AMERICAN IMMIGRATION LAW FOUNDATION
LEGAL ACTION CENTER
LITIGATION CLEARINGHOUSE NEWSLETTER

Vol. 1, No. 18 October 13, 2006

LAWSUIT CHALLENGES DHS' REFUSAL TO FOLLOW *PEREZ-GONZALEZ*, NINTH CIRCUIT I-212 DECISION; COURT ISSUES TRO

A federal court granted a temporary restraining order in a suit challenging DHS' refusal to follow *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004). *Perez-Gonzalez* is a Ninth Circuit case holding that individuals who have previously been removed or deported may apply for adjustment of status (under INA § 245(i)) along with an accompanying I-212 waiver application. Pursuant to the temporary order, USCIS district offices and the AAO cannot deny any I-212 application pending in the Ninth Circuit on basis that ten years has not elapsed since the applicant's last departure. In addition, DHS cannot give legal effect to an I-212 that was denied on this basis, and, thus, at least temporarily, protects qualifying I-212 applicants against reinstatement of removal under INA § 241(a)(5). This order does not affect I-212 applicants outside of the Ninth Circuit. For more information about the TRO, see http://www.ailf.org/lac/tro_lit_92806.pdf.

The suit, *Duran Gonzalez v. U.S. Dept. of Homeland Security*, C-06-1411, was brought as a class action by the Northwest Immigrants Right Project, the American Immigration Law Foundation, and Van Der Hout, Brigagliano & Nightingale, LLP. It was filed in the Western District of Washington on September 28, 2006. It focuses on the policy as set forth in a March 31, 2006 USCIS memo intended to implement *Perez-Gonzalez*. See http://www.aila.org/content/default.aspx?docid=20233.

In this memo, USCIS headquarters advised field officers to deny I-212 waivers in any case where the person is inadmissible for having been deported (INA § 212(a)(9)(C)(I)(i)) and ten years have not lapsed since the last departure. This memo and policy , however, conflict directly with *Perez-Gonzalez v. Ashcroft*, which did not require applicants to satisfy a ten years from the date of last departure. District Court Judge Marsha J. Pechman's temporary restraining order says that the government is "enjoined from applying or enforcing the policy set forth in Part 3(A) of the *Perez-Gonzalez* Memo."

If DHS denied your client's I-212 because 10 years had not elapsed after the departure from the US and/or DHS has arrested your client and/or reinstated a prior removal order against your client, please email us immediately at clearinghouse@ailf.org. If you have already contacted us about the denial of your client's I-212, you do not need to contact us again unless there has been a development.

For more information and updates about the suit, see http://www.ailf.org/lac/lac_lit_92806.shtml.

SUPREME COURT REMANDS ASYLUM CASE

The Supreme Court granted the government's certiorari petition in *Gonzales v. Tchoukhrova*, No. 05-1401 (Oct. 2, 2006). In *Tchoukrova v. Gonzales*, 404 F.3d 1181, *reh'g denied* 430 F.3d 1222 (9th Cir. 2005), the Ninth Circuit issued a favorable asylum decision involving social group as the basis of the claim. The Supreme Court's order vacated the Ninth Circuit's decision and remanded the case "for further consideration in light of *Gonzales v. Thomas*, 547 U.S. ___ (2006)."

By citing *Thomas*, a recent case applying the "ordinary remand rule," the Supreme Court indicated that the Ninth Circuit erred by reaching issues that the BIA had not ruled on in the first instance. The Supreme Court's order suggests that the Ninth Circuit should have remanded *Tchoukrova* to the BIA for further analysis. Importantly, the Supreme Court's order did not express any opinion regarding the merits of the underlying decision.

For a more detailed description of the Ninth Circuit's decisions, see AILA's case summaries at http://www.aila.org/Content/default.aspx?docid=18312 http://www.aila.org/Content/default.aspx?docid=16392

CLEARINGHOUSE HIGHLIGHT

In each edition of this newsletter, the Clearinghouse highlights cases that showcase novel arguments, creative lawyering, and issues of first impression.

CSPA Protects Aged Out Beneficiary Where No Application for Immigrant Visa Pending on Date of Enactment. *Rodriguez v. Gonzales*, No. CV 04-8671 (C.D. Cal. May 31, 2006)

A federal district court interpreted the effective date provision of the CSPA and found that the statute applies to an approved beneficiary who aged out prior to the enactment of the CSPA and had not filed an application for an immigrant visa because he had been ineligible at that time. The plaintiff in this case, a US citizen, filed an I-130 for her son when he was 19 years old. He turned 21 on January 13, 2000. The petition was approved on October 23, 2001 and the son was classified first preference family-sponsored immigrant. When Congress enacted the CSPA in 2002, the son's priority date was not current.

Plaintiff brought this action seeking a declaratory judgment that her son qualifies as an immediate relative. She argued that under the effective date provision of the CSPA (§ 8(1)), the CSPA was applicable to her son and he retained his status as a child pursuant to the formula for calculating age found in § 2 of the CSPA, INA § 201(f)(1). CSPA § 8(1) says that a beneficiary of a visa petition approved before the date of enactment of the CSPA qualifies for protection under the Act "only if a final determination has not been made on the beneficiary's application for an immigrant visa or adjustment of status to lawful permanent residence." The government argued that section 8(1) applies only to beneficiaries with pending applications. Here, the plaintiff had not filed an immigrant visa application prior to the date of enactment because his first preference priority date was not current. The government therefore maintained that, under § 8(1), the CSPA was inapplicable and the beneficiary had aged out. The court rejected the government's argument and concluded that § 8(1) does not include a filing requirement. The court said that its "interpretation of the statute is consistent with [the statute's] plain language and furthers the congressional objective of providing expansive relief and promoting family reunification." Thus, the court ordered that the government immediately reclassify the beneficiary as an immediate relative rather than an adult child, and adjudicate the petition accordingly.

The government did not appeal the court's decision, and thus the decision is final. Other courts may find the decision persuasive and attorneys may consult the judge's thorough opinion when making this argument in another venue. The decision is posted at http://www.ailf.org/lac/gonzales_53106.pdf.

SOUTHERN CALIFORNIA PRACTITIONERS: VAWA ADJUSTMENTS DENIED FOR BEING PRESENT WITHOUT ADMISSION

The National Network to End Violence Against Immigrant Women and the National Immigration Project are considering litigation to challenge the unlawful denial of VAWA adjustment applications for applicants who are present without being admitted or paroled. Pursuant to INA § 245(a), VAWA self-petitioners are eligible to adjust regardless of their manner of entry. The Los Angeles and San Diego District Offices, among others, have a policy of denying VAWA adjustment applications for people inadmissible under INA § 212(a)(6)(A)(i) unless the entry was connected to the abuse. If you have a VAWA client whose adjustment application was denied or is pending in the Los Angeles or San Diego District Offices, please contact Mike Seplow at MSeplow@aol.com.

AILF Legal Action Center, Litigation Clearinghouse

www.ailf.org/lac
clearinghouse@ailf.org

Beth Werlin
Litigation Clearinghouse Attorney

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.

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

AILF gratefully acknowledges LexisNexis for providing online legal research services.