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SECOND CIRCUIT OVERTURNS *MATTER OF BLAKE*

The Second Circuit overturned *Matter of Blake*, 23 I&N Dec. 722 (BIA 2005), holding that §212(c) eligibility turns on whether the offense that renders a permanent resident deportable would render a similarly situated individual excludable. See *Blake v. Carbone*, __ F.3d __, 2007 U.S. App. LEXIS 12607 (2d Cir. June 1, 2007). In its precedent decision, the BIA had found that a person found removable due to a conviction for sexual abuse of a minor is ineligible for a waiver under former section 212(c) of the INA. The BIA reasoned that the aggravated felony ground of removal had no statutory counterpart in the 212(a) grounds of inadmissibility. The Second Circuit found that the BIA erred in focusing on the grounds of deportation, rather than the particular offense to determine eligibility for §212(c) relief.

Prior to the Second Circuit's decision in *Blake*, the First, Third, Fifth, and Seventh Circuits has issued decisions accepting *Matter of Blake*. It is unclear what effect the Second Circuit's decision may have in these four circuits. However, the Seventh Circuit has indicated that the law is now unsettled. See *Gutierrez-Almazan v. Gonzales*, 05-4494, 2007 U.S. App. LEXIS 14709 (7th Cir. June 21, 2007). The Eighth and Ninth Circuits have held arguments in pending cases challenging *Matter of Blake*.

AILF's *Matter of Blake* Litigation Issue Page at http://www.ailf.org/lac/lit_issue_pages.shtml, provides a list of the circuit court decisions and information about unpublished and pending cases. The page also includes amicus briefs filed in three circuits.

FIFTH CIRCUIT RULES THAT NATZ DELAY LITIGATION IS PREMATURE IF FBI CHECK IS NOT COMPLETE

The Fifth Circuit recently ruled in *Walji v. Gonzales*, __ F.3d __, 2007 U.S. App. LEXIS 14450 (5th Cir. 2007), that USCIS must receive a "definitive response" from the FBI before the 120-day time period

in 8 U.S.C. §1447(b) begins to run. A district court would have jurisdiction over the naturalization application at the end of the 120 day period.

This decision conflicts with many district court decisions and the Ninth Circuit. These courts have held that the 120-day period begins to run after the naturalization "examination" occurred, whether or not the security examination was complete. These courts examined the statutory language that states that an applicant may apply for a hearing on their naturalization application if there is no determination on the application 120 days after "the examination is conducted."

In contrast, the Fifth Circuit in *Walji* looked to 8 (Continued)

NEW AT THE LAC ...

AILF Considering Challenge to DOL Regulation on Attorneys Fees. AILF is considering filing a lawsuit against the U.S. Department of Labor to challenge regulations issued on May 17, 2007. Among other things, the regulations forbid employees from paying any of the "employer's" expenses of a labor certification, even if the employee is able and willing to do so. It is critical that attorneys contact AILF for more information if they have clients, either employers or employees, who could be potential plaintiffs in the lawsuit. Please email us at laborcert@ailf.org for more information.

Ninth Circuit to Hear Arguments in I-212/245(i) Class Action. The Ninth Circuit set *Duran v. U.S. Dept. of Homeland Security* for oral argument in Seattle, Washington on August 6, 2007. This class action challenges the Department of Homeland Security's willful refusal to follow the precedent decision of the Ninth Circuit in *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004) (holding that people previously been removed may apply for adjustment of status under INA § 245(i) along with an I-212 waiver application). The government appealed the preliminary injunction. For more information about the suit, see http://www.ailf.org/lac/lac_lit_92806.shtml.

Natz Delay Litigation Continued

C.F.R. §335.2(b). This regulation states that USCIS will notify applicants for an initial examination only after USCIS has received a “definitive response” from the FBI that the criminal background check is completed. The court reasoned that Congress could not have intended for “examination” to mean a “premature” examination that took place before the background check was complete.

The petitioner in *Walji* is considering filing a petition for rehearing. Petitioners with pending district court actions in the Fifth Circuit may want to ask the courts to hold their cases in abeyance pending a decision on rehearing and/or issuance of the mandate.

At least one district court already has disagreed with the ruling in *Walji*. In *Naos v. Swacina*, No. 07-20724 (S.D. Fla. June 27, 2007), the court explicitly found that the Fifth’s Circuit’s reasoning was wrong. The court held that it had jurisdiction over the § 1447(b) petition even though the FBI checks were not complete.

Please see AILF’s Litigation Issue Page, “Natz Delay Litigation,” for recent case law, summaries of pending class actions, and other information and resources related to naturalization delays.
http://www.aifl.org/lac/lit_issue_pages.shtml

BIA HOLDS ORAL ARGUMENTS IN JUNE AND JULY

The Board of Immigration Appeals scheduled oral arguments in five cases to address issues involving 245(i) adjustment of status, the definition of “child abuse,” and multiple possession charges. At AILA’s Annual Conference this month, BIA Chair Juan Osuna indicated that cases where the BIA holds oral arguments are likely to result in precedent decisions.

The BIA held the first two arguments on June 21, 2007. Both cases involved respondents who were unlawfully present in the United States for one year or more, who left the United States and then reentered without being admitted or paroled. The issue in these cases was whether the respondents are eligible for adjustment of status under INA § 245(i).

The Board asked the respondents to address the court of appeals decisions, *Acosta v. Gonzales*, 439 F.3d 550 (9th Cir. 2006), *Padilla-Caldera v. Gonzales*, 426 F.3d 1294 (10th Cir. 2005), *Berrum-Garcia v. Comfort*, 390 F.3d 1158 (10th Cir. 2004), and *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004). The Board Members presiding over the cases were Patricia Cole, Lauri Filppu and Roger Pauley. AILA submitted an amicus brief arguing that 245(i) is available for individuals who reentered.

On June 28, 2007, the BIA heard two cases addressing the definition of “child abuse” under INA § 237(a)(2)(E)(i). One of the cases was remanded to the BIA by the Ninth Circuit in a published decision, *Velazquez-Herrera v. Gonzales*, 466 F.3d 781 (9th Cir. 2006). In this case, the Ninth Circuit specifically directed the BIA to issue a precedent regarding the definition of “child abuse.” The second case raises an additional issue regarding the burden of proof to show that the respondent was not convicted of an aggravated felony in order to qualify for LPR cancellation of removal. The Board Members presiding over the cases were Patricia Cole, Roger Pauley and Christopher Grant (an IJ temporarily sitting on the Board). The National Immigration Project, the Immigrant Legal Resource Center and the Washington Defenders Association’s Immigration Project submitted an amicus brief in support of respondent *Velazquez-Herrera*.

On July 12, 2007, the BIA will hear argument in a case involving two drug possession convictions. The BIA has asked the respondent to discuss whether under the Supreme Court’s recent decision *Lopez v. Gonzales*, a second state drug possession offense committed after the first conviction becomes final constitutes an aggravated felony even if the second offense did not charge the person as a recidivist or otherwise allow the person to challenge the validity of the original conviction. The Board Members presiding over this case are Patricia Cole, Lauri Filppu and Christopher Grant. The Immigrant Defense Project of the New York State Defenders Association and the Immigrant Rights Clinic of Washington Square Legal Services filed an amicus brief in support of the respondent. For more information about *Lopez* and links to resources, see AILF’s *Lopez* Litigation Issue Page at http://www.aifl.org/lac/lit_issue_pages.shtml.

AILF Legal Action Center, Litigation Clearinghouse

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The Clearinghouse is a project of AILF’s 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 case information.

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

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