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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

MIRSAD HAJRO, JAMES R. MAYOCK

Plaintiffs,

v.

UNITED STATES CITIZENSHIP
AND IMMIGRATION SERVICES,
T. DIANE CEJKA, Director
USCIS National Records Center,
ROSEMARY MELVILLE,
USCIS District Director of San Francisco,
JANET NAPOLITANO, Secretary
Department of Homeland Security,
ERIC HOLDER, Attorney General
Department of Justice

Defendants

Case No. CV 08 1350 PSG

**PLAINTIFFS'
SUPPLEMENTAL BRIEF**

Pursuant to the Court's ORDER Soliciting Supplemental Briefing In Light
Of Recent Decision, Plaintiffs submit this Supplemental Brief addressing the
significance of the Ninth Circuit's recent opinion in *Dent v. Holder*, __F.3d__,
2010 WL 4455877 (9th Cir. Nov.9, 2010) to the pending cross-motions for
summary judgment.

Hajro v. USCIS - Case No. CV 08 1350 PSG
Plaintiff's Supplemental Brief

INTRODUCTION

In *Dent*, the Ninth Circuit addresses an alien's right to see his alien registration file ("A-file") during proceedings against him. "Section B" of the *Dent* decision, entitled "The government's duty to produce the A-file", strongly supports Plaintiffs' First, Second, and Seventh Causes of Action in the First Amended Complaint. The Ninth Circuit's decision recognizes the essential role that an alien's timely access to his or her "A-file" in immigration proceedings has in ensuring the fundamental fairness guarantee required by Due Process. This supports the basic argument in Plaintiffs' motion for summary judgment.

ARGUMENT

Plaintiffs' basic argument throughout this case has been that both the Mayock Settlement Agreement, which the government claims is no longer in effect, and the Constitution require the government to expedite the processing of FOIA requests when substantial due process rights of the requestor would be impaired by the failure to process immediately¹. Plaintiffs' constitutional arguments are set forth at pages 6-8 and 19-21 of Plaintiffs' Memorandum Of Points and Authorities (Document 51). These excerpts are attached to this brief as *Exhibits 1 and 2*.

Dent involved access to the A-file for aliens in removal proceedings based on the "shall have access" statute, 8 U.S.C. § 1229a(c)(2)(B). This statute only

¹This loss of substantial due process rights is not to be automatically assumed in any situation, but must be demonstrated by the FOIA requestor based on the facts of an individual case. An example would be where an individual has been denied citizenship based on alleged facts cited in the denial which the applicant disputes. The applicant should be granted access to the A-file to examine the basis of such fact finding by the government before his appeal brief is submitted or an appeal hearing is held under 8 U.S.C. § 1447(a).

1 applies to removal proceedings. The Court implied that this statute may give
 2 aliens a right to the A-file without the pre-condition of having to request it and
 3 without the necessity of filing a FOIA request. *Dent* at *6. The Court expressed
 4 its due process concerns with relying on FOIA requests:

5 If it (8 C.F.R. § 103.21) applied to removal proceedings, a serious
 6 due process problem would arise, because FOIA requests often
 7 take a very long time, continuances in removal hearings are
 8 discretionary, and aliens in removal hearings might not get
 9 responses to their FOIA requests before they were removed...It
 would indeed be unconstitutional if the law entitled an alien in
 removal proceedings to this A-file, but denied him access to it until
 it was too late to use it. *Dent*, at *6.²

10 *Dent* rests on the bedrock principle that “An alien has a Fifth
 11 Amendment right to due process...” *Dent* at *5. Though the facts of *Dent*
 12 dictated that the Court applied that right to removal proceedings, this
 13 fundamental right guaranteed by the Constitution “applies to all ‘persons’
 14 within the United States, including aliens, whether their presence here is
 15 lawful, unlawful, temporary, or permanent.” *Zadvydas v. Davis*, 533 U.S. 678,
 16 693 (2001) It therefore should apply to all immigration proceedings involving
 17 those aliens, including citizenship appeals and appeals to the Board of
 18 Immigration Appeals.

19 For aliens, “fundamental fairness” has been found to mean, *inter alia*:
 20 obtaining evidence to present one’s case, *Chin Yow v. U.S.*, 208 U.S. 8, 11-13
 21 (1908); a full and fair hearing of claims and a reasonable opportunity to
 22 present evidence; *Colmenar v. INS*, 210 F.3d 967, 971-972 (9th Cir. 2000); the
 23 right to present witnesses, *Najaf-Ali v. Meese*, 653 F.Supp 833, 836-839 (N.D.
 24 Cal. 1987); the right to adequate interpretation, *Perez-Lastor v. INS*, 208 F.3d

25
 26 ²Although the Court did not consider “Track 3”, which would seem to
 27 address this concern, the identical concern remains for aliens in immigration
 proceedings outside the context of removal hearings.

773, 777-78 (9th Cir. 2000); the right to effective representation, *Ahmed v. Mukasey*, 548 F.3d 768, 771 (9th Cir. 2008); constitutionally sufficient “notice” by the government, *Walters v. Reno*, 145 F.3d 1032, 1042-45 (9th Cir. 1998); procedural due process, *Padilla -Augustin v. INS*, 21 F.3d 970, 974-977 (9th Cir. 1994); an opportunity to be heard, *Castillo-Villagra v. INS*, 972 F.2d 1017, 1029 (9th Cir. 1992); adequate explanation of hearing procedures; *Jacinto v. INS*, 208 F.3d 725, 727-28 (9th Cir. 2000); fair procedures by the government; *Haitian Refugee Center v. Nelson*, 872 F.2d 1555, 1562-63 (11th Cir. 1989), *aff’d sub nom. McNary v. Haitian Refugee Center*, 498 U.S. 479 (1991).

Plaintiffs submit that the right of timely access to the documents in the A-file, where to do otherwise would cause prejudice to the alien in presenting his or her case³, should be added to this list of procedural due process protections.

8 U.S.C. § 1229a(c)(2)(B) mandates access to the A-file for aliens in removal proceedings. In *Dent*, the Court said this means that ALL aliens in removal proceedings are guaranteed this access *prior to* their removal hearing. This statutorily guaranteed access does not apply to aliens within the United States who are not in removal proceedings. Those aliens must file FOIA requests. 8 C.F.R. § 103.21. But, to comply with the constitutional mandate of due process for aliens, immigration proceedings for aliens within the United States must be fundamentally fair. *Zadvydas, supra*. The corollary is that to ensure that this right is meaningful, those aliens that can demonstrate that substantial due process rights would be impaired by the failure to process their

³A showing of prejudice “means that the outcome of the proceeding may have been affected by the alleged violation.” *Colmenar v. INS*, 210 F.3d 967, 971 (9th Cir. 2000) “We require the petitioner to show only that the IJ’s conduct ‘potentially [affected] the outcome of the proceedings.’ ” *supra*, at 972 (internal citations omitted). For an example, see Exhibit 3, Declaration of Robert Pauw.

1 FOIA request immediately must be granted expedited processing.⁴

2 *Dent*'s discussion of due process occurs in the removal context which
3 includes a statutory right of access to the A-file. There is no statutory right of
4 access to the A-file in other contexts. However, the underlying foundation of
5 *Dent* is that an alien's timely access to documents that are necessary to ensure
6 a fair opportunity to present one's case is required by due process. This
7 principle supports the core of Plaintiffs' argument: if an alien can
8 demonstrate that government delay in processing a FOIA request is going to
9 impair substantial due process rights then the FOIA request must be
10 expedited⁵. This is constitutionally required to ensure the fundamental
11 fairness of hearings and proceedings involving aliens within the United States⁶.

12
13
14 ⁴It must be noted that this is only due to the government's persistent and
15 gross violation of the 20 day processing mandate in the FOIA statute. If the
16 government obeyed the law and processed FOIA cases on a timely basis as
17 required by the statute, then this question of expedited processing would only
18 arise in the rarest of cases when even waiting 20 days was too long a delay due
19 to a "compelling need". See Pl. Mem. Of Points and Authorities, pp.6-8.

20 ⁵Another option would be to delay the hearing, brief, response, or motion
21 deadline until at least 30 days after the FOIA request is processed, however,
22 such continuances or extensions for filing briefs, responses, or motions are
23 discretionary and therefore not guaranteed. In some cases they are time
24 barred: (motions to reopen) 8 U.S.C. § 1229a(c)(7); 8 C.F.R. §§ 1003.2(c)(2),
25 1003.23(b)(1); (requests for evidence and notices of intent to deny) 8 C.F.R.
26 103.2(b)(8)(iv).

27 ⁶Examples of such cases where such a showing might be demonstrated
28 include, but are not limited to: appeals of denials of citizenship under 8 U.S.C.
§1447, appeals to the Board of Immigration Appeals under 8 C.F.R. §1003.3 ,
appeals to the Administrative Appeals Office under 8 C.F.R. §103.3, appeals to
the Legalization Appeals Office under 8 C.F.R. §245a.2(p), motions to reopen
under 8 C.F.R. §1003.2(c), and responses to a request for evidence or notice of
intent to deny under 8 C.F.R. §103.2(b)(8).

As the Ninth Circuit stated: “Dent argues that because he was not provided with the documents in his A-file, he was denied an opportunity to fully and fairly litigate his removal and his defensive citizenship claim. *We agree.*” *Dent*, at *6. (*emphasis added*) “That a proceeding should have taken place without the benefit of the documents in the government’s file...*invited error.*” *Dent*, at *4. (*emphasis added*) This is strong support for Plaintiffs’ contention that in all immigration proceedings involving aliens within the United States, where the impairment of substantial due process rights is demonstrated, failure to provide the A-file on a timely basis constitutes prejudice.

CONCLUSION

The fundamental fairness principle underlying *Dent* lends support to Plaintiffs’ position that expediting FOIA requests where there is a demonstrated loss of substantial due process rights is required by the Constitution.⁷

⁷Plaintiffs wish to inform the Court that Plaintiff Hajro’s appeal from the denial of his naturalization application under 8 U.S.C. § 1421(c) remains pending (No. C 10-01772 MEJ). As of this date the government continues to unlawfully withhold evidence from his A-file which could potentially affect the outcome of that proceeding. See Pl. Memo of Points and Authorities (Document 51) pp 21-25. As this case has recently been assigned to a new Judge, Plaintiff respectfully informs the Court that a hearing on cross-motions for summary judgment was held more than one year ago on October 27, 2009. It is Plaintiff’s hope that this case and this issue regarding access to evidence in Plaintiff’s A-file will be decided before his pending naturalization appeal. Should that not occur, however, Plaintiff would still have standing and the issue would not be moot if he lost the appeal because “This decision (denying naturalization) is made without prejudice toward the filing of a new application in the future.” See *Exhibit G* p.32 of the First Amended Complaint. Thus, the same issue would arise again between the same parties with the filing of a new citizenship application. See, *Hernandez v. Cremer*, 913 F.2d 230, 233-235 (5th Cir. 1990)

Dated: December 14, 2010

Respectfully submitted,

_____/s/_____
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