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COURTS LIMIT APPLICABILITY OF MANDATORY DETENTION, INA § 236(c)

This is the first in a series of articles focusing on developments concerning mandatory detention.

Since the Supreme Court's 2003 decision *Demore v. Kim*, 538 U.S. 510 (2003), lower courts have set limits on when the government may detain a person under the mandatory detention provision at INA § 236. Several courts now have ordered a person to be released on bond, despite INA § 236(c), reasoning that 1) removal proceedings extended beyond a reasonable period during which mandatory detention could be justified, and/or 2) removal was not foreseeable.

Tijani v. Willis, 430 F.3d 1241 (9th Cir. 2005) (length of detention); *Ly v. Hansen*, 351 F.3d 263 (6th Cir. 2003) (length of detention; likelihood of no repatriation); *Parlak v. Baker*, 374 F. Supp. 2d 551 (E.D. Mich. 2005) (length of detention; possibility of no repatriation); *Oyedeji v. Ashcroft*, 332 F. Supp. 2d 747 (M.D. Pa. 2004) (length of detention); *Diamande v. Wrona*, No. 05-73290, 2005 U. S. Dist. LEXIS 33795 (E.D. Mich. 2005) (unpublished) (length of detention).

SUPREME COURT UPDATE

Government Petitions for Certiorari in Asylum Case

The government has petitioned for certiorari in a Ninth Circuit asylum case, *Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2005) (en banc). See *Gonzales v. Thomas*, No. 05-552 (summary posted on Infonet at www.aila.org/content/default.aspx?docid=16791). The Ninth Circuit held that "family membership may constitute membership in a 'particular social group,' and thus confer refugee status on a family member who has been persecuted or who has a well-founded fear of future persecution on account of that familial relationship."

The government's certiorari petition was filed on October 31, 2005, and the opposition was filed on January 11, 2006.

Government Does Not Oppose Certiorari Petition in Case Challenging Broad Interpretation of Drug/Aggravated Felony Ground of Removal

As reported in the December 21, 2003 issue of the Litigation Clearinghouse Newsletter, several individuals have petitioned for certiorari on whether drug convictions that qualify as state felonies, but would not qualify as felonies under federal law, nonetheless constitute aggravated felonies under INA §§ 237(a)(2)(A)(iii) and 101(a)(43)(B). The cases are, *Lopez v. Gonzales*, No. 05-547, *Mendoza-Torres v. U.S.*, No. 05-7496, *Toledo-Flores v. U.S.*, No. 05-7664, and *Salazar-Regino v. Moore*, No. 05-830. The Court denied the certiorari petition in *Sanchez-Villalobos v. U.S.*, No. 05-484 on January 17, 2006.

In its January 24 response in *Lopez*, the government conceded that the Court should grant the certiorari petition. The government's response cited the importance and recurrence of the issue and the circuit split as reasons for supporting Supreme Court review.

Court to Hear RICO Case Involving Hiring of Undocumented Workers

In this class action, plaintiffs, employees of Mohawk Industries, have alleged that their employer violated the Racketeer Influences and Corrupt Organizations Act (RICO). Specifically, plaintiffs alleged that Defendant Mohawk conspired and worked with various third party recruiters, including recruitment agencies and Mohawk employees, to recruit, hire, harbor, and conceal undocumented immigrants in order to depress the wages of its authorized employees.

On December 12, 2005, the Court granted certiorari on the following narrow issue:

Whether a defendant corporation and its agents can constitute an “enterprise” under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§1961-1969 (RICO), in light of the settled rule that a RICO defendant must “conduct” or “participate in” the affairs of some larger enterprise and not just its own affairs.

The case is *Mohawk Industries, Inc. v. Shirley Williams et al.*, No. 05-465. Petitioner-Defendant Mohawk’s brief is due on January 26, 2006.

If the Supreme Court upholds the Eleventh Circuit’s decision, businesses that frequently rely on temporary workers may be more vulnerable to liability under RICO, including the statute’s treble damages provision. The plaintiffs are represented by Howard M. Foster of Johnson & Bell in Chicago. Mr. Foster also represents plaintiffs in several other RICO suits challenging the alleged hiring of undocumented workers. *See Trollinger v. Tyson Foods Inc.*, 370 F.3d 602 (6th Cir. 2004); *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163 (9th Cir. 2002). Mr. Foster’s efforts are praised by the restrictionist group Center for Immigration Studies. *See RICO: A New Tool for Immigration Law Enforcement* by Micah King available at www.cis.org/articles/2003/back1103.html.

MOTIONS FILED TO STOP DEPORTATIONS TO HAITI

On January 19, 2006, immigration attorneys and advocates simultaneously filed motions with immigration courts nationwide requesting that their Haitian clients’ cases be administratively closed due to catastrophic conditions in Haiti. AILA and hundreds of national and local organizations and individuals endorsed this action.

This legal strategy stemmed from the DHS’ failure to grant TPS to Haitians facing removal from the United

States. AILA Attorneys Thomas Griffin and Ira Kurzban organized the efforts. The organizers encourage attorneys to continue to file these motions on behalf of Haitian clients. The motion is available on Infonet or by contacting Thomas Griffin at griffin@msgimmigration.com.

CLEARINGHOUSE HIGHLIGHT

In each edition of this newsletter, the Clearinghouse will highlight one case in order to showcase novel arguments, creative lawyering, and issues of first impression.

***Tchoukhrova v. Gonzales*, 404 F.3d 1181, reh’g denied 430 F.3d 1222 (9th Cir. 2005).**

In this asylum case, the court held that disabled Russian children and their parents constitute a particular social group because both the disability and the familial relationship are immutable characteristics. The court also held that a parent can seek asylum on the basis of the harm that the child suffered. The court found that the harm suffered by the petitioner’s disabled child rose to the level of persecution, and, as a result, the petitioner was statutorily entitled to asylum and qualified for withholding of removal. The petitioner’s child and husband qualified as derivatives.

The government petitioned for rehearing en banc. The court denied the petition on December 5, 2005. *Petitioner was represented Jonathan Montag, San Diego, California.*

AILA prepares digests of all Supreme Court and significant appeals court decisions and posts them on Infonet. The digests are sorted by court and are searchable. See <http://www.aila.org/content/default.aspx?docid=16392> and <http://www.aila.org/content/default.aspx?docid=18312>.

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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.