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SUPREME COURT UPDATE

Favorable Ruling in Drug Possession Case

On December 5, 2006, the Supreme Court, in an 8-1 decision, held that drug possession convictions that qualify as state felonies, but would not qualify as felonies under federal law, are not "aggravated felonies" as defined under INA § 101(a)(43)(B) ("drug trafficking crimes"). The case is *Lopez v. Gonzales*, No.05-547, 549 U.S. ___ (2006). In unqualified terms, the Court said, "Unless a state offense is punishable as a federal felony it does not count." The Court rejected the government's broad interpretation of what constitutes an aggravated felony and resolved a circuit split. The decision did not address whether a state possession drug offense preceded by a prior drug conviction may constitute an aggravated felony. Under federal law, certain possession offenses preceded by a prior final drug conviction may be prosecuted as a felony. Justice Souter wrote the majority opinion, from which Justice Thomas dissented. See http://www.supremecourtus.gov/opinions/06pdf/05-547.pdf.

Without explanation, the Court dismissed as improvidently granted the writ of certiorari in the companion case, *Toledo-Flores v. U.S.*, No. 05-7664, 549 U.S. ___ (2006). *Toledo-Flores* addressed the aggravated felony issue in the criminal sentencing context. See http://www.supremecourtus.gov/opinions/06pdf/05-7664.pdf.

Arguments in Theft Offense Case

On December 5, 2006, the Court heard oral arguments in *Gonzales v. Duenas-Alvarez*, 05-1629. The Court granted certiorari to address "[w]hether a 'theft offense,' which is an 'aggravated felony' under the Immigration and Nationality Act, 8 U.S.C. 1101(a)(43)(G), includes aiding and abetting." The Ninth Circuit had found that taking a vehicle under California Vehicle Code § 10851(a) does not categorically qualify as a theft offense under INA § 101(a)(43)(G) and therefore is not an aggravated felony under INA § 237(a)(2)(A)(iii). The argument transcript is available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-1629.pdf.

CLASS ACTION SEEKS TO RESTORE SSI BENEFITS FOR ASYLEES AND REFUGEES

On December 4, 2006, seven elderly or disabled refugees and asylees filed a class action asking the government to restore their SSI (Supplemental Security Income) benefits. Federal law limits them to seven years receipt of SSI benefits as LPRs. The assumption is that they will naturalize during this period and therefore become eligible to receive SSI as United States citizens. However, in numerous cases delays in processing adjustment applications and naturalization petitions have resulted in the termination of SSI benefits for the plaintiffs. The complaint alleges that over 6000 immigrants have lost their SSI benefits because seven years have expired and that over 46,000 immigrants will be cut off from their SSI benefits between 2006 and 2012.

The case, *Kaplan v. Chertoff*, 06-5304 (E.D. Pa.), was filed by Community Legal Services, the Hebrew and Immigrant Aid Society (HIAS) and Council Migration Service, and pro bono counsel at the Ballard Spahr Andrews & Ingersoll in Philadelphia. The complaint and press release are available at http://www.ailf.org/lac/litclearinghouse/kaplan_v_chertoff_120606.pdf
http://www.ailf.org/lac/litclearinghouse/kaplan_release_120606.pdf

SUITS CHALLENGING LOCAL GOVERNMENTS' ANTI-IMMIGRANT ORDINANCES

An increasing number of states are passing local ordinances targeting undocumented immigrants. These laws range in severity and scope, but generally penalize landlords who rent or lease their property to undocumented immigrants, business owners who hire immigrants, and immigrants themselves. Several of the ordinances already have been challenged. Below,

find a list of these cases. Please send AILF at clearinghouse@ailf.org other recent case filings and information relevant to the cases summarized here. We are posting this list, along with complaints, press releases, news articles, and court orders on AILF's Litigation Clearinghouse Issue Pages at http://www.ailf.org/lac/lac_lit_index.shtml.

Challenge to Dallas Ordinance Targeting Landlords. *Ramos v. The City of Farmers Branch*, No. 06-12227 (Tex. Dist. Ct. *filed* Dec. 4, 2006). A real estate agent brought suit in the District Court of Dallas County challenging the enforcement of two ordinances that prevent landlords from renting to undocumented immigrants and require landlords to meet certain property maintenance requirements. The plaintiff claims that the city council violated the Texas Open Meetings Act when it voted to approve the ordinances in closed-door meetings.

TRO Granted to Stop Escondido Ordinances. *Garrett et al. v. City of Escondido*, No. 06CV2434 (S.D. Cal., *complaint filed* Nov. 3, 2006). The U.S. District Court for the Southern District of California granted a temporary restraining order stopping enforcement of an ordinance that targets landlords who rent to undocumented immigrants. In granting the TRO, the court found that plaintiffs raised serious constitutional questions about whether the ordinance preempts federal law and whether it violates due process.

Challenge to New Jersey Township Ordinance Aimed at Landlords. *Riverside Coalition of Business Persons, et al. v. Township of Riverside* (N.J. Super. Ct. Burlington County, *complaint filed* Oct. 18, 2006). Landlords, immigrants and residents of Riverside Township, New Jersey are challenging an ordinance that prohibits property owners from renting, leasing, or allowing their property to be used by "illegal immigrants." Plaintiffs argue the ordinance is *ultra vires* to state law and violates property owners' substantive due process rights.

TRO Granted to Halt Ordinances Targeting Landlords/Businesses. *Lozano et al. v. City of Hazleton*, No. 3:06CV1586 (M.D. Pa., *complaint filed* Aug.15, 2006). The U.S. District Court for the Middle District of Pennsylvania granted a TRO enjoining enforcement of two ordinances which would require occupants of rental units to prove legal citizenship and/or residency and would target businesses that employ undocumented immigrants.

Immigrants Prevail Against Driver License Ordinance. *Villegas v. Silverman*, 832 N.E.2d 598 (Ind. Ct. App. 2005). The Indiana Court of Appeals held that undocumented immigrants had standing to challenge a state law that implemented new identification requirements to obtain a state driver license. The court found that the new requirements were not adopted in accordance with the Indiana Administrative Rules and Procedures Act ("ARPA") and therefore, were void.

CLEARINGHOUSE HIGHLIGHT

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

Court Finds Jurisdiction Over APA Suit Challenging Denial of L-1A Extension

Shah v. Chertoff, No. 3:05-CV-1608, 2006 U.S. Dist. LEXIS 73754 (N.D. Tex. Oct. 5, 2006) Plaintiffs, an employer and employee, sought an extension of the employee's L-1A visa. The request was denied on the basis that the employee did not manage or direct the management of a department, function, or component of the company, as required under the L-1 regulations. The AAO upheld the denial. Plaintiffs brought this suit claiming that under the Administrative Procedures Act (APA) the court could review the merits of the AAO's denial. The government moved to dismiss, arguing that the court lacked jurisdiction because the extension decision is discretionary and thus not reviewable under INA § 242(a)(2)(B)(ii) and the APA (5 U.S.C. § 701(a)(1)).

The court rejected the government's arguments and denied the motion to dismiss. The court, looking to the statutory provisions governing non-immigrant visas, specifically, INA §§ 214(a) and (c)(1), found that they do not explicitly grant "discretion," nor does the language clearly connote discretion. The court noted, however, that other district courts have reached opposite conclusions.

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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.

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