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CSPA LITIGATION UPDATE: BIA NARROWLY INTERPRETS INA § 203(h); DISTRICT COURT CERTIFIES CLASS ACTION

The BIA interpreted section 3 of the Child Status Protection Act (CSPA) and held that the priority date retention and automatic conversion provision does not apply to a derivative beneficiary of a 4th preference family-based visa petition. *Matter of Wang,* 25 I&N Dec. 28 (BIA 2009). This same provision, codified at INA § 203(h)(3), also is at issue in several cases in the District Court for the Central District of California. One of those cases, *Costelo v. Chertoff*, No. 08-688 (C.D. Cal. *filed* June 20, 2008), was filed as a class action, and last week, the court issued a tentative order certifying the class.

Section 203(h)(3) of the INA states that where certain beneficiaries of visa petitions, including derivative beneficiaries, are unable to retain the status of "child" under the CSPA formula, they nevertheless are entitled to automatic conversion of the petition to the appropriate category and retention of the priority date from the original petition. The BIA found that this provision is ambiguous. It went on to hold that INA § 203(h)(3) would apply only to visa petitions filed by an LPR parent for a child as either a direct or derivative beneficiary. Thus, the BIA rejected Wang's argument that he should retain for his adult daughter a 1992 priority date where he was the beneficiary of a 4th preference visa and his daughter had been named as a derivative beneficiary and where she aged out before the visa was available. Arguably, the BIA's interpretation ignores the plain language of INA § 203(h)(3), which covers all derivative beneficiaries, including those in other family-based petitions and in employment-based and diversity petitions.

In *Costelo*, the district court tentatively certified a class defined as "Permanent resident aliens who obtained their permanent residence status on or after August 6, 2002, and who filed petitions on behalf of children who subsequently 'aged-out' of their preference category and for whom the Defendants have not granted the automatic conversion and retention of the original priority date of the original visa petition or application pursuant to 8 U.S.C. §

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SUPREME COURT FINDS CATEGORICAL APPROACH NOT APPLICABLE FOR DETERMINING LOSS AMOUNT FOR FRAUD OFFENSE

The Supreme Court addressed what evidence an IJ may consider to determine removability based on an aggravated felony conviction under INA § 101(a)(43)(M)(i), an offense that involves fraud or deceit in which the loss to the victim or victims exceeds $10,000. *See Nijhawan v. Mukasey*, 557 U.S. __, 2009 U.S. LEXIS 4320 (June 15, 2009). In a unanimous decision, the Court held that the IJ did not err in looking beyond the record of conviction and considering the petitioner's sentencing stipulation and restitution order to determine the amount of loss to the victim. The Court said that neither the categorical approach nor the modified categorical approach applies to determining the loss amount. Read a summary of this case and the decision at http://www.ailf.org/lac/supremecourt_112806.shtml.

NEW AT THE LAC …

The LAC issued the following new and updated Practice Advisories. They are available at http://www.ailf.org/lac/lac_pa_topics.shtml.

The Section 237(a)(1)(H) Fraud Waiver (June 16, 2009). This Practice Advisory discusses the § 237(a)(1)(H) waiver for fraud or misrepresentation at admission that would otherwise render deportable certain LPRs and VAWA self-petitioners.

Return to the United States after Prevailing on a Petition for Review (updated May 28, 2009). This Practice Advisory contains practical and legal suggestions for attorneys representing clients who have prevailed on a petition for review or other legal action and who are outside of the United States.

Also, the LAC continues to post developments in immigration litigation on our Litigation Issue Pages, http://www.ailf.org/lac/lit_issue_pages.shtml. Recently, we have updated our "Ineffective Assistance of Counsel" page with information about the AG's order vacating *Matter of Compean*, including a link to the decision, DOJ's press release, and AILF's press release.

CSPA Continued

1153(h)(3)." Following the BIA's decision in *Matter of Wang*, the Court invited the parties to submit supplemental briefs to address the decision and its impact on the pending motion for class certification.

COURT ENTERS FINAL ORDER IN FAVOR OF RELIGIOUS WORKERS IN CLASS ACTION

The district court issued a final order in a class action challenging the requirement that religious workers have an approved visa petition before they can file an adjustment of status application. *Ruiz-Diaz v. USA*, No. 07-1881 (W.D. Wash. June 11, 2009). The court previously granted plaintiffs' summary judgment motion and held that the bar against concurrent filing for religious workers set forth in 8 C.F.R. § 245.2(a)(2)(i)(B) was invalid and unenforceable. In its final order, the court, inter alia, directed USCIS to 1) accept I-485 applications and I-765 employment authorization applications submitted concurrently or subsequent to the I-360 visa petition and 2) adjudicate the applications in the same manner as applications from non-religious worker applicants. Read a summary of the case and order at http://www.ailf.org/lac/clearinghouse_otherissues.shtml#ruiz.

CLEARINGHOUSE HIGHLIGHT
Second Circuit Finds Jurisdiction to Review Hardship Determination in Cancellation Case

Mendez v. Holder, No. 06-0032, __ F.3d__, 2009 U.S. App. LEXIS 9951 (2d Cir. May 8, 2009)

The Second Circuit found jurisdiction to review an IJ's finding (affirmed by the BIA) that the petitioner had not shown "exceptional and extremely unusual hardship" to his U.S. citizen son and daughter for cancellation of removal under INA § 240A(b). Although Second Circuit case law interpreting INA § 242(a)(2)(B)(i) (the discretionary decision bar) generally precludes the court from reviewing the IJ's hardship determination, it can review "errors of law" with respect to the determination. Here, there was an error of law because the IJ "totally overlooked" and "seriously mischaracterized" facts that were important to the hardship determination. The court reasoned that the BIA, after taking the overlooked evidence into consideration, may have reached a different conclusion. Thus, the court remanded the case to the BIA to reevaluate the hardship determination. The government has sought an extension to file a petition for rehearing.

BIA REMANDS *OROZCO*, CASE INVOLVING ADJUSTMENT OF STATUS WHEN ADMISSION INVOLVED FRAUD OR MISREPRESENTATION

Without addressing the continuing validity of *Matter of Areguillin*, 17 I&N Dec. 308 (BIA 1980), the BIA remanded *Matter of Orozco* to an immigration judge so that the government can amend the Notice to Appear to include an inadmissibility charge. *Matter of Orozco* was before the BIA on remand from the Ninth Circuit, *Orozco v. Mukasey*, 521 F.3d 1068 (9th Cir. 2008) (vacated Oct. 20, 2008).

The original issue in the case was whether a noncitizen is "admitted" for purposes of adjustment of status (INA § 245(a)) if he is inspected and allowed to enter the United States, regardless of whether he actually was inadmissible at the time for fraud or misrepresentation. In its briefing to the BIA, DHS generally agreed that this can constitute an admission because, consistent with *Matter of Areguillin*, all that is required under the current definition of "admission" is a procedurally regular entry. However, the government argued that an exception exists where, at entry, the noncitizen falsely claims to be an LPR, citing to the statutory definition of when a returning LPR is considered to be "seeking admission" (INA §101(a)(13)(C)). Because *Orozco* misrepresented his status as an LPR at his entry, the government argues that he was not "admitted" and moved to remand so it could amend the NTA to charge him as inadmissible under INA § 212(a)(6)(A)(i) (present without admission).

A second case raising the continuing validity of *Matter of Areguillin* remains pending before the BIA. It does not involve a false claim to LPR status and thus does not fit within the exception alleged by the government in Orozco. AILF and AILA filed amicus briefs in both cases. Please contact AILF at clearinghouse@ailf.org if you have similar cases that are or will be in the circuit courts.

Read the unpublished BIA decision at http://www.ailf.org/lac/chdocs/Orozco-dar.pdf . Read the government's brief at http://www.aila.org/Content/default.aspx?docid=27805

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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.

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