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ADVERSE DECISIONS ON INA §§ 245(i) AND 212(a)(9)(C)

Ninth Circuit Vacates Preliminary Injunction in I-212, *Perez-Gonzalez* Class Action; *Perez Gonzalez* No Longer Law of Ninth Circuit

On November 30, 2007, the Ninth Circuit Court of Appeals ruled in favor of the government and vacated the preliminary injunction in *Duran Gonzalez v. DHS*. *Duran Gonzalez* is a circuit-wide class action challenging the DHS' refusal to follow *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004). In *Perez-Gonzalez*, the Ninth Circuit determined that individuals who have previously been removed or deported (inadmissible under INA § 212(a)(9)(C)(i)(II)) may apply for adjustment of status (under INA § 245(i)) along with an accompanying I-212 waiver.

The Ninth Circuit's November 30 decision vacates the preliminary injunction, which protected I-212 applicants in the Ninth Circuit. Although the decision will not go into effect until the mandate is issued, it is important to note that *Perez-Gonzalez* is no longer the law of the circuit. Unless a panel or en banc court issues a subsequent favorable decision in *Duran Gonzalez* or another case, noncitizens should not rely on *Perez Gonzalez*. To read more about this suit, class member information, and decisions, see AILF's website at http://www.ailf.org/lac/lac_lit_92806.shtml.

BIA Finds Reentry After 1+ Years of Unlawful Presence Bars Adjustment under INA § 245(i)

The BIA issued a precedent decision, *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007), in which it held that a person subject to INA § 212(a)(9)(C)(i)(I) (reentry after being unlawfully present for more than one year) is not eligible to adjust status under INA § 245(i). In so doing, the BIA disagreed with favorable decisions in the Ninth and Tenth Circuits, *Acosta v. Gonzales*, 439 F.3d 550 (9th Cir. 2006), and *Padilla-Caldera v. Gonzales*, 453 F.3d 1237 (10th Cir. 2005). The BIA's decision says that it is not addressing

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AMENDED FEDERAL COURT RULES LIMIT ACCESS TO ELECTRONIC DOCUMENTS

On December 1, 2007, amended federal rules of procedure went into effect that limit public access to electronic court documents. Amended Federal Rule of Civil Procedure 5.2(c) limits remote access to electronic files in immigration and social security cases. The rule states that only "the parties and their attorneys may have remote electronic access to any part of the case file, including the administrative record." Other persons may have full access to the electronic record *at the courthouse*, and may have remote electronic access to the docket and "an opinion, order, judgment, or other disposition of the court," but

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NEW AT THE LAC …

Brief in Supreme Court Case. The ACLU and AILF submitted an amicus curiae brief on behalf of the ACLU, AILA and AILF in *Ali v. Achim*, No. 06-1346. *Ali* considers whether an offense must be an aggravated felony to be classified as a "particularly serious crime." The amicus brief focuses exclusively on the jurisdictional issues in the case, and discusses, INA § 242(a)(2)(D) and INA § 242(a)(2)(B)(ii). Find out more about this case and read the amicus brief at http://www.ailf.org/lac/supremecourt_112806.shtml.

Petition for Rehearing En Banc in Reinstatement Case. AILF filed a petition for rehearing en banc on behalf of AILF, AILA, the National Immigration Project of the National Lawyers Guild, and Northwest Immigrant Rights Project in *Martinez-Merino v. Keisler* No. 05-74776, 2007 U.S. App. LEXIS 23725 (Oct. 10, 2007). The panel, relying on *Morales-Izquierdo v. Gonzales*, 486 F.3d 484 (9th Cir. 2007), held that it was precluded from reviewing a challenge to a reinstated removal order. The petition for rehearing argues that INA § 241(a)(5) "limits or eliminates judicial review" within the meaning of INA § 242(a)(2)(D) and, therefore, the court has jurisdiction to review constitutional and legal challenges to reinstated removal orders.

INA § 245(i) Continued

whether to apply the holding in the Ninth and Tenth Circuits, but notes that under Supreme Court law, "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." The implications for applicants in the Ninth and Tenth Circuits are unclear. However, Ninth Circuit applicants should be aware that *Acosta* relies on *Perez-Gonzalez*, which the court in *Duran* said is no longer the law of the circuit.

In a related case issued the same day, the BIA held that a person inadmissible under INA § 212(a)(9)(B)(i)(II) also is ineligible to adjust status. The case is *Matter of Lemus*, 24 I&N Dec. 373 (BIA 2007), and a petition for review is planned.

Federal Rules of Procedure Continued

may not have access to any other part of the case file or the administrative record. Under the amended Federal Rule of Appellate Procedure 25(a)(5), the privacy rule that applied to the case below also would govern the case on appeal. Courts of Appeals that formerly made electronic briefs available on their websites (such as the 8th Circuit) will restrict access in compliance with new rule.

When the amendments were proposed, Public Citizen commented that the prevalence of sensitive information did not justify the bar on remote access where many other types of cases have similar sensitive information. Public Citizen also commented that barring remote access to district court records shields problems at the agency level from the public eye, removes a key check against arbitrary abuses of power, and is inconsistent with the premise of the E-Government Act to make available documents for increased citizen participation. See comment at http://www.uscourts.gov/rules/CV%20Rules%202005.htm.

For more information regarding the amended rules, see http://www.uscourts.gov/rules/privacy2.html. AILF will follow and report on any developments, including any possible challenges to the rules.

MANDAMUS ACTIONS FOR DELAYED NATZ INTERVIEWS

Naturalization applicants are bringing mandamus suits to compel USCIS to act on their applications in cases where USCIS has not yet interviewed the applicant. These actions have become more common in light of a USCIS Interoffice Memorandum dated April 25, 2006 stating that the agency would cease to schedule naturalization interviews until all FBI background checks were completed. Prior to this change in policy, naturalization applicants typically brought actions under 8 U.S.C. § 1447(b) when 120 days had passed from the date of the interview. Although applicants continue to bring 1447(b) actions in cases where USCIS conducted the interview, some applicants are filing mandamus suits to address the pre-interview delay.

The case law in this area is just beginning to develop, but already several courts have found jurisdiction to compel agency action on stalled naturalization applications and denied the government's motions to dismiss. In *Lazli v. USCIS*, No. 05-1680, 2007 U.S. Dist. LEXIS 10713 (D. Or. Feb. 12, 2007), the court found jurisdiction over the action, determined that the delay was unreasonable, and then ordered the FBI to complete the background check and USCIS to complete the adjudication of the application. *See also Assadzadeh v. Mueller*, No. 07-2676, 2007 U.S. Dist. LEXIS 80915 (E.D. Pa. Oct. 31, 2007) (denying the government's motion to dismiss APA and mandamus claims); *Shaat v. Klapakis*, No. 06-5625, 2007 U.S. Dist. LEXIS 70338 (E.D. Pa. Sept. 24, 2007) (same); *Hanbali v. Chertoff*, No. 07-50, 2007 U.S. Dist. LEXIS 65742 (W.D. Ken. Aug. 17, 2007) (same); *Anjum v. Hansen*, No. 06-00319, 2007 U.S. Dist. LEXIS 22685 (S.D. Ohio, March 28, 2007) (same). *But see Ahmed v. Mueller*, No. 07-0411, 2007 U.S. Dist. LEXIS 68847 (E.D. Pa. Sept. 14, 2007) (finding no non-discretionary duty to schedule an interview on a naturalization application when the FBI has not completed its background checks).

For more information about naturalization delay litigation see AILF Litigation Issue Pages "Natz Delay Litigation" and "Recent Mandamus Litigation" at http://www.ailf.org/lac/lit_issue_pages.shtml.

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