



AMERICAN IMMIGRATION LAW FOUNDATION
LEGAL ACTION CENTER
LITIGATION CLEARINGHOUSE
NEWSLETTER

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**SUPREME COURT HEARS ARGUMENTS ON
RETROACTIVITY OF REINSTATEMENT
STATUTE**

On March 22, 2006, the Supreme Court heard arguments in the first immigration case to come before the newly-constituted Roberts' Court. The Court's decision may determine the removal cases of thousands of noncitizens and also signal the direction of the new Court, which now includes Chief Justice John Roberts and Justice Samuel Alito.

The Court had granted the petition for certiorari in order to address the following question: "Whether and under what circumstances INA § 241(a)(5) applies to an alien who reentered the United States illegally before the effective date of IIRIRA, April 1, 1997." The decision below was *Fernandez-Vargas v. Gonzales*, 394 F.3d 881 (10th Cir. 2005).

During the oral argument, the Justices' questions concerned whether Congress intended the 1996 change in the law to apply to people, like Mr. Fernandez-Vargas, who reentered the United States long before 1996. The Court also focused on the effect of the change to the reinstatement provision on Mr. Fernandez-Vargas's eligibility for adjustment of status through his U.S. citizen wife. As the petitioner's attorney argued, the pre-IIRIRA reinstatement statute contained explicit language indicating that it applied to people who were deported before the statute was enacted. However, IIRIRA's reinstatement provision did not include such language.

Justice Scalia appeared to accept the government's argument that for purposes of the retroactivity analysis, the relevant time is when the reinstatement occurred rather than when the person was originally deported or reentered. Justice Breyer's questions indicated that the case likely would turn on step two of the *Landgraf* retroactivity analysis.

Before the argument, AILF and AILA coordinated the preparation and filing of an amicus curiae brief on

behalf of nine organizations. Trina Realmuto, Matt Adams, Stacy Tolchin and Marc Van Der Hout drafted the amicus brief. A decision is expected this spring.

**GOVERNMENT URGES
MISINTERPRETATION OF REAL ID ACT
JURISDICTION PROVISION,
INA § 242(A)(2)(D)**

Over the past several months, in several district court cases around the country, the government has argued that new section 242(a)(2)(D) of the INA, which was added by section 106 of the REAL ID Act, bars jurisdiction over APA actions challenging CIS decisions in the non-removal context. Two courts have adopted these arguments and dismissed the APA actions. These rulings, and the government's underlying argument, however, are not supported by the statutory language, the statutory scheme, or the REAL ID Act's legislative history.

Section 242(a)(2)(D) expands the jurisdiction of the courts of appeals over constitutional claims and questions of law raised in petitions for review of orders of removal. Specifically, it says, "[n]othing in subparagraph (B) or (C), or in any other provision of

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**COURT OF APPEALS DOCKETING FEE
INCREASES TO \$450 ON APRIL 9**

Effective April 9, 2006, the docketing fee for a petition for review or an appeal of a district court decision will be \$450. Congress imposed this fee increase as part of the Deficit Reduction Act of 2005, Pub. L. 109-171, § 10001 (Feb. 8, 2006). Currently, the docketing fee is \$250.

Individuals who are unable to pay the fee may apply to appear *in forma pauperis*. Federal Rule of Appellate Procedure 24 sets forth the requirements and procedures for proceeding *in forma pauperis*. Affidavit forms are available on the courts' web pages. <http://www.uscourts.gov/courtlinks/>.

this Act (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals....” Thus, for example, a petitioner who is subject to the jurisdictional bar based upon certain criminal offenses (INA § 242(a)(2)(C)) is no longer precluded from seeking court of appeals review over statutory eligibility for relief from removal.

The government appears to be taking the position that INA § 242(a)(2)(D) restricts district court review in non-removal cases. For example, the government has argued that a district court no longer has jurisdiction over non-discretionary legal claims raised in an APA challenge to CIS' denial of an affirmatively filed adjustment application. Instead, the government insists that these claims can only be raised in a petition for review in circuit court, even though no removal proceedings have been initiated against the individual and thus there is no jurisdiction to bring a petition for review.

We believe this argument is wrong. Section 242(a)(2)(D) makes no reference to district court review. The legislative history confirms that by enacting section 106 of the REAL ID Act, Congress intended to channel all review of *removal decisions* into the court of appeals; Congress sought to “address the anomalies created by *St. Cyr*,” whereby some parts of a removal order were reviewable by a petition for review, while other parts were reviewable only by habeas. *See Conference Report on HR 1268*, Congressional Record – H2873 (May 3, 2005). In addition, INA § 242(a)(2)(D) is inapplicable to any case in which jurisdiction is not otherwise barred, such as by INA §§ 242(a)(2)(B) or (C). Therefore, in a case where a person is challenging CIS' denial of a benefit based upon a non-discretionary, statutory eligibility issue, section 242(a)(2)(D) is inapplicable.

Mary Kenney, on behalf of AILF, has filed an amicus brief in opposition to the misinterpretation of INA § 242(a)(2)(D). The case is *Kim Hur v. Gonzales*, 05-

2319 (4th Cir.) filed Nov. 29, 2005. *Please contact the Clearinghouse at clearinghouse@ailf.org if you have a case in which this issue arises.

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.

***Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013 (9th Cir. 2005) –Mother’s Residency Imputed to Minor for Purposes of Cancellation of Removal.**

In this Petition for review, Petitioner argued that (1) his burglary conviction under Washington law was not a crime involving moral turpitude, and (2) even if he was removable, he was eligible for LPR cancellation of removal. The court found that the Washington burglary statute was divisible, but concluded that the record of conviction established that petitioner’s conviction was a crime involving moral turpitude.

Petitioner’s eligibility for cancellation of removal turned on whether he satisfied the seven-year of residency requirement. Although Petitioner had been an LPR for only five years when he pled guilty to burglary, his mother had been an LPR for over twelve years, during which time Petitioner was a minor and resided with her. The court held that a parent’s admission for permanent residence status is imputed to the parent’s unemancipated minor children residing with the parents for purposes of the seven year continuance presence requirement for cancellation or removal. Accordingly, the petition for review was granted. Subsequently, the government petitioned for panel rehearing; the court denied this petition on March 1, 2006. *Petitioner was represented by Soren Rottman of the Northwest Immigrant Rights Project.*

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.
<http://www.aila.org/Content/default.aspx?docid=18515>

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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.

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