2241 petition. The
3 district court accordingly purported to "dismiss" Marquez-
4 Almanzar's petition, and transferred it to our court under 28
5 U.S.C. § 1631. See Marquez-Almanzar v. Ashcroft, No. 03 Civ.
6 1601, 2003 U.S. Dist. LEXIS 9272, at *19-*20 (S.D.N.Y. June 3,
7 2003). Marquez-Almanzar appealed.

8 We subsequently consolidated: 1) the case as it was
9 transferred to us by the district court; 2) Marquez-Almanzar's
10 appeal from the district court's decision dismissing his § 2241
11 petition; and 3) Marquez-Almanzar's petition for review of the
12 January 31, 2003, BIA order.

13 14 DISCUSSION

15 I. Nationality Claim

16 A. Jurisdiction

17 The district court transferred Marquez-Almanzar's § 2241
18 petition to our court on the theory that 8 U.S.C. § 1252(b)(5)⁴

1 ⁴ The statute provides as follows:
2

3 (5) Treatment of nationality claims

4 (A) Court determination if no issue of fact.

5 If the petitioner claims to be a national of the
6 United States and the court of appeals finds from the
7 pleadings and affidavits that no genuine issue of
8 material fact about the petitioner's nationality is
9 presented, the court shall decide the nationality
10 claim.

11 (B) Transfer if issue of fact

1 bars district courts from adjudicating in the first instance
2 claims of U.S. nationality, when raised as a defense to removal.
3 The court found that § 1252(b)(5) "on its face, appears to
4 provide that nationality claims shall be presented to the Court
5 of Appeals in the first instance, and transferred to the District
6 Court only if the Court of Appeals determines that the petition
7 involves genuine issues of material fact." Marquez-Almanzar,
8 2003 U.S. Dist. LEXIS 9272, at *7.

9 Marquez-Almanzar argues that the district court erred in
10 light of the Supreme Court's decision in INS v. St. Cyr, 533 U.S.
11 289 (2001), and our own decisions in Liu v. INS, 293 F.3d 36 (2d
12 Cir. 2002), and Wang v. Ashcroft, 320 F.3d 130 (2d Cir. 2003).
13 In his view, these cases establish that habeas corpus review
14 remains available unless Congress has explicitly abrogated such
15 review by referring to "habeas corpus" or "§ 2241" in the statute
16 said to eliminate it. Neither § 1252(b)(5), nor any other part
17 of § 1252, contained such a reference at the time Marquez-

1 If the petitioner claims to be a national of the
2 United States and the court of appeals finds that a
3 genuine issue of material fact about the petitioner's
4 nationality is presented, the court shall transfer the
5 proceeding to the district court of the United States
6 for the judicial district in which the petitioner
7 resides for a new hearing on the nationality claim and
8 a decision on that claim as if an action had been
9 brought in the district court under section 2201 of
10 Title 28.

11 (C) Limitation on determination

12 The petitioner may have such nationality claim
13 decided only as provided in this paragraph.

1 Almanzar brought his habeas petition in the district court. The
2 government argues, following the reasoning of the district court,
3 that the clear-statement rule in St. Cyr applies only where
4 abrogating habeas would leave a petitioner with no other means of
5 review under the statutory scheme. Because § 1252(b)(5) provides
6 for review of nationality claims in the court of appeals, the
7 government contends, we should interpret the statute as
8 foreclosing § 2241 review in the district court.

9 This question was of considerably greater significance when
10 we heard argument than it is now, as we issue our decision. That
11 is because on May 11, 2005, the REAL ID Act of 2005, Pub. L. No.
12 109-13, 119 Stat. 231, became law. Section 106(a)(1)(B) of the
13 Act, 8 U.S.C. § 1252(a)(5),⁵ unequivocally eliminates habeas
14 corpus review of orders of removal, with a limited exception not
15 relevant here. Section 106(b) makes this provision effective
16 immediately and applicable to cases, like Marquez-Almanzar's, "in
17 which the final administrative order of removal, deportation, or

1 ⁵ The amended statute provides as follows:
2
3

4 Notwithstanding any other provision of law (statutory
5 or nonstatutory), including section 2241 of Title 28, or any
6 other habeas corpus provision . . . a petition for review
7 filed with an appropriate court of appeals in accordance
8 with this section shall be the sole and exclusive means for
9 judicial review of an order of removal entered or issued
10 under any provision of this chapter For purposes of
11 this chapter, in every provision that limits or eliminates
12 judicial review or jurisdiction to review, the terms
13 "judicial review" and "jurisdiction to review" include
14 habeas corpus review pursuant to section 2241 of Title 28,
or any other habeas corpus provision

1 exclusion was issued before, on, or after” the date of enactment.
2 Section 106(c) requires that any case pending in district court
3 on the date of enactment that was brought challenging an order of
4 removal under the general habeas statute, 28 U.S.C. § 2241, be
5 transferred to the court of appeals for the circuit “in which a
6 petition for review could have been properly filed.” The court
7 of appeals is to “treat the transferred case as if it had been
8 filed pursuant to a petition for review” under 8 U.S.C. § 1252,
9 except that the thirty-day deadline ordinarily imposed on such
10 petitions by 8 U.S.C. § 1252(b)(1) does not apply. REAL ID Act §
11 106(c).

12 Marquez-Almanzar’s argument that § 1252 does not contain a
13 clear statement abrogating § 2241 relief has thus been answered
14 by the new provisions added to § 1252 by the REAL ID Act.
15 Moreover, even if we were to determine that the district court,
16 at the time of its decision, erred in transferring Marquez-
17 Almanzar’s habeas petition to our court, it would be pointless to
18 remand this case to the district court, as the district court
19 would be obliged by section 106(c) of the Act to transfer the
20 case back to us for resolution on the merits.⁶ We thus decline
21 to decide the primary jurisdictional question presented by this

1 ⁶ Because Marquez-Almanzar’s removal proceedings were
2 completed in New York, a petition for review would have been
3 properly filed in our court. See 8 U.S.C. § 1252(b)(2) (“The
4 petition for review shall be filed with the court of appeals for
5 the judicial circuit in which the immigration judge completed the
6 [removal] proceedings.”).

1 case, as our jurisdiction no longer depends upon its resolution,
2 and as any answer in this regard would have little, if any,
3 relevance to future litigation, given the REAL ID Act's
4 elimination of § 2241 relief as a means to review orders of
5 removal.⁷

6 Accordingly, we treat Marquez-Almanzar's transferred § 2241
7 petition as a petition for review filed under 8 U.S.C. §
8 1252(b)(5), and proceed to the merits. Cf. Langhorne v.
9 Ashcroft, 377 F.3d 175, 177 (2d Cir. 2004).

10 B. Merits

11 Marquez-Almanzar argues that he is not an alien and thus
12 cannot be removed from the United States for his crimes. See 8
13 U.S.C. § 1227(a)(2)(B)(i) (any "alien" convicted of controlled
14 substance offense after admission to United States is
15 deportable); 8 U.S.C. § 1227(a)(2)(A)(iii) (any "alien" convicted
16 of aggravated felony after admission to United States is
17 deportable). The term "alien" is defined in this context as "any

1 ⁷ Because we find, below, that Marquez-Almanzar's
2 nationality claim is not meritorious, we assume for present
3 purposes that his petition was properly exhausted (a fact not
4 contested by the parties) and that the BIA's January 31 order was
5 a final order of removal that we can review on the merits. The
6 jurisdictional prerequisites to our consideration of the merits
7 in this case are imposed by statute, not the Constitution, and
8 thus are not a bar to our assumption of "hypothetical
9 jurisdiction" where, as here, the jurisdictional issues are
10 complex and the substance of the claim is plainly without merit.
11 See Abimbola v. Ashcroft, 378 F.3d 173, 180 (2d Cir. 2004); Fama
12 v. Comm'r of Corr. Servs., 235 F.3d 804, 816 n.11 (2d Cir. 2000);
13 see also Restoration Pres. Masonry, Inc. v. Grove Europe Ltd.,
14 325 F.3d 54, 59-60 (1st Cir. 2003) (citing cases).

1 person not a citizen or national of the United States." 8 U.S.C.
2 § 1101(a) (3). Marquez-Almanzar acknowledges that he is not a
3 U.S. citizen, but he claims to be a national of the United
4 States. The term "national of the United States" means either "a
5 citizen of the United States" or "a person who, though not a
6 citizen of the United States, owes permanent allegiance to the
7 United States." 8 U.S.C. §§ 1101(a) (22) (A) & (B).

8 Marquez-Almanzar claims that, although he is not a citizen,
9 he "owes permanent allegiance to the United States," and thus has
10 acquired U.S. nationality under 8 U.S.C. § 1101(a) (22) (B). The
11 statute, as he reads it, creates an independent avenue to U.S.
12 national status: one can become a U.S. national without
13 citizenship (i.e., a "non-citizen national") solely by
14 manifesting permanent allegiance to the United States. He
15 asserts that his enrollment and service in the U.S. Army (which
16 required that he swear allegiance to the U.S. Constitution, his
17 application for naturalization (which required that he swear he
18 was willing to take an oath of allegiance to the United States),
19 his registration for the Selective Service, his "complete
20 immersion in American Society," and his lack of ties to the
21 Dominican Republic together demonstrate that he owes permanent
22 allegiance to the United States.⁸

1 ⁸ Marquez-Almanzar bolsters his construction of §
2 1101(a) (22) (B) by reference to international law, which, he
3 argues, "determines nationality by examining the habitual
4 residence, family ties, attachments, and participation in public

1 We have previously indicated that Marquez-Almanzar's
2 construction of § 1101(a)(22)(B) is erroneous, but have not
3 addressed the issue at length. In Oliver v. INS, 517 F.2d 426,
4 427 (2d Cir. 1976) (per curiam), the petitioner, as a defense to
5 deportation, argued that she qualified as a U.S. national under §
6 1101(a)(22)(B) because she had resided exclusively in the United
7 States for twenty years, and thus "'owe[d] allegiance'" to the
8 United States. Without extensively analyzing the statute, we
9 found that the petitioner could not be "a 'national' as that term
10 is understood in our law." Id. We pointed out that the
11 petitioner still owed allegiance to Canada (her country of birth
12 and citizenship) because she had not taken the U.S.
13 naturalization oath, to "'renounce and abjure absolutely and
14 entirely all allegiance and fidelity to any [foreign state of] .
15 . . which the petitioner was before a subject or citizen.'" Id.
16 at 428 (quoting INA § 337(a)(2), 8 U.S.C. § 1448(a)(2)). In
17 making this observation, we did not suggest that the petitioner
18 in Oliver could have qualified as a U.S. national by
19 affirmatively renouncing her allegiance to Canada or otherwise
20 swearing "permanent allegiance" to the United States. In fact,

1 life of the individual," and "disfavors a definition of national
2 that would render individuals stateless." He contends that under
3 Dominican law an individual loses citizenship if he serves in a
4 foreign army, and that his service in the U.S. Army thus stripped
5 him of Dominican citizenship. The government disputes this
6 characterization of Dominican law. Because the issue is
7 immaterial to our disposition of this case, we do not decide it.
8

1 in the following sentence we said that Title III, Chapter 1 of
2 the INA⁹ “indicates that, with a few exceptions not here
3 pertinent, one can satisfy [8 U.S.C. § 1101(a)(22)(B)] only at
4 birth; thereafter the road lies through naturalization, which
5 leads to becoming a citizen and not merely a ‘national.’”¹⁰ Id.
6 at 428.

7 Our conclusion in Oliver, which we now reaffirm, is
8 consistent with the clear meaning of 8 U.S.C. § 1101(a)(22)(B),
9 read in the context of the general statutory scheme. The
10 provision is a subsection of 8 U.S.C. § 1101(a). Section 1101(a)
11 defines various terms as they are used in our immigration and
12 nationality laws, U.S. Code tit. 8, ch. 12, codified at 8 U.S.C.
13 §§ 1101-1537. The subsection’s placement indicates that it was
14 designed to describe the attributes of a person who has already
15 been deemed a non-citizen national elsewhere in Chapter 12 of the
16 U.S. Code, rather than to establish a means by which one may
17 obtain that status. For example, 8 U.S.C. § 1408, the only
18 statute in Chapter 12 expressly conferring “non-citizen national”
19 status on anyone, describes four categories of persons who are
20 “nationals, but not citizens, of the United States at birth.”

1 ⁹ Chapter 1, codified at 8 U.S.C. §§ 1401-09, is entitled
2 “Nationality at Birth and Collective Naturalization.”

1 ¹⁰ The “exceptions” alluded to were presumably those
2 explicitly described in INA Title III, Chapter 1. See, e.g., 8
3 U.S.C. § 1407(a)(1) (granting citizenship to certain residents of
4 Guam as of a particular date).

1 All of these categories concern persons who were either born in
2 an "outlying possession" of the United States, see 8 U.S.C. §
3 1408(1), or "found" in an "outlying possession" at a young age,
4 see id. § 1408(3), or who are the children of non-citizen
5 nationals, see id. §§ 1408(2)&(4).¹¹ Thus, § 1408 establishes a
6 category of persons who qualify as non-citizen nationals; those
7 who qualify, in turn, are described by § 1101(a)(22)(B) as owing
8 "permanent allegiance" to the United States. In this context the
9 term "permanent allegiance" merely describes the nature of the
10 relationship between non-citizen nationals and the United States,
11 a relationship that has already been created by another statutory
12 provision. See Barber v. Gonzales, 347 U.S. 637, 639 (1954) ("It
13 is conceded that respondent was born a national of the United
14 States; that as such he owed permanent allegiance to the United
15 States"); cf. Philippines Independence Act of 1934, §
16 2(a)(1), Pub. L. No. 73-127, 48 Stat. 456 (requiring the
17 Philippines to establish a constitution providing that "pending
18 the final and complete withdrawal of the sovereignty of the
19 United States[,] [a]ll citizens of the Philippine Islands
20 shall owe allegiance to the United States").

21 Other parts of Chapter 12 indicate, as well, that §
22 1101(a)(22)(B) describes, rather than confers, U.S. nationality.
23 The provision immediately following § 1101(a)(22) defines

1 ¹¹ The "outlying possessions of the United States" are
2 American Samoa and Swains Island. See 8 U.S.C. § 1101(a)(29).

1 "naturalization" as "the conferring of nationality of a state
2 upon a person after birth, by any means whatsoever." 8 U.S.C. §
3 1101(a)(23). If Marquez-Almanzar were correct, therefore, one
4 would expect to find "naturalization by a demonstration of
5 permanent allegiance" in that part of the U.S. Code entitled
6 "Nationality Through Naturalization," see INA tit. 8, ch. 12,
7 subch. III, pt. II, codified at 8 U.S.C. §§ 1421-58. Yet nowhere
8 in this elaborate set of naturalization requirements (which
9 contemplate the filing by the petitioner, and adjudication by the
10 Attorney General, of an application for naturalization, see,
11 e.g., 8 U.S.C. §§ 1427, 1429), did Congress even remotely
12 indicate that a demonstration of "permanent allegiance" alone
13 would allow, much less require, the Attorney General to confer
14 U.S. national status on an individual.

15 Finally, the interpretation of the statute underlying our
16 decision in Oliver comports with the historical meaning of the
17 term "national" as it is used in Chapter 12. The term (which as
18 §§ 1101(a)(22)(B) and 1408 indicate, includes, but is broader
19 than, "citizen") was originally intended to account for the
20 inhabitants of certain territories- territories said to "belong
21 to the United States," including the territories acquired from
22 Spain during the Spanish-American War, namely the Philippines,
23 Guam, and Puerto Rico- in the early twentieth century, who were
24 not granted U.S. citizenship, yet were deemed to owe "permanent

1 allegiance" to the United States and recognized as members of the
2 national community in a way that distinguished them from aliens.
3 See 7 Charles Gordon et al., Immigration Law and Procedure, §
4 91.01[3][b] (2005); see also Rabang v. Boyd, 353 U.S. 427, 429-30
5 (1957) ("The Filipinos, as nationals, owed an obligation of
6 permanent allegiance to this country. . . . In the [Philippine
7 Independence Act of 1934], the Congress granted full and complete
8 independence to [the Philippines], and necessarily severed the
9 obligation of permanent allegiance owed by Filipinos who were
10 nationals of the United States."). The term "non-citizen
11 national" developed within a specific historical context and
12 denotes a particular legal status. The phrase "owes permanent
13 allegiance" in § 1101(a)(22)(B) is thus a term of art that
14 denotes a legal status for which individuals have never been able
15 to qualify by demonstrating permanent allegiance, as that phrase
16 is colloquially understood.¹²

1 ¹² In the early years of the twentieth century, the
2 distinction between citizens and noncitizen nationals
3 was an important one. Many of our insular possessions
4 were not regarded as fully incorporated into the United
5 States, and their inhabitants were not accorded full
6 rights of citizenship. With the grant of independence
7 to the Philippines, and the gradual extension of
8 citizenship rights to the indigenous inhabitants of
9 other insular possessions, the distinction between
10 citizenship and noncitizen nationality has become less
11 significant.
12

13 7 Gordon et al., Immigration Law and Procedure, § 91.01[3][b]
14 (internal footnote omitted); see also Oliver, 517 F.2d at 428 n.3
15 (quoting earlier version of the same treatise). The people of

1 We hold, therefore, that one cannot qualify as a U.S.
2 national under 8 U.S.C. § 1101(a)(22)(B) by a manifestation of
3 "permanent allegiance" to the United States. As we said in
4 Oliver, the road to U.S. nationality runs through provisions
5 detailed elsewhere in the Code, see 8 U.S.C. §§ 1401-58, and
6 those provisions indicate that the only "non-citizen nationals"
7 currently recognized by our law are persons deemed to be so under
8 8 U.S.C. § 1408. Our holding is consistent with the BIA's own
9 interpretation of the statute, see In re Navas-Acosta, Interim
10 Dec. (BIA) 3489, 23 I. & N. Dec. 586, 2003 WL 1986475 (BIA 2003),
11 and the decisions of other circuits, see Sebastian-Soler v. U.S.
12 Att'y Gen., 409 F.3d 1280, 1285 (11th Cir. 2005); United States
13 v. Jimenez-Alcala, 353 F.3d 858, 861-62 (10th Cir. 2003);
14 Perdomo-Padilla v. Ashcroft, 333 F.3d 964, 966-67 (9th Cir.
15 2003), cert. denied 540 U.S. 1104 (2004). To the extent that
16 United States v. Morin, 80 F.3d 124 (4th Cir. 1996) applies in
17 this context, we disagree with the reasoning of that court.¹³

1 Puerto Rico were collectively nationalized by the Jones Act of
2 1917, ch. 145, § 5, 39 Stat. 951 (1917) (current version codified
3 at 8 U.S.C. § 1402). The people of Guam became citizens of the
4 United States by virtue of the Organic Act of Guam, ch. 512, § 4,
5 64 Stat. 384 (1950) (current version codified at 8 U.S.C. §
6 1407).

1 ¹³ In Morin, the Fourth Circuit considered the meaning of §
2 1101(a)(22)(B) in deciding whether the defendant's plan to murder
3 an individual residing outside the United States violated the
4 federal murder-for-hire statute (federal law prohibits the murder
5 of "a national of the United States, while such national is
6 outside the United States," 18 U.S.C. § 2332(a)). The court
7 found that the intended victim was indeed a U.S. national under §

1
2 It follows from our holding that Marquez-Almanzar is not a
3 U.S. national, but rather an alien subject to removal under 8
4 U.S.C. §§ 1227(a)(2)(A)(iii) and (B)(i).
5

6 II. Claim of Prima Facie Eligibility for Citizenship

7 Marquez-Almanzar asks, in the alternative, that we remand
8 his case for consideration of whether he has established prima
9 facie eligibility for U.S. citizenship. While his brief does not
10 explain why such a showing would entitle him to relief, we assume
11 his claim is that the IJ erred in refusing to terminate removal
12 proceedings under former 8 C.F.R. § 239.2(f). As we have noted,
13 see supra, during his removal proceedings Marquez-Almanzar had an
14 application pending for naturalization under INA § 329, 8 U.S.C.
15 § 1440, which relaxes naturalization requirements for those who
16 have served in the U.S. military on active-duty status during
17 wartime. Marquez-Almanzar argues that the IJ erred when it found
18 that because he had been convicted of an "aggravated felony," as
19 defined by 8 U.S.C. § 1101(a)(43), he was barred by 8 U.S.C. §
20 1101(f)(8) from demonstrating the good moral character requisite
21 to naturalization under § 1440.

1 1101(a)(22), as he had demonstrated "permanent allegiance" by
2 obtaining permanent residence status and applying for U.S.
3 citizenship. See Morin, 80 F.3d at 126. The court provided
4 little reasoning for its conclusion and did not address the issue
5 at length.

1 We recently rejected the same argument in Boatswain v.
2 Gonzales, ___ F.3d ___, 2005 WL 1532319 (2d Cir. June 30, 2005),
3 in which we held that the aggravated felony bar in § 1101(f)(8)
4 applies to applicants for naturalization under § 1440 based on
5 prior wartime military service. Applying Boatswain to this case,
6 we conclude that the IJ's ruling was correct.

7 _____

8 CONCLUSION

9 _____For the foregoing reasons, the petition for review is
10 DENIED.