LITIGATION CLEARINGHOUSE NEWSLETTER

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SUITS CHALLENGE LOCAL IMMIGRATION ENFORCEMENT

Three pending suits allege that immigration enforcement efforts by Frederick County, MD and Maricopa County, AZ sheriff's deputies are being carried out in a racially and ethnically discriminatory manner, thereby violating the plaintiffs' constitutional rights. These counties are participating in the §287(g) program which authorizes DHS to enter into agreements with state and local agencies, permitting specially trained officers to perform immigration enforcement functions under ICE supervision.

In *Santos v. Jenkins*, No. 09-02978 (D. Md. *filed* November 10, 2009), a woman filed suit against the Frederick County officials, charging that sheriff's deputies violated her Fourth and Fourteenth Amendment rights when they approached her in a public square, questioned her, and asked her to provide identification. Santos alleges that the deputies prevented her from leaving, and ultimately, she was taken into custody and turned over to ICE. Santos alleges, *inter alia,* that the deputies had not been trained under the §287(g) program and thus were not authorized to enforce immigration laws; that the stop was carried out in a racially discriminatory manner; and that the officers did not have individualized suspicion that a crime had been committed.

Similar suits have been filed against Sheriff Arpaio of Maricopa County alleging that he adopted a policy of stopping, detaining, questioning and/or searching persons in vehicles who are or appear to be Latino as a means of enforcing federal immigration law, resulting in violations of plaintiffs' Fourth and Fourteenth Amendment rights. *See Mora v. Arpaio,* No. 09-01719 (D. Ariz. *filed* Aug. 19, 2009) (brought by an LPR and his US citizen son); *Melendres v. Arpaio*, 07-2513 (D. Ariz. *filed* July 16, 2008) (filed as a class action on behalf of Latinos who have been or stand to be targeted in their cars as a result of their race and/or ethnicity). Read more about these cases and view court documents at the Legal Action Center's Enforcement Litigation Issue page at http://www.legalactioncenter.org/clearinghouse/litigation-issue-pages/enforcement.

NEW AT THE LAC …

Post Departure Motions to Reopen. The LAC submitted an amicus briefs in two cases arguing that the regulatory bar to motions to reopen after a person has departed the U.S. conflicts with the statute. The LAC is interested in participating in other cases challenging the post departure bar. The cases are *Rosillo-Puga v. Holder*, 580 F.3d 1147 (10th Cir. 2009) (pet. for reh'g filed Nov. 13, 2009), and *Trabanino v. Holder*, No. 08-75065 (9th Cir.). Please email us at clearinghouse@immcouncil.org.

EB-1 Visas. The LAC submitted an amicus brief in support of rehearing in *Kazarian v. USCIS,* 580 F.3d 1030 (9th Cir. 2009), a case challenging USCIS's denial of an "extraordinary ability" employment-based visa. The LAC argues USCIS erred by adding an additional requirement to the sixth criterion, 8 CFR § 204.5(h)(3)(vi) (authorship of scholarly articles), that is not in the governing regulations, namely, that the applicant must demonstrate the research community's reaction to the publications.

Ineffective Assistance of Counsel. The LAC sent a letter to EOIR recommending steps the immigration courts and the BIA can take to protect the right to effective assistance of counsel and help ensure that noncitizens in removal proceedings are afforded a fair hearing. We encourage other interested organizations to contribute to this effort, either by submitting separate recommendations or a letter endorsing our recommendations. Read more about the letter at http://www.legalactioncenter.org/sites/default/files/docs/lac/IAC-EOIR-statement-2009-11-12.pdf.

K-2 Visa Holders Do Not "Age Out" After Admission to the United States. As reported in the last newsletter, the LAC filed a brief with the BIA arguing that the offspring of fiancé(e)s of U.S. citizens (K-2 visa holders) do not "age-out" after admission to the United States and therefore may adjust even after turning 21 years of age. Thereafter, the LAC filed briefs in two similar BIA cases. We continue to be interested in learning about cases that raise this issue and are pending before immigration courts, the BIA and the courts of appeals. Please contact us at clearinghouse@immcouncil.org.

WHAT IS THE STATUS OF STAYS OF REMOVAL AFTER *NKEN V. HOLDER*?

The LAC and AILA are interested in finding out about practitioners' experiences when requesting stays of removal pending petitions for review after the Supreme Court's decision in *Nken v. Holder*, 129 S. Ct. 1749 (April 22, 2009). In *Nken*, the Court held that courts of appeals should apply the traditional criteria governing stays: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. The Court noted that the first two factors are most critical and that to satisfy them, a petitioner cannot merely show a "possibility" of relief or of irreparable injury.

The Court's decision reversed the Fourth and Eleventh Circuits, which had held that the standard in INA § 242(f)(2) applies and therefore, a person must show by "clear and convincing evidence" that the removal order "is prohibited as a matter of law" before granting a stay. Prior to *Nken*, the First, Second, Third, Fifth, Sixth, Seventh, and Tenth Circuits already considered motions for a stay using the traditional standard for injunctive relief.

Before *Nken*, the Ninth Circuit articulated the stay standard somewhat differently: the petitioner had to show *either*: 1) a probability of success on the merits and the possibility of irreparable injury, *or* 2) that serious legal questions were raised and the balance of hardships tipped sharply in petitioner's favor. *Andreiu v. Ashcroft*, 253 F.3d 477 (9th Cir. 2001). The Ninth Circuit has not addressed its prior stay cases post *Nken*. However, at least one Ninth Circuit practitioner has reported that the government generally has been filing non-oppositions to petitioners' motions for stays.

The LAC is not aware of any circuit decision applying the new standard in the immigration context. Please share your experiences about how courts of appeals are treating requests for stays in your circuit by emailing clearinghouse@immcouncil.org.

LOS ANGELES AREA NATURALIZATION APPLICANTS SETTLE CLASS ACTION

On November 9, 2009, LPRs who were challenging delays in the adjudication of their naturalization applications announced that they had reached a settlement with the government in *Kolhatkar v. Arellano*, No. 07-1394 (C.D. Cal.). The settlement applies to certain naturalization applicants who applied within USCIS District 23 (including Los Angeles, Santa Ana, and San Bernadino Field Offices); who have had an interview; and whose application remains pending for more than 180 days due to the noncompletion of the FBI name check. Under the terms of the settlement, the government is required to adjudicate 70 percent of the applications within 90 days and 90 percent of the applications within 180 days. The agreement also provides for three sets of limited reports by USCIS to plaintiffs' counsel regarding the status of the naturalization applications. Read more about this suit and other naturalization delay litigation at the Legal Action Center's Naturalization Adjudication Delay Litigation Issue Page at http://www.legalactioncenter.org/clearinghouse/litigation-issue-pages/naturalization-adjudication-delays.

CLEARINGHOUSE HIGHLIGHT

Fifth Circuit Finds BIA Erred in Reversing IJ Grant of Waiver Under INA § 216(c)(4)

Alvarado de Rodriguez v. Holder, No. 08-60585, 2009 U.S. App. LEXIS 22363 (5th Cir. Oct. 9, 2009)

The Fifth Circuit recently held that the BIA erroneously reversed an IJ's decision to grant a hardship waiver under INA § 216(c)(4)(B). The IJ had found that the petitioner's marriage was bona fide and accordingly, granted her a waiver to excuse the joint filing of a petition to remove the conditions on her LPR status. DHS appealed, and the BIA reversed the IJ, finding that the petitioner did not show that she entered into her marriage in good faith. On a petition for review, petitioner argued that the BIA failed to apply the "clearly erroneous" standard in reviewing the IJ's findings of fact and credibility determinations, as required by regulation.

In granting the petition for review, the Fifth Circuit first rejected the government's argument that it lacks jurisdiction over the denial of the waiver. The court noted that despite the discretionary decision bar to review, INA § 242(a)(2)(B)(ii), the court retains jurisdiction over questions of law. Here, whether the BIA applied the appropriate standard is a legal question that the court may consider. The court went on to find that the BIA did not apply the clearly erroneous standard; instead, it independently re-weighed the evidence and made findings of fact and a credibility determination de novo. The court warned that "the BIA is not entitled to state the correct legal standard but actually apply an incorrect standard." In addition, the court indicated that applying the proper standard, the evidence establishes that the petitioner is eligible for a hardship waiver.

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