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LEGAL ACTION CENTER

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BUSINESS GROUPS CHALLENGE E-VERIFY RULE; DHS TO SUSPEND RULE

The United States Chamber of Commerce and other business groups filed a lawsuit challenging a new USCIS rule and a June 6, 2008 Executive Order that require certain government contractors and subcontractors to participate in the E-Verify program. *Chamber of Commerce v. Chertoff*, No. 08-03444 (D. Md. *filed* Dec. 23, 2008). The rule requiring participation in E-Verify – an Internet-based system that allows employers to verify electronically that newly hired employees are authorized to work in the United States – was to become effective on January 15, 2009. The complaint alleges, inter alia, that the rule and the Executive Order violate the INA because IIRIRA § 402(a) precludes the Secretary of Homeland Security from requiring participation in the program. On January 9, the plaintiffs announced that DHS has agreed to suspend the rule until February 20, 2009.

Read more about this suit on AILF's Employment Verification Litigation Issue Page, http://www.ailf.org/lac/clearinghouse_nomatch.shtml. This Litigation Issue Page also includes developments in the Social Security no-match letter litigation.

SUPREME COURT UPDATE

The Supreme Court will hear oral argument in two immigration-related cases this winter: (1) Stay Standard, *Nken v. Mukasey*, No. 08-681 (argument on Jan. 21, 2009). The Court will consider whether INA § 242(f)(2) (clear and convincing evidence standard) or the traditional test for preliminary injunctive relief applies when adjudicating stays of removal pending a petition for review; (2) Aggravated Identify Theft, *Flores-Figueroa v. U.S.*, No. 08-108 (argument on Feb. 25, 2009). The Court will consider whether the aggravated identity theft statute, 18 U.S.C. § 1028A(a)(1), requires that the defendant know that the means of identification he or she used belonged to another person. Read more about these cases and other Supreme Court developments at AILF's Supreme Court Update webpage, http://www.ailf.org/lac/supremecourt_112806.shtml.

AG OVERRULES *LOZADA*

On January 7, 2009, the Attorney General issued a precedent decision holding that respondents in removal proceedings do not have a Fifth Amendment due process right to effective assistance of counsel. Thus, the AG found that although IJs and the BIA

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NEW AT THE LAC …

Matter of Orozco (BIA brief submitted Jan. 8, 2009). AILF submitted an amicus brief in support of the respondent arguing that an individual is "admitted" for purposes of adjustment of status (INA 245(a)) if that individual is inspected and allowed to enter the United States, regardless whether he or she actually was inadmissible at the time for fraud, misrepresentation or any other reason. This case is before the BIA on remand from the Ninth Circuit after the court vacated its prior decision, *Orozco v. Mukasey*, 521 F.3d 1068 (9th Cir. 2008) (vacated Oct. 20, 2008). Interestingly, in its brief, DHS agrees with AILF's position that "lawful entry" under INA § 101(a)(13) means procedurally lawful only and that a person who entered by fraudulent means has been admitted. The BIA also has scheduled oral argument for Jan. 29, 2009 in another case addressing these issues.

Matter of Yauri (BIA brief submitted Nov. 4, 2008). AILF submitted an amicus brief in support of the respondent to address when and how an arriving alien in removal proceedings can apply for adjustment of status.

Equal Access to Justice Act (EAJA) Fee Application (updated Dec. 15, 2008). AILF's Practice Advisory addresses the eligibility and procedural requirements for filing an EAJA fee application. http://www.ailf.org/lac/pa/EAJA_Fees_04_07_06.pdf

Voluntary Departure Q&A (December 22, 2008). This Q&A provides an overview of EOIR's new regulations on voluntary departure. See the discussion of the new rule on the following page. http://www.ailf.org/lac/pa/VoluntaryDeparture_QandA_12_22_2008.pdf

AG Overrules *Lozada* Continued

may reopen cases as a matter of discretion, respondents have no legal right to have their cases reopened when counsel was ineffective. The decision overrules prior BIA precedents, including *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), and *Matter of Assaad*, 23 I&N Dec. 553 (BIA 2003). The AG's decision specifies when the BIA and immigration judges, in their discretion, may grant motions to reopen based on claims of "deficient performance of counsel." Respondent must show that but for counsel's deficient performance, it is more likely than not that they would have been entitled to the ultimate relief they were seeking. The AG's decision sets forth the substantive and procedural requirements for these claims.

The decision, *Matter of Compean*, 24 I&N Dec. 710 (AG 2009), is available at http://www.aila.org/content/fileviewer.aspx?docid=27567&linkid=188325. See AILF's press release and amicus brief in this case at http://www.ailf.org/lac/lac_biaprocedures.shtml. AILF will continue its efforts to secure the right to counsel in removal proceedings and will provide guidance regarding *Compean* over the next few weeks and months.

Regulatory Developments in Removal Cases

Under New Voluntary Departure Rule, VD Terminates When Filing PFR or MTR.

EOIR issued a final rule, effective January 20, 2009, that addresses various aspects of voluntary departure, several of which have been the subject of extensive litigation in the federal courts. Among other things, this rule specifies that voluntary departure terminates upon the filing of a motion to reopen or reconsider and upon the filing of a petition for review; requires individuals granted voluntary departure to provide proof to the BIA of payment of the voluntary departure bond if a case is appealed; and purports to reverse *Matter of Diaz-Ruacho*, 24 I&N Dec. 47 (BIA 2006) (regarding consequences of failing to depart if voluntary departure bond is not posted within five days). AILF has been involved in much of the voluntary departure litigation, commented on the proposed rule, and issued a Q&A about the new rule. Read the rule at http://www.aila.org/content/fileviewer.aspx?docid=27460&linkid=187734 and AILF's Q&A at http://www.ailf.org/lac/pa/VoluntaryDeparture_QandA_12_22_2008.pdf

EOIR Withdraws New BIA Streamlining Rule.

In June 2008, EOIR published a proposed rule on BIA streamlining procedures and issuance of precedent decisions. Among other things, the proposed rule limited courts of appeals review over AWO procedure, dictated exhaustion requirements for judicial review, and allowed the majority of three-member panels to issue precedent decisions without securing full BIA support for the decision. AILF and AILA submitted comments critical of this rule, *see* http://www.aila.org/content/default.aspx?docid=26290. Although the final version of this rule was cleared for publication, on December 30, 2008, the Department of Justice withdrew the rule. The current rules regarding BIA streamlining and other BIA adjudication procedures remain in effect. *See* 8 C.F.R. § 1003.1.

Respondent Seeks Reconsideration of AG's Decision on CIMTs and the Categorical Approach

The respondent in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (AG 2008) is seeking reconsideration of the Attorney General's decision. The decision, issued in November 2008, establishes a new framework for determining whether a conviction qualifies as a crime involving moral turpitude. Under the new framework, immigration judges may be allowed to consider "any additional evidence … necessary or appropriate to resolve accurately the moral turpitude question." The decision marks a drastic departure from how immigration judges, the BIA and the courts have analyzed crimes to determine whether they are CIMTs and essentially guts the application of the categorical and modified categorical approach.

Several organizations submitted an amicus brief in support of the respondent's motion to reconsider. Read the brief of amici at http://www.aila.org/Content/default.aspx?docid=27391 DHS filed a response to the motion to reconsider, and amici submitted a reply on January 6, 2009.

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The Clearinghouse is a project of AILF's 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 case information.

Litigation Clearinghouse Newsletters are posted on AILF's web page at www.ailf.org/lac/litclearinghouse.shtml.

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