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COURTS AND BIA ISSUE DECISIONS ON ADJUSTMENT OF STATUS (INA § 245(i))
AFTER REENTRY WITHOUT ADMISSION

Over the past two years, three circuit courts have examined whether a person who reentered without admission can apply for adjustment of status under INA § 245(i). (These cases are described below). In January 2006, the BIA entered the debate in a precedent decision, *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006). The BIA held that a person who reentered the United States without admission after having been removed is ineligible to adjust under INA § 245(i) because he or she is inadmissible under INA § 212(a)(9)(C)(i)(II) (previously removed). In *Matter of Torres-Garcia*, the respondent had filed an I-212 waiver from outside of the United States, and DHS approved his request for permission to reapply for admission. Thereafter, the respondent reentered the United States without being admitted or paroled.

Importantly, the respondent in *Matter of Torres-Garcia* did not contest removability under INA § 212(a)(9)(C). Some petitioners may have arguments that the prior order was unlawful or that their current entry is lawful. The respondent in *Matter of Torres-Garcia* also reentered after April 1, 1997, the trigger date for INA § 212(a)(9)(C)(i)(II). See Memorandum of Paul Virtue, INS Acting Executive Associate Director (June 17, 1997) available on *Infonet*, AILA InfoNet Doc. No. 97061790. Further, the BIA's decision did not address the recently enacted Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. 109-162 (Jan. 5, 2006). This Act was signed by the President three weeks before the BIA issued *Matter of Torres-Garcia*. Section 813(b) specifically refers to the use of I-212 waivers from within the United States, thus reinforcing the argument that the waivers may be granted retroactively.

The other circuit court cases that address similar issues are:

Perez-Gonzalez v. Ashcroft, 379 F.3d 783 (9th Cir. 2004). On petition for review of reinstatement order.

Petitioner filed an application for adjustment under INA § 245(i) and filed an I-212 waiver before the reinstatement order was issued. The court held that the I-212 should be adjudicated first, and if approved, be retroactive to the date on which the petitioner entered the country. In such a situation, the petitioner would not be inadmissible under INA § 212(a)(9)(C) and would not be subject to reinstatement, INA § 241(a)(5). *Despite Matter of Torres-Garcia*, *Perez-Gonzalez controls in the Ninth Circuit*.

Berrum-Garcia v. Comfort, 390 F.3d 1158 (10th Cir. 2004). On habeas petition challenging reinstatement of removal.

Petitioner filed an application for adjustment under INA § 245(i) and an I-212 waiver; subsequently, DHS issued a reinstatement order. The court held that INA § 241(a)(5) bars illegal reentrants from any relief, including adjustment and an I-212 waiver, regardless of whether the relief applications were filed before reinstatement. The court also rejected *Perez*-

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New at the LAC ...

AILF's Legal Action Center recently filed an amicus curiae brief in *Garcia v. Gonzales*, 11th Cir., No. 05-12059. In the brief we argued that 8 CFR § 1245.1(c)(8), the regulation barring "arriving aliens" from adjusting status if in proceedings, violates INA § 245(a) ("*Succar*" issue).

AILF issued a new litigation resource, *FOIA Resources*. This is non-exhaustive list of FOIA resources including agency information as well as articles and other secondary resources regarding FOIA litigation. It is available at http://www.ailf.org/lac/lac_resources_020606.pdf.

Gonzalez's reasoning that individuals may apply for I-212 waivers from inside the U.S. after being removed.

***Mortera-Cruz v. Gonzales*, 409 F.3d 246 (5th Cir. 2005).** On petition for review in removal proceedings.

Petitioner conceded that he was subject to inadmissibility under INA § 212(a)(9)(C)(i)(I), but argued that INA § 245(i) trumps this ground of inadmissibility. The court rejected petitioner's argument.

***Padilla-Caldera v. Gonzales*, 426 F.3d 1294 (10th Cir. 2005)** (petition for rehearing en banc pending, petitioner ordered to respond by Feb. 15, 2006). On petition for review in removal proceedings.

The court found that INA § 245(i) trumps inadmissibility under INA § 212(a)(9)(C)(i)(I) (reentry after more than one year of unlawful presence). The court distinguished *Berrum* on the ground that Petitioner *Berrum* had been "ordered removed" and thus was subject to the reinstatement provision, INA § 241(a)(5), which bars relief.

COURTS LIMIT APPLICABILITY OF MANDATORY DETENTION, INA § 236(c)

This is the second in a series of articles focusing on developments concerning mandatory detention. The first article is in the January 25, 2006 issue of the Litigation Clearinghouse Newsletter.

Since the Supreme Court's 2003 decision *Demore v. Kim*, 538 U.S. 510 (2003), lower courts have set limits on when the government may detain a person under the mandatory detention provision at INA § 236. At least one court found that INA § 236(c) applies only when a person is taken into immigration custody at the time of release from criminal custody. See *Quezado-Bucio v. Ridge*, 317 F. Supp. 2d 1221 (W.D. Wash. 2004) (interpreting language in INA § 236(c)(1) "when the alien is released" and rejecting *Matter of Rojas*, 23 I&N Dec. 117 (BIA 2001)) cited in *Tenreiro*

v. Ashcroft, No. 04-768, 2004 U.S. Dist. LEXIS 13601 (D. Or. June 14, 2004), *vacated on other grounds by* 2004 U.S. Dist. LEXIS 14005 (D. Or. July 12, 2004); see also *Zabadi v. Chertoff*, No. 05-03335, 2005 U.S. Dist. LEXIS 31914 (N.D. Ca. 2005) (citing *Quezado-Bucio* in interpreting similar language in pre-IIRIRA detention provision).

The Seventh Circuit, in a 2004 decision, left open the possibility that the application of INA § 236(c) to individuals with good-faith claims that they are not removable as charged may violate due process. See *Gonzalez v. O'Connell*, 355 F.3d 1010 (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.

***Pinho v. Gonzales*, 432 F.3d 193 (3d Cir. 2005)**

This case challenges the AAO's denial of adjustment of status based on a controlled substance violation that was later vacated. The Third Circuit first found that the district court has jurisdiction to review the AAO's decision under the APA and 28 U.S.C. § 1331. Moving on to the merits of the case, the court noted that a person whose conviction is vacated because of ineffective assistance of counsel is no longer "convicted" for immigration purposes. In order to determine the basis of the vacatur, the court must look first at the judge's decision for vacating; the court may look to the criminal court record only if the decision does not state clearly the reasons for the vacatur. The court may not consider any additional evidence. *Petitioner Pinho was represented by Thomas Moseley.*

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.

<http://www.aila.org/Content/default.aspx?docid=18314>

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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.

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