

CASE NOS. 10-73215, 11-71124

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

SAMA ABDIAZIZ ABDISALAN,

PETITIONER,

V.

ERIC H. HOLDER, JR., UNITED STATES ATTORNEY GENERAL,

RESPONDENT.

ON PETITION FOR REVIEW FROM THE BOARD OF IMMIGRATION APPEALS

**BRIEF OF AMICUS CURIAE AMERICAN IMMIGRATION LAWYERS
ASSOCIATION IN SUPPORT OF PETITIONER'S PETITION FOR PANEL
REHEARING AND SUGGESTION FOR REHEARING EN BANC**

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INTRODUCTION AND STATEMENT OF INTEREST

Final orders of removal from the United States carry profound, life-altering consequences. They can disrupt family relationships and community ties for many years, sometimes forever. They can compel the return of people to countries they barely know, or where persecution, torture or death is feared. For these reasons and many more, Congress long has provided for judicial review of final orders of removal. Currently, judicial review provisions are set forth in the Immigration and Nationality Act (“INA” or “the Act”) at 8 U.S.C. § 1252.

But what is a “final order of removal” for purposes of judicial review under the Act, and specifically, when is a removal order “final”? In the present case, these questions are presented in the context of a denial of asylum by the Board of Immigration Appeals (“BIA” or “the Board”), accompanied by a remand of the proceedings to the immigration court for background checks to support a grant of withholding of removal. *Abdisalan v. Holder*, 728 F.3d 1122, 1123 - 1124 (9th Cir. 2013).

Amicus curiae, the American Immigration Lawyers Association (“AILA”) respectfully submits this brief to support Petitioner Sama Abdiaziz Abdisalan’s request for panel rehearing and suggestion for rehearing en banc. AILA is a national association with more than 14,000 members nationwide, including lawyers and law school professors, who practice and teach in the field of

immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor and courtesy of those appearing in a representative capacity in immigration and naturalization matters. As the nation's preeminent bar association for immigration attorneys, AILA's membership possesses expertise in the complexities of the INA's provisions, as well as on-the-ground experience in the conduct of removal proceedings, including BIA appeals, remands to immigration courts, and petitions for review to federal courts of appeals.

A clear and consistently applied resolution of the issue of when an order of removal from the Board is final for judicial review is vitally important to the immigration bar, and to the people we represent who seek to challenge in federal court a BIA denial of an immigration benefit in removal proceedings. Such a resolution would benefit not only the petitioner and counsel, it ultimately would benefit the judiciary. A uniform and cogent rule would promote efficiency in litigation and conserve judicial resources.

As things stand, case law interpreting the finality of a Board order denying one immigration benefit and remanding for consideration of another exists in disarray. This Court should grant rehearing or rehearing en banc to clarify when a

final order of removal exists in this situation for purposes of filing a petition for review pursuant to 8 U.S.C. § 1252(a)(1), (b)(1). Moreover, any new rule announced should be applied equitably to avoid disadvantaging individuals who have filed petitions for review under the somewhat confusing, extant regime.

ARGUMENT

I. The Court Should Clarify Its Jurisprudence Concerning When An Order of Removal Is Final for Judicial Review Pursuant to 8 U.S.C. § 1252, And Announce A Clear Rule.

Petitioner argues that the panel decision in *Abdisalan* augments an existing intra-circuit conflict concerning the finality of an order of removal. *See* Petitioner’s Petition for Panel Rehearing and Suggestion for Rehearing En Banc (“Petition for Rehearing”) at 7 – 12 (10/21/2013)(discussing 9th circuit decisions that resolve in disparate fashions the timing of judicial review of removal orders following remands to the immigration judge by the Board for background checks). AILA agrees that the *Abdisalan* decision creates even more uncertainty as to when a petition for review must be filed when the Board denies asylum but remands for background checks to support withholding of removal or relief under the Convention Against Torture. Further, this uncertainty places asylum applicants at risk of losing access to review of a removal order by a federal court unless the applicant files a petition for review every single time that the BIA issues an order

dismissing all or only part of an appeal, or an immigration judge issues an order on remand that is not appealed to the Board.

Such an iterative cycle of petitions for review of partial denials and partial grants of appeals by the BIA would undermine the plain meaning of the word “final” in the term “final order of removal” set out in 8 U.S.C. 1101(a)(47). *See* Petition for Rehearing at 3 – 5. An order still in play on remand at the immigration court or in a subsequent appeal to the BIA is patently not final. It would be fundamentally unfair to an asylum applicant to require numerous petitions for review of orders that remain subject to modification and review by the Board or an immigration judge. A sequential and cumulative approach to petitions for review also unnecessarily adds to the cost and complexity of judicial review for asylum applicants, many of whom appear pro se or through counsel appearing pro bono or at a substantially reduced fee. Such an approach also would strain the resources of the Government and the Court in managing and responding to a number of petitions for review in a single matter, instead of only one petition for review of the final order of removal.

The instant petition for rehearing presents the Court with an opportunity to reconcile inconsistent decisions in this area. And in doing so, the Court will promote judicial economy, as well as protect the statutory and due process rights of people with final orders of removal based on denials of asylum.

II. Any New Rule Concerning the Finality of Orders of Removal for Judicial Review Should Not Disadvantage Individuals Who Filed Petitions for Review Under Existing Law.

In announcing any new and transparent rule governing the finality of removal orders for purposes of judicial review under 8 U.S.C. § 1252, AILA submits that individuals who already have filed petitions for review under the existing, somewhat inconsistently applied regime should not be disadvantaged. Accordingly, AILA respectfully requests that a new rule not be applied to the detriment of anyone whose pending petition for review falls within existing case law. The need to equitably apply a new rule further supports resolution of this petition for rehearing by the en banc court.

CONCLUSION

For the reasons stated, *amicus curiae* AILA requests this Court to grant rehearing or rehearing en banc in the present matter.

Respectfully submitted,

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DATED: October 31, 2013

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed.R.App.Proc. 32(a)(7)(B), because it contains 1106 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

I certify further that this brief complies with the typeface requirements in Fed.R.App.Proc. 32(a)(5), and the type style requirements of Rule 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010, Version 14.0.7106.5003, in Times New Roman 14-point font.

October 31, 2013

s/ Deborah S. Smith

Attorney for Amici Curiae

CERTIFICATE OF SERVICE

I, Deborah S. Smith, certify that on October 31, 2013, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Deborah S. Smith