

PRACTICE ADVISORY¹

Immigration Litigation & the *Chenery* Doctrine

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Introduction

Have you ever rubbed your eyes or scratched your head in disbelief after reading a government brief that urges the federal court to uphold an immigration decision based on a reason or rationale not discussed, or even mentioned, in the decision itself? If you litigate immigration cases in federal court, the answer probably is yes.

Unfortunately, and despite controlling authority against them, attorneys litigating immigration cases for the United States, whether from the local U.S. Attorney's office, the Office of Immigration Litigation or even the Office of the Solicitor General, regularly file briefs that attempt to justify immigration decisions based on rationales that *they* consider persuasive, *instead of*, or *in addition to*, the rationale provided by the immigration agency. Although litigators may instinctively seek to respond on the merits, a prudent litigator first will consider whether the court may address these arguments at all.

In *SEC v. Chenery Corp.*, the Supreme Court established that reviewing courts only review the reasons invoked by the agency below and may not entertain post hoc rationalizations by government counsel in appellate litigation. *Securities & Exchange Comm'n v. Chenery Corp.*, 318 U.S. 80 (1943); *Securities & Exchange Comm'n v. Chenery Corp.*, 332 U.S. 194 (1947). This advisory takes a closer look at these two decisions as well as the ongoing importance and application of the *Chenery* doctrine in immigration litigation. It also contains an appendix containing citations to select circuit court decisions applying the doctrine.

The Supreme Court's Decisions in *Chenery I* and *II*

***SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943) (“*Chenery I*”)**

The *Chenery* decisions review the lawfulness of a Federal Water Service Corporation (“FWSC”) reorganization plan submitted to the Securities and Exchange Commission (“SEC” or “Commission”) under the Public Utility Holding Company Act of 1935. *Chenery Corp.*, 318 U.S. 80. After FWSC filed three unsuccessful proposed reorganization plans, the SEC ultimately approved FWSC's fourth plan over the objections of FWSC's officers, directors and controlling stockholders. *Id.* at 81-85. The SEC's order approving the amended plan required these

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individuals to surrender the preferred stock that they acquired while the reorganization plans were pending before the SEC at cost plus interest. The order, however, permitted approximately 6,000 other preferred stock owners to convert their preferred stock into stock in the reorganized company. *Id.* at 86. The SEC reasoned that FWSC’s officers, directors and controlling shareholders were fiduciaries and, therefore, were duty-bound to avoid acquiring securities of FWSC while plans for the company’s reorganization were pending before it. *Id.* at 87. Although the SEC acknowledged that FWSC’s officers, directors and controlling shareholders did not improperly or fraudulently acquire their preferred stock, the SEC justified the order solely based on the applicability of broad, judicially-created equity principles. *Id.*

The D.C. Circuit set the order aside, finding that no statute, regulation or rule of law or equity prohibited the stock transaction at issue. *Chenery Corp. v. Securities & Exchange Comm’n*, 128 F.2d 303, 307-10 (D.C. Cir. 1942). The SEC petitioned the Supreme Court to grant certiorari. Before the D.C. Circuit and the Supreme Court, the SEC defended its opinion on grounds other than those upon which it based its opinion. *Id.* at 301; *Chenery Corp.*, 318 U.S. at 92.

On petition for certiorari, the Supreme Court held that it only could review the order based on the equity ground stated by the Commission. *Id.* at 87 (“The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.”). The Court reasoned that “an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency.” *Id.* at 88.

The Court further held that, on its stated grounds, the SEC’s order “plainly cannot stand,” finding that neither Congress nor the courts proscribed the purchases of preferred stock at issue. *Id.* at 88-89. The Court went on to suggest that the SEC’s decision may have been justified if it relied upon the agency’s experience and expertise or if it acted under its delegated rulemaking authority to promulgate a new general standard of conduct. *Id.* at 92-93. But the Court refused to guess at the rationale behind the SEC’s determination, stating that “courts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review.” *Id.* at 94. Accordingly, the Court remanded the case for appropriate further proceedings consistent with its opinion. *Id.* at 95.

***SEC v. Chenery Corp.*, 332 U.S. 194 (1947) (“Chenery II”)**

On remand following *Chenery I*, the officers, directors and controlling stockholders of the Federal Water Service Corporation (FWSC) proposed an amendment to the company’s reorganization plan that would permit them to profit from the stock purchases they made while reorganization proceedings were pending before the SEC. *Chenery Corp.*, 332 U.S. at 198-99. The SEC denied the amendment, this time finding the proposed amendment inconsistent with the standards of §§ 7 and 11 of the Public Utility Holding Company Act of 1935. *Id.* at 199. The U.S. Court of Appeals for the D.C. Circuit reversed the SEC’s order rejecting the proposed amendment. *Id.* The D.C. Circuit concluded that the Supreme Court’s decision in *Chenery I* barred the Commission’s decision. *Id.*

Four years after its first opinion, the case again came before the Supreme Court. This time, the Court considered the propriety of the Commission's decision in light of its earlier decision. The Court began its opinion with a recap of its earlier holding in *Chenery I*, stating:

When the case was first here, we emphasized a simple but fundamental rule of administrative law. **That rule is to the effect that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis.** To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency.

We also emphasized in our prior decision an important corollary of the foregoing rule. **If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable.** It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive. In other words, "We must know what a decision means before the duty becomes ours to say whether it is right or wrong." *United States v. Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499, 511.

Chenery Corp., 332 U.S. at 196-97 (emphasis added).²

The Court then held that nothing in its earlier decision, finding the Commission's decision unsupported by equity principals, prevented the Commission from reaching the same conclusion based on different reasoning in remand proceedings. *Id.* at 201-03. The SEC, as an administrative agency, is free to choose whether to announce its new rule through rulemaking or adjudication. *Id.* at 203 (citation omitted).

Turning to the merits of the SEC's decision denying the proposed amendment, the Court first found that the possibility that the decision may have retroactive effect, as applied to FWSC's officers, directors and controlling shareholders (because it would deprive them of the profits and control that sought by purchasing preferred stock while the reorganization plan was pending), did not automatically render the decision invalid. *Id.* at 203. They reiterated that judicial review of agency decisions announcing new principals, like ordinary administrative actions, requires

² This language from the Court's 1947 opinion is generally quoted by litigators and the lower courts in reference to the *Chenery* doctrine, even though this part of the 1947 opinion summarizes the Court's 1943 decision.

examination of whether the agency’s decision “is based upon substantial evidence and is consistent with the authority granted by Congress.” *Id.* at 207 (citation omitted). Applying this standard to the SEC’s decision, the Court concluded that the facts and statutory foundations as well as application of the agency’s experience and expertise supported the SEC’s rationale for prohibiting the stock purchase in question, therefore, upheld the decision. *Id.* at 207-09.

Importance and Application in Immigration Litigation

Although the Supreme Court decided the *Chenery* cases more than a half a century ago, the *Chenery* doctrine remains relevant at all levels of federal court immigration litigation today. In petition for review litigation, attorneys from the Office of Immigration Litigation often file answering briefs asking the court of appeals to affirm a Board of Immigration Appeals (BIA or Board) decision on grounds other than those invoked by the BIA itself.³

For example, it is fairly common for a government brief to argue one or more of the following:

- petitioner is “deportable anyway” or “inadmissible anyway” on a basis not charged by the Department of Homeland Security;
- petitioner is “not credible anyway” based on testimony not discussed by the BIA;
- the Board’s decision denying a motion to reopen based on ground X is “correct anyway” because the motion is barred by ground Y;
- the Board’s decision affirming an immigration judge’s decision denying relief based on the failure to meet statutory requirement A should be “upheld anyway” because the immigration judge also suggested the person could not meet statutory requirement B (even though the immigration judge and/or the Board did not rule on whether petitioner met statutory requirement B).

Carried to its logical conclusion, such arguments call on the courts of appeals to affirm BIA decisions regardless of whether the decision is properly based in law or fact, as long as there is some other basis to uphold it.

Arguments by government counsel in briefing or at oral argument that ignore the *Chenery* doctrine are cause for concern for all immigration litigators, although the concept is not unique to immigration litigation.⁴ If immigration litigators respond to “anyway” arguments without raising

³ See, e.g., *Comollari v. Ashcroft*, 378 F.3d 694, 696 (7th Cir. 2004) (“As we tirelessly remind the lawyers from the Justice Department’s Office of Immigration Litigation . . . the *Chenery* rule bars a reviewing court from upholding an agency’s decision on a ground different from the agency’s.”) (Posner, J.).

⁴ See, e.g., *NLRB v. Kentucky River Cmty. Care Co.*, 532 U.S. 706, 715 n.1 (2001) (“We do not . . . substitute counsel’s post hoc rationale for the reasoning supplied by the Board itself.”) (citation omitted); *Fed. Power Comm’n v. Texaco*, 417 U.S. 380, 397 (1974) (“[W]e cannot accept appellate counsel’s post hoc rationalizations for agency action; for an agency’s order must be upheld, if at all, on the same basis articulated in the order by the agency itself.”) (citations

the *Chenery* doctrine, it may signal to the court that an argument is valid or merits addressing despite the agency’s failure to do so. And, if courts inappropriately spend time entertaining these arguments, this detracts from consideration of the relevant reasoning at issue in the case. Moreover, court decisions that address post hoc rationalization are, in effect, impermissible policy decisions that may foreclose further analysis in cases that properly present the issue.

While raising the *Chenery* doctrine as a response to an argument based on a post hoc rationalization often is within a client’s best interest, counsel must independently make this determination based on the facts and procedural history of the case. Significantly, even if counsel raises the *Chenery* doctrine, the court may not agree that the doctrine applies or may conclude that remand is futile.⁵ Therefore, in addition to raising the doctrine, a prudent litigator also will respond to the merits of the argument.

Conclusion

In sum, immigration litigators should look out for the “anyway” arguments – arguments that a noncitizen is deportable or inadmissible “anyway” or that an immigration decision is correct or should be upheld “anyway.” Litigators have an important precedent at their disposal to counter these arguments in reply briefing or in response to a question at oral argument. The Supreme Court’s decisions in *Chenery* establish that a court’s review of an immigration decision is limited to the grounds invoked by the agency. *Chenery Corp.*, 318 U.S. at 92; *Chenery Corp.*, 332 U.S. at 196. If litigators consistently raise the *Chenery* doctrine, perhaps someday government counsel will stop trying to justify immigration decisions based on reasoning the agency itself chose not to employ.

omitted); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971) (observing that it is a well-settled principle that an agency may not utilize post hoc rationalizations for its prior action, nor may a federal court may apply such reasons).

⁵ Remand under *Chenery* is not required where “[t]here is not the slightest uncertainty as to the outcome of a proceeding” before the agency. *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969). Readers should review applicable circuit law addressing when remand to an immigration agency is futile. For example, in the Second Circuit, even if the agency’s stated grounds are unsustainable, the court may find remand to the BIA is futile when either: (1) “the IJ or BIA’s reliance on an erroneous aspect of its reasoning is so tangential that there is no realistic possibility that the outcome would be different on remand” or (2) “overwhelming evidence supporting the administrative adjudicator’s findings makes it clear that the same decision would have been reached in the absence of the [agency’s] errors.” *Cao He Lin v. United States DOJ*, 428 F.3d 391, 401 (2d Cir. 2005) (citations omitted).

In contrast, a circuit court ordinarily must order remand when the BIA has not spoken on “a matter that statutes place primarily in agency hands.” *INS v. Ventura*, 537 U.S. 12, 16-17 (2002) (per curiam); see also *Gonzales v. Thomas*, 547 U.S. 183, 187 (2006) (per curiam).

APPENDIX

CIRCUIT CITATIONS

First Circuit

Gailius v. INS, 147 F.3d 34, 44 (1st Cir. 1998) (holding that “the INS may not seek to have the BIA opinion upheld on the grounds that there was no reasonable fear of persecution because the letters were not authentic; the agency simply has not ruled on the authenticity issue, either implicitly or explicitly.”).

De Rivera v. Ashcroft, 394 F.3d 37, 40 (1st Cir. 2005) (“Since the agency action, under *Succar*, cannot be sustained on the stated grounds, the appropriate remedy is to remand to the BIA for further proceedings consistent with the holding in *Succar*.”).

Second Circuit

Song Jin Wu v. INS, 436 F.3d 157, 164 (2d Cir. 2006) (“It is not the function of a reviewing court in an immigration case to scour the record to find reasons why a BIA decision should be affirmed. Rather, we take the Board's decision as we find it, and if the reasoning it advances for denying a petitioner’s claim cannot support the result, we will vacate the decision.”).

Singh v. United States DOJ, 461 F.3d 290, 294 (2d Cir. 2006) (“And we cannot, on appeal, substitute an argument – even one the BIA made in another context – for those that the BIA actually gave to support the conclusion [petitioner] disputes on appeal.”).

Third Circuit

Garcia v. AG of the United States, 665 F.3d 496, 502 (3d Cir. 2011) (“[W]e may affirm the BIA’s decision only if we find that its stated reasons are correct, as it was the BIA—not the IJ—that provided the final and authoritative ‘grounds invoked by the agency,’” citing *Chenery*).

Qun Wang v. AG of the United States, 423 F.3d 260, 271 (3d Cir. 2005) (“ . . . we will not supply the basis for [the agency’s] decision where appropriate reasons are not set forth by the administrative agency itself”) (internal citations omitted).

Berishaj v. Ashcroft, 378 F.3d 314, 330 (3d Cir. 2004) (“ . . . we are unable to square this practice [of taking judicial notice of post-final order country reports] with the clear command from *SEC v. Chenery Corp.* that courts reviewing the determination of an administrative agency must approve or reject the agency’s action purely on the

basis of the reasons offered by, and the record compiled before, the agency itself.”)
(internal citation omitted).

Fourth Circuit

Li Fang Lin v. Mukasey, 517 F.3d 685, 693-94 (4th Cir. 2008) (“Here, we cannot review the BIA’s decision because the BIA has given us nothing to review. We would run the risk of violating fundamental separation-of-powers principles if we attempted to divine the BIA’s thoughts on this matter and tried to build a legal conclusion in a veritable vacuum where BIA interpretation should always first exist.”).

Island Creek Coal Co. v. Henline, 456 F.3d 421, 426-27 (4th Cir. 2006) (“We cannot accept the invitation to affirm the Board’s rejection of Island Creek’s statute of limitations defense on a ground not actually relied upon by the Board.”).

Fifth Circuit

Garcia Carias v. Holder, No. 11-60550, -- F.3d --, 2012 U.S. App. LEXIS 20284, *7-8 n.1 (5th Cir. Sept. 27, 2012) (stating “[b]ecause the timeliness of Garcia’s motion was not addressed by the Board, we will refrain from reaching this issue,” citing *Chenery*).

Enriquez-Gutierrez v. Holder, 612 F.3d 400, 407 (5th Cir. 2010) (“[S]ince the BIA is a division of the Executive Office for Immigration Review (“EOIR”), and a ‘judicial judgment cannot be made to do service for an administrative judgment,’ . . ., we may usually only affirm the BIA on the basis of its stated rationale for ordering an alien removed from the United States.”) (internal citations and quotations omitted).

Sixth Circuit

Pruidze v. Holder, 632 F.3d 234, 240 (6th Cir. 2011) (“These are all things the Board *may* do, but because we review what the Board *did* do . . . they are questions for another day,” citing *Chenery*) (emphasis in the original).

NLRB v. USPS, 833 F.2d 1195, 1201 (6th Cir. 1987) (“This Court will not affirm the Board’s actions based on reasons not relied upon by the Board itself.”).

Seventh Circuit

Moab v. Gonzales, 500 F.3d 656, 659 (7th Cir. 2007) (“The Supreme Court of the United States has admonished, in *Chenery I*, that we may not sanction an agency decision based upon the post-hoc rationalizations of appellate counsel for the agency’s decision.”) (citation omitted).

Comollari v. Ashcroft, 378 F.3d 694, 696 (7th Cir. 2004) (“As we tirelessly remind the lawyers from the Justice Department’s Office of Immigration Litigation, . . . , the *Chenery* rule bars a reviewing court from upholding an agency’s decision on a ground different from the agency’s”) (citations to case examples omitted).

Mengistu v. Ashcroft, 355 F.3d 1044, 1046 (7th Cir. 2004) (“[The *Chenery* doctrine] forbids the lawyers for an administrative agency to defend the agency’s decision on a ground different from that stated or at least discernible in the decision itself.”) (citations omitted).

Eighth Circuit

Ngure v. Ashcroft, 367 F.3d 975, 984 (8th Cir. 2004) (“It is, of course, a basic principle of administrative law that where agency action is subject to judicial review, the agency must provide an adequate reasoned explanation of its decision,” referencing *Chenery I* and *II*).

Mayo v. Schiltgen, 921 F.2d 177, 179 (8th Cir. 1990) (“[A] reviewing court cannot search the record to find other grounds to support the [agency’s] decision . . . [but] must consider the agency’s rationale for its decision, and if that rationale is inadequate or improper the court must reverse and remand for the agency to consider whether to pursue a new rationale for its decision or perhaps to change its decision.”) (footnote omitted).

Ninth Circuit

Altamirano v. Gonzales, 427 F.3d 586, 595 (9th Cir. 2005) (“*Chenery* requires that an agency’s discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself. . .”).

Recinos de Leon v. Gonzales, 400 F.3d 1185, 1189 (9th Cir. 2005) (“We may affirm the IJ only on grounds set forth in the opinion under review,” citing *Chenery*).

Navas v. INS, 217 F.3d 646, 658 n.16 (9th Cir. 2000) (rejecting government counsel’s post hoc rationalization, stating “[t]his court cannot affirm the BIA on a ground upon which it did not rely.”).

Tenth Circuit

Haga v. Astrue, 482 F.3d 1205, 1207-08 (10th Cir. 2007) (“[T]his court may not create or adopt post-hoc rationalizations to support [an agency’s] decision that are not apparent from the [] decision itself.”).

Contreras-Bocanegra v. Holder, 678 F.3d 811, 819 (10th Cir. 2012) (en banc) (“While agencies have the power under certain circumstances to promulgate categorical rules that supplant

individualized adjudication, . . . , we cannot uphold the Board’s action on grounds not provided by the agency itself.”) (internal citation omitted).

Eleventh Circuit

N.L.R.B. v. Episcopal Cmty. of St. Petersburg, 726 F.2d 1537, 1540 (11th Cir. 1984) (“[A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency.”) (citation omitted).

Druid Hills Civic Ass’n, Inc. v. Fed. Highway Admin., 772 F.2d 700, 714 (11th Cir. 1985) (“If the record fails to show a sufficient basis for the administrative decision, the . . . determination must be overturned.”).