No. 11-482

In the Supreme Court of the United States

JUAN CARLOS VALDEZ-BERNAL, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals applied the correct standard to evaluate whether it should transfer petitioner's citizenship claim to the district court for de novo review under 8 U.S.C. 1252(b)(5).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A3-A5) is not published in the Federal Reporter but is available at 432 Fed. Appx. 704. An earlier decision in the case is reprinted in 261 Fed. Appx. 2. The decisions of the Board of Immigration Appeals (Pet. App. A6-A13) and the immigration judge (Pet. App. A14-A32) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 12, 2011. A petition for rehearing was denied on July 20, 2011. The petition for a writ of certiorari was filed on October 14, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a lawful permanent resident of the United States who was born in Mexico to a Mexican citizen mother and a U.S. citizen father. Pet. App. A4, A20-A21. Petitioner's father, Carlos Valdez, was born either in Guatemala or Mexico. It is unclear how he became a U.S. citizen. *Id.* at A20. Records indicate that petitioner's father served in the U.S. Army from 1951 to 1953, during the Korean War. *Id.* at A22.

Petitioner was admitted to the United States on February 23, 1968, as a lawful permanent resident. Administrative Record (A.R.) 1021-1022. In August 2001, he was convicted of possession of a controlled substance, in violation of Cal. Health and Safety Code § 11350(a). A.R. 970-973. In 2005, the government initiated removal proceedings. A.R. 855. At his removal hearing, petitioner argued that he was not removable because he acquired citizenship through his U.S. citizen father. A.R. 855, 868-870.

At the time of petitioner's birth in 1957, a child born outside the United States to a U.S. citizen father could acquire U.S. citizenship if, before the child's birth, the father had been physically present in the United States for a total of ten years, at least five of which were after the father had turned 14 years of age. 8 U.S.C. 1401(a)(7) (1952).[1] The government has the burden of

[1] Section 1401 has since been amended. Section 1401(a)(7) was redesignated as 8 U.S.C. 1401(g) and the term of the required physical presence in the United States was reduced to a total of five years, two of which must be after the parent turned 14. Immigration and Nationality Act Amendments of 1986 (1986 Act), Pub. L. No. 99-653, § 12, 100 Stat. 3657. The amendment does not apply unless the child was born on

proving alienage by clear and convincing evidence. See 8 U.S.C. 1229a(c)(3)(A). Petitioner admitted he was born abroad, which raised a rebuttable presumption of alienage. *Ayala-Villanueva* v. *Holder*, 572 F.3d 736, 737 n.3 (9th Cir. 2009); *In re Leyva*, 16 I. & N. Dec. 118, 119 (B.I.A. 1977). It was thus petitioner's burden to produce "substantial credible evidence in support of his citizenship claim." *Ayala-Villanueva*, 572 F.3d at 737.

The immigration judge (IJ) found that the only concrete evidence of petitioner's father's presence in the United States began with his service in the Korean War from 1951 to 1953. A.R. 857-858. Even if he had lived entirely in the United States following his military service, he would still have lacked ten years of presence before petitioner's birth in 1957. *Ibid.* Petitioner and several of his family members testified in support of his claim of citizenship, but could not offer specific support for the proposition that petitioner's father was in the United States prior to 1951. A.R. 856-858. The IJ held that petitioner had not produced any substantial evidence that his father had been present in the United States for ten years before petitioner's birth in 1957. *Ibid.* The IJ ordered petitioner removed. A.R. 866. The Board of Immigration Appeals dismissed petitioner's appeal in a written per curiam decision. A.R. 788-790.

2. Petitioner first sought judicial review in the court of appeals in 2007. *Valdez-Bernal* v. *Mukasey*, 261 Fed. Appx. 2 (9th Cir. 2007). Although the court agreed that the record "supports a conclusion that [petitioner's] father * * * was not physically present in the United States for ten years prior to 1957," it found that the IJ

or after November 14, 1986, so it does not govern petitioner's citizenship claim. See Immigration Technical Corrections Act of 1988, Pub. L. No. 100-525, § 8(r), 102 Stat. 2618.

had failed to inform petitioner of his right to counsel at his removal proceeding. *Id.* at 4. The court granted the petition and remanded to the Board with instructions "to remand to the Immigration Judge for a new hearing." *Ibid.*

3. On remand, the IJ discovered additional untranscribed hearing tapes showing that petitioner had been advised of his right to counsel but had elected to proceed without counsel. Pet. App. A15-A16. At the Board's direction, the IJ nevertheless held a new removal hearing. *Id.* at A7-A8, A14-A32. The IJ issued a second written decision, concluding that petitioner had not produced credible evidence that his father had been physically present in the United States for ten years prior to his birth in 1957. *Id.* at A21. The IJ concluded that the date petitioner's father first arrived in the United States is "a mystery and remains so despite the many hours of testimony and pages of exhibits." *Ibid.* The IJ found that the testimony of petitioner's mother on this question was internally contradictory and in conflict with the documentary evidence. *Id.* at A30-A31.

The Board again dismissed petitioner's appeal. Pet. App. A6-A13. The Board found that the "clear weight of evidence," including petitioner's father's military certificate and social security records, petitioner's brother-in-law's testimony, and his mother's testimony, "establishes [petitioner]'s father's presence in the United States beginning sometime in late-1950, not 1946 as [petitioner] now claims." *Id.* at A12.

4. Petitioner again sought judicial review in the court of appeals. The court of appeals denied his petition for review in an unpublished memorandum disposition. Pet. App. A3-A5. The court noted that "traditional summary judgment rules guide our decision." *Id.* at A4

(citing *Baeta* v. *Sonchik*, 273 F.3d 1261, 1265 (9th Cir. 2001)). The court held that because "the pleadings and affidavits do not create a genuine issue of material fact," the court would decide nationality. *Ibid.*; see 8 U.S.C. 1252(b)(5)(A) (providing that the court of appeals "shall decide" the nationality claim if "the court of appeals finds from the pleadings and affidavits that no genuine issue of material fact about the petitioner's nationality is presented"). The court concluded that "[a]t most, the undisputed facts establish six or seven years of physical presence before October 1957," and that petitioner had not produced "substantial credible evidence to create a genuine issue of material fact about whether his father was physically present prior to 1950." Pet. App. A4-A5.

ARGUMENT

Petitioner contends (Pet. 8-10) that the court of appeals applied the wrong standard to determine whether it should transfer the case to the district court for de novo review. Petitioner also contends (Pet. 10-14) that the court of appeals erred in finding that petitioner's evidence did not create a genuine issue of material fact about his citizenship. Neither claim has merit. The court of appeals stated the correct standard and properly found that petitioner failed to meet his burden under 8 U.S.C. 1252(b)(5). Moreover, even if the court of appeals misapplied the standard, this Court's review of an unpublished unprecedential memorandum disposition is not warranted.

1. Section 1252(b)(5) provides that the court of appeals "shall decide" a petitioner's nationality claim if "the petitioner claims to be a national of the United States and the court of appeals finds from the pleadings and affidavits that no genuine issue of material fact

about the petitioner's nationality is presented." 8 U.S.C. 1252(b)(5)(A). If, on the other hand, "the court of appeals finds that a genuine issue of material fact about the petitioner's nationality is presented," the court of appeals

> shall transfer the proceeding to the district court of the United States for the judicial district in which the petitioner resides for a new hearing on the nationality claim and a decision on that claim as if an action had been brought in the district court under section 2201 of title 28.

8 U.S.C. 1252(b)(5)(B).

The court of appeals' memorandum disposition correctly stated the standard of review under Section 1252(b)(5). The court explained that "Section 1252(b)(5) and traditional summary judgment rules guide our decision." Pet. App. A4 (citing *Baeta* v. *Sonchik*, 273 F.3d 1261, 1265 (9th Cir. 2001)). The court "h[e]ld that the pleadings and affidavits do not create a genuine issue of material fact," so it would proceed to "decide nationality." *Ibid.* This is precisely the standard of review set forth in the statute and in Ninth Circuit case law. See *Baeta*, 273 F.3d at 1265 ("In order to create a genuine issue of fact that warrants an evidentiary hearing, Baeta must satisfy traditional summary judgment principles, such as tendering sufficient evidence for each statutory element."); *Chau* v. *I.N.S.*, 247 F.3d 1026, 1029 (9th Cir. 2001) ("In determining whether a genuine issue of material fact exists, traditional summary judgment principles apply."). Indeed, petitioner concedes (Pet. 7) that the court of appeals stated the "proper burdens of proof."

Petitioner nonetheless contends (Pet. 10) that the court erred "[b]y conflating the genuine issue standard and the substantial evidence standard" when it applied the standard to petitioner's case. Petitioner points to the last paragraph of the court of appeals' disposition, in which the court explained that "[p]etitioner did not produce substantial credible evidence to create a genuine issue of material fact about whether his father was physically present prior to 1950." Pet. App. A5. But as the quoted language itself shows, the court specifically concluded that petitioner had not "create[d] a genuine issue of material fact." The court's reference to the lack of "substantial credible evidence" to create a genuine issue simply meant that petitioner had not produced sufficient evidence to create a genuine issue. The court's use of the word "substantial" to describe that insufficiency does not suggest that the court was employing the substantial evidence standard for judicial review of agency action, as petitioner asserts (Pet. 9-10). Cf. *Agosto* v. *INS*, 436 U.S. 748, 755 (1978) (noting that use of the word "substantial" in committee reports on predecessor to Section 1252(b)(5)(B) were not amenable to interpretation of requiring "substantial evidence").

Thus, the court's use of the phrasing petitioner quotes reflects an imprecise formulation—or, at most, an erroneous application of the governing standard of review, which the court properly set out in the first paragraph of its disposition. This Court's review is "rarely granted" for a court of appeals' "misapplication of a properly stated rule of law." Sup. Ct. R. 10. Petitioner makes no showing that such review is warranted here, even if the court's phrasing in the portion of the opinion petitioner cites was erroneous.

2. In any event, petitioner failed to raise a genuine issue of material fact regarding his citizenship that

would warrant transfer to the district court under 8 U.S.C. 1252(b)(5)(B).

Petitioner points to a declaration by his mother in 2008 and to her testimony in 2009 in which she claimed that she met petitioner's father in 1946 and that he was living and working in the United States at that time. Pet. 10-11, 13. Petitioner's mother originally testified in 2005, however, that she met petitioner's father after he was released from the Army. Pet. App. A22-A23. A military document establishes that the release was in 1953. *Id*. at A22. And at the close of her 2009 testimony, petitioner's mother returned to her original 2005 testimony that she and petitioner's father first met in 1953. *Id.* at A25-A26.

Under "traditional summary judgment principles," *Chau*, 247 F.3d at 1029, petitioner's mother's affidavit does not raise a genuine issue of material fact because it conflicts with her testimony. See *Nelson* v. *City of Davis*, 571 F.3d 924, 927 (2009) ("The general rule in the Ninth Circuit is that a party cannot create an issue of fact by an affidavit contradicting his prior deposition testimony.") (citation omitted); see also *Pyramid Sec. Ltd*. v. *IB Resolution, Inc.*, 924 F.2d 1114, 1123 (D.C. Cir.) (recognizing that a party "may not create a material issue of fact simply by contradicting its prior sworn testimony"), cert. denied, 502 U.S. 822 (1991); *Martin* v. *Merrell Dow Pharm., Inc.*, 851 F.2d 703, 706 (3d Cir. 1988) ("When * * * the affiant was carefully questioned on the issue, had access to the relevant information at that time, and provided no satisfactory explanation for the later contradiction, the courts of appeals are in agreement that the subsequent affidavit does not create a genuine issue of material fact."); *Barwick* v. *Celotex Corp.*, 736 F.2d 946, 960 (4th Cir. 1984) ("A genuine issue of material fact is not created where the only issue of fact is to determine which of the two conflicting versions of the plaintiff's testimony is correct.") (citing *Radobenko* v. *Automated Equip. Corp.*, 520 F.2d 540, 544 (9th Cir. 1975)). Absent petitioner's mother's inconsistent testimony, there is no evidence that petitioner's father was in the United States prior to 1951, and therefore no evidence that he could have been in the United States for ten years before 1957. Thus under the governing standard, petitioner was not entitled to have his case transferred to the district court for de novo review.

3. Even if the court of appeals had misapplied the standard for determining whether a genuine issue of material fact existed, this case would not warrant this Court's review. The Ninth Circuit has cited and applied the correct standard in a published, precedential decision. See *Chau*, 247 F.3d at 1029. The unpublished decision at issue here could not "resurrect" (Pet. 18) the substantial evidence standard in lieu of the Section 1252(b)(5) standard. The decision here has no precedential value beyond the facts of this case, under which petitioner's citizenship claim was properly denied. It therefore does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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