



AMERICAN IMMIGRATION LAW FOUNDATION
LEGAL ACTION CENTER
LITIGATION CLEARINGHOUSE
NEWSLETTER

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COURT ISSUES PERMANENT INJUNCTION AGAINST DHS IN ADIT LITIGATION

A federal district court issued a permanent injunction against DHS benefiting individuals who were granted adjustment of status by an immigration judge or the BIA. In this national class action, the plaintiffs challenged DHS' failure to provide documentation of their permanent resident status through a process called Alien Documentation, Identification and Telecommunication (ADIT) processing. The court's order sets forth timeframes during which DHS must issue the documentation. The case is *Santillan, et al. v. Gonzales*, No. 04-02686 (N.D. Cal. Dec. 22, 2005).

The court divided the class into two subclasses: (1) persons who adjusted prior to April 1, 2005, and (2) persons who adjusted [on or] after April 1, 2005. (April 1, 2005 was the date that EOIR's Background and Security Check regulations, 70 Fed. Reg. 4743 (Jan. 31, 2005) went into effect.) As to pre-April 1, 2005 residents, DHS must issue documentation within 60 days of the USCIS InfoPass appointment or 15 days of the ASC biometrics capture, whichever is later. As to post-April 1, 2005 residents, DHS must issue documentation within 30 days of the InfoPass appointment or 15 days of the ASC biometrics capture, whichever is later. If DHS fails to produce the documentation within these timeframes, USCIS must issue temporary documentation. The court's order also requires DHS to provide "Post-Order Instructions" to individuals at the conclusion of immigration court proceedings. And, within three days of the final EOIR order, DHS/ICE Chief Counsel offices must notify USCIS of the EOIR decision.

The court's memorandum rejects the government's "security concerns" as justification for withholding documentation. "The injunction ... gives defendants the opportunity to integrate [the plaintiffs] into the light of lawful society. The government's notion that

aliens running about without identification provides a more secure situation than aliens with documentation is absurd."

Congratulations to the plaintiffs' legal team, The Lawyers' Committee for Civil Rights Under Law of Texas, MALDEF, and Cooley Godward LLP.

If you have clients who are class members:

Please make appointments with USCIS to start the process. If you encounter problems, contact Javier Maldonado at The Lawyers' Committee for Civil Rights Under Law of Texas, jmaldonado@txlawyerscommittee.org.

New at the LAC ...

Over the past several weeks, AILF's Legal Action Center has filed amicus curiae briefs in the following cases.

Fernandez-Vargas v. Gonzales, Supreme Court, No. 04-1376. The issue is whether and under what circumstances the reinstatement of removal (or deportation) provision at INA §241(a)(5), as enacted by IIRIRA §305(a), applies retroactively to a person who reentered the U.S. before IIRIRA's effective date, April 1, 1997.

Imam v. Gonzales, 7th Cir., Case No. 05-3787: ("Succar" issue) Arguing that 8 CFR § 1245.1(c)(8), the regulation barring "arriving aliens" from adjusting status if in proceedings, violates INA § 245(a).

Delphin v. Gonzales, 11th Cir., Case No. 05-14941: ("Succar" issue) Arguing that 8 CFR § 1245.1(c)(8), the regulation barring "arriving aliens" from adjusting status if in proceedings, violates INA § 245(a).

COURTS REJECT THE APPLICABILITY OF *MATTER OF GRIJALVA* AND THE PRESUMPTION OF EFFECTIVE SERVICE

Several courts recently have weighed in on the BIA's long standing presumption of effective service of notice. In a pre-IRIRA case, *Matter of Grijalva*, 21 I&N Dec. 27 (BIA 1995), the BIA said that if notice of proceedings is sent through the US postal service by certified mail and there is proof of attempted delivery, a strong presumption of effective service arises. The BIA further held that though the presumption can be overcome, the respondent must present probative and substantive evidence, such as documentary evidence from the postal service or third party affidavits. "A bald and unsupported denial of receipt of certified mail is not sufficient to support a motion to reopen to rescind an in absentia order...."

Although many immigration judges continue to apply the presumption of effective service in post-IRIRA removal proceedings – even though the INA no longer requires delivery by certified mail – three courts (5th, 8th and 9th Circuits) have concluded that delivery by regular mail does not raise the same presumption of service, and thus less evidence may be required to establish nondelivery.

Maknojiya v. Gonzales, No. 04-60361, 2005 U.S. App. LEXIS 26239 (5th Cir. Dec. 1, 2005) (unpublished) (reissued as published opinion on Dec. 9, 2005)

Ghounem v. Ashcroft, 378 F.3d 740 (8th Cir. 2004)

Salta v. INS, 314 F.3d 1076 (9th Cir. 2002)

As these courts have noted, when regular mail is used, the only proof of nondelivery may be the respondent's statement that he or she did not receive the notice.

Only one court of appeals, the Tenth Circuit, has held explicitly that *Matter of Grijalva* is applicable to post-IRIRA removal cases. See *Gurung v. Ashcroft*, 371 F.3d 718 (10th Cir. 2004). However, *Gurung* left open

the possibility that the respondent's statement alone, if sufficiently detailed and in affidavit form, may be sufficient to overcome the presumption of effective delivery. See also *Joshi v. Ashcroft*, 389 F.3d 732 (7th Cir. 2004).

CLEARINGHOUSE HIGHLIGHT

In each edition of this newsletter, the Clearinghouse will highlight one case in order to showcase novel arguments, creative lawyering, and issues of first impression.

***United States v. Copeland*, 376 F.3d 61 (2d Cir. 2004)**

This case was a successful collateral attack of a deportation order in the context of an illegal reentry case. See 8 U.S.C. § 1326. The Second Circuit Court of Appeals upheld the district court's dismissal of the criminal charge against Copeland.

Among the issues the court addressed was whether the entry of the deportation order was fundamentally unfair. This issue turned on whether the failure to advise a person in proceedings of the right to seek section 212(c) relief can constitute fundamental unfairness. Several courts already had held that the failure to inform a person about *discretionary* relief cannot give rise to a fundamental procedural error. However, the Second Circuit rejected the analyses in these decisions, distinguishing between the right to apply for relief and the right to the relief itself. As the court noted, "the right to a Section 212(c) hearing is well established and mandatory, whether or not the ultimate granting of relief is discretionary." The court also relied on the Supreme Court's analysis in *INS v. St. Cyr*, "which recognized the importance of being able to seek such relief and the right to seek such relief, even if discretionary, cannot be lightly revoked." *Defendant-Appellee Copeland was represented by the Legal Aid Society Federal Defender Division, New York, NY.*

AILA prepares digests of all Supreme Court and significant appeals court decisions and posts them on Infonet. The digests are sorted by court and are searchable. See www.aila.org.

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AILF's Legal Action Center works to advance fundamental fairness in United States immigration law and to protect the constitutional and legal rights of noncitizens. The LAC conducts national impact litigation; writes amicus curiae briefs; produces practice advisories; conducts the Litigation Institute and other legal educational programs; and mentors, coordinates and provides technical support for lawyers litigating due process and fairness issues in family, removal and business immigration cases.

The Clearinghouse is a project of the Legal Action Center. The Litigation Clearinghouse serves as a national point of contact for lawyers conducting or contemplating immigration litigation. The LAC encourages immigration attorneys to contact the Clearinghouse to share information about your cases.