Santos v. Blanche

Docket No.: 23-7191-ag

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Case Information

Court: U.S. Court of Appeals for the Second Circuit

Date Decided: September 8, 2026

Judges: Chief Judge Lohier, Circuit Judge Sullivan (concurring in part and dissenting in part), Circuit Judge Kahn (author)

Lower Court: U.S. Customs and Border Protection

Parties and Attorneys

Petitioner: Flavio Divino Santos; Represented By: Annelise M.J. de Araujo

Respondent: Todd Blanche, United States Attorney General; Represented By: Tim Ramnitz, Brian M. Boynton, Shelley R. Goad

Amicus Curiae: National Immigration Litigation Alliance

Overview

Issue: Whether reinstatement orders and denials of motions to reopen them are judicially reviewable, and whether immigration regulations authorize Customs and Border Protection to reopen reinstatement decisions.

Lower Court Held: U.S. Customs and Border Protection (CBP) denied Santos's motion to reopen, reconsider, and rescind his reinstatement order because it believed no prescribed mechanism authorized that relief.

What Was Overturned: The Second Circuit denied review of the 2017 reinstatement order as untimely, but granted review of the 2023 reopening denial, vacated that denial, and remanded; it denied the government's dismissal motion as moot.

Why: Reinstatement orders and reopening denials were reviewable, Santos lacked the diligence necessary for equitable tolling of his direct challenge, and CBP abused its discretion by misunderstanding its regulatory reopening authority.

Background

Santos, a Brazilian citizen, first entered the United States without inspection in 1995, later departed, and received an expedited removal order when he sought reentry on a visitor visa in 2004. After entering without inspection near Vermont in July 2017, he was apprehended and CBP reinstated the 2004 order. Santos asserted that he spoke only Portuguese but received notice of his right to contest reinstatement in English. He and his wife cooperated with investigators targeting their smuggling network, whose members had threatened retaliation. The government dismissed his unlawful-entry charge. An immigration judge ultimately denied withholding of removal, and the Board of Immigration Appeals affirmed in October 2020.

Santos's wife received asylum in 2020 and filed an asylee-relative petition for him. U.S. Citizenship and Immigration Services denied it in May 2022 because of his outstanding reinstatement order. Santos represented that he requested rescission from U.S. Immigration and Customs Enforcement in August 2022 and received a telephone denial in April 2023. Counsel requested his immigration file in April 2023 and received a response in June. In August 2023, Santos moved before CBP to reopen, reconsider, and rescind the reinstatement order, alleging that the failure to advise him in a language he understood violated governing procedures and due process. CBP denied the motion on August 23, and Santos petitioned for review on September 22, challenging both that denial and the 2017 order.

Lower Court Decision

CBP denied the motion on the ground that no prescribed mechanism permitted it to reopen, reconsider, or vacate a reinstatement order. It therefore did not adjudicate the merits of Santos's challenge to the reinstatement process. The agency decision under review was distinct from the earlier immigration-court proceedings concerning withholding of removal.

Second Circuit Reversal

Reviewing statutory-construction questions de novo, the Second Circuit held that reinstatement orders were final removal orders reviewable under 8 U.S.C. § 1252(a)(1) [authorizing judicial review of final removal orders]. Reinstatement required new factual determinations and independently established removability; it was not merely execution of the original order. Finality attached when the decision became definitive and no further agency review was available as of right. Under Riley v. Bondi, the deadline in 8 U.S.C. § 1252(b)(1) [requiring a petition within 30 days of the final removal order] was a claims-processing rule, not jurisdictional. Assuming equitable tolling was available, Santos lacked reasonable diligence: he did not explain his delay after the May 2022 benefits denial, including waiting eleven months to request his file. The Second Circuit

therefore denied his challenge to the 2017 order without reaching its merits.

The Second Circuit separately held that § 1252(a), together with 8 U.S.C. § 1252(b)(6) [requiring consolidation of review of removal orders and related reopening or reconsideration decisions], authorized review of CBP's reopening denial. The latter provision did not distinguish between final orders issued by the Board of Immigration Appeals and those issued by the Department of Homeland Security.

On reopening authority, the Second Circuit held that 8 C.F.R. § 103.5(a) [authorizing reopening or reconsideration by the official responsible for the latest decision] covered reinstatement decisions. Its broad text contained no applicable exclusion and was not confined to immigration-benefits applications by surrounding headings or references to a benefits-oriented form. Nor did 8 U.S.C. § 1231(a)(5) [providing for reinstatement after unlawful reentry and barring reopening or review of the prior removal order] foreclose relief: that prohibition concerned the original removal order, not the distinct reinstatement decision. Santos challenged the reinstatement process, not his original removal.

The Second Circuit also held that 5 U.S.C. § 701(a)(2) [excluding review of agency action committed to agency discretion by law] did not preclude review. Section 103.5 supplied meaningful standards, including proper cause, new facts, and supporting evidence. Independently, even otherwise unreviewable discretionary decisions could be remanded when the agency misunderstood its authority. Applying abuse-of-discretion review, the Second Circuit concluded that CBP's legal error required vacatur and remand for initial consideration of Santos's motion.

Dissent

Circuit Judge Sullivan agreed that reinstatement orders were reviewable and that Santos's direct challenge was untimely, but dissented from review of the reopening denial. Reading § 103.5 in context, he concluded that it governed immigration-benefits requests, not CBP enforcement decisions. Without that regulation, he found no judicially manageable standards for reviewing CBP's discretionary refusal to reopen. He also argued that the majority's interpretation created a circuit split, relying on contrary Fifth, Seventh, and Tenth Circuit decisions.

Legal Significance

The decision established that CBP could not reject reinstatement-reopening motions categorically for lack of authority, and that its denials were subject to appellate review. The majority expressly rejected restrictive readings of § 103.5 in other circuits, while disputing the continuing force or precedential scope of portions of those decisions.

The ruling preserved the distinction between challenging reinstatement and reopening the underlying removal order. It did not decide whether equitable tolling generally applied to the petition deadline or whether Santos's notice claim warranted relief.

Key Takeaway

Directly challenge reinstatement within 30 days; a later reopening motion does not cure an untimely petition. A motion to CBP may challenge defects in reinstatement itself, but this decision did not authorize reopening the underlying removal order.

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