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FOIA LAWSUITS FORCE AGENCIES TO RELEASE RECORDS; RECENT FOIA LAWSUIT SEEKS INFORMATION ABOUT STIPULATED REMOVAL

Several FOIA lawsuits filed in the last two years have successfully compelled government agencies to release records on a range of immigration-related issues. The FOIA requests that form the basis of the lawsuits range from inquiries about the conduct of DHS during home and workplace raids to policies behind lengthy searches and inspections at U.S. ports of entry by Customs and Border Protection. In several cases, plaintiffs allege that the agencies violated FOIA by failing to promptly release records, improperly withholding records, and failing to make reasonable efforts to search for records responsive to plaintiffs' requests.

A recent lawsuit, filed by several advocacy groups, challenges the methods used by DHS, DHS sub-agencies and DOJ to implement stipulated removal. *Nat'l Lawyers' Guild San Francisco Chapter et al. v. DHS et al.*, No. 08-1537 (N.D. Cal. *filed* Nov. 12, 2008). An immigration judge may order a person removed "without a hearing and in the absence of the parties" if the person signs a written document stipulating to the removal. 8 C.F.R. §1003.25(b); 8 U.S.C. §1229a(d). Plaintiffs allege that DHS and its sub-agencies are focusing the implementation of stipulated removal on thousands of detained immigrants, the large majority of whom are not represented by counsel. As a result, plaintiffs assert, the implementation of stipulated removal raises due process concerns.

Plaintiffs allege that the agencies violated FOIA by, inter alia, wrongfully withholding agency records related to stipulated removal and failing to make reasonable efforts to search for records responsive to plaintiffs' requests. Plaintiffs seek injunctive relief and attorneys' fees.

For more information about recent FOIA lawsuits, see AILF's new FOIA Litigation Issue Page, http://www.ailf.org/lac/clearinghouse_foia.shtml. See AILF's Practice Advisory, *Fugitive Disentitlement Doctrine: FOIA and Petitions for Review*, for arguments to challenge the application of the fugitive disentitlement doctrine to deny FOIA requests. http://www.ailf.org/lac/pa/lac_pa_fugdis.pdf.

CLEARINGHOUSE HIGHLIGHT

Seventh Circuit Holds Waiver of Rights under Visa Waiver Program Must be Knowing and Voluntary
Bayo v. Chertoff, 535 F.3d 749 (7th Cir. 2008), *petition for rehearing pending*.

A waiver of the right to a removal hearing and to contest removal under the Visa Waiver Program (VWP) is valid only if entered into knowingly and voluntarily, the Seventh Circuit recently held. Under the VWP, citizens of participating countries may enter the U.S. for up to 90 days without a visa if they waive their right to contest any subsequent removal action (other than on the basis of an asylum application). 8 U.S.C. § 1187.

Bayo, a Guinean citizen, entered the U.S. under the VWP using a stolen Belgium passport. Upon entry, he signed an English language waiver of the right to contest removal. He subsequently overstayed the 90-day authorized period and married a U.S. citizen. When he applied for adjustment of status based upon this marriage, DHS officials arrested him and ordered him removed without a hearing, in accord with VWP procedures. He challenged the removal order in a petition for review, arguing that, as a non-English speaker, he did not understand the waiver he had signed.

The Seventh Circuit first found jurisdiction over the limited issue of whether "Bayo unknowingly, and therefore invalidly, waived his right to a hearing and appellate review." 535 F.3d at 752. It then considered whether Bayo had a due process right to challenge his removal order on the basis that his waiver was invalid. The Court recognized that a non-citizen within the U.S. has a due process right to challenge the government's claim that it can summarily remove him. Relying on *Boumediene v. Bush*, 128 S.Ct. 2229 (2008), the Court found that that this due process protection extends to a port of entry because such ports are physically within the U.S. and within the government's exclusive control. The Court concluded

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that due process required that a non-citizen's waiver of the right to a removal hearing under the VWP be knowing and voluntary.

The Court remanded the case with instructions that DHS hold a fact-finding hearing on Bayo's claim that he did not understand the waiver he signed. The government has petitioned for rehearing.

NINTH CIRCUIT: MOTION TO REOPEN FOR ADJUSTMENT OF STATUS CAN BE GRANTED DESPITE GOVERNMENT OPPOSITION

The Ninth Circuit recently joined the Second and Sixth Circuit in holding that DHS should not be able to unilaterally block a motion to reopen for adjustment of status by opposing the motion. *Ahmed v. Mukasey*, __ F.3d __ (9th Cir. Nov. 19, 2008). The Ninth Circuit held that when DHS opposes a motion to reopen for adjustment of status, the BIA may consider the objection, but may not deny the motion solely because the motion is opposed by DHS. The case addressed the BIA's decision, *Matter of Velarde*, where the BIA held that a motion to reopen to adjust status may be granted where, among other requirements, "the Service . . . does not oppose the motion . . ." 23 I&N Dec. 253 (BIA 2002). In petitioner's case, the BIA found that, in the absence of other reasons for denying the motion, DHS's opposition to the motion "would have mandated a denial of the motion under *Matter of Velarde*."

The Ninth Circuit disagreed with the BIA, holding that DHS's opposition to the motion was not dispositive. First, the court reasoned that the BIA did not provide a "reasoned explanation" for its decision in *Velarde*. Second, the court stated that the BIA should exercise independent judgment and discretion. Allowing an adversarial party to a proceeding to unilaterally block a motion would deprive the BIA, and by extension the federal courts, of any meaningful review.

The Second and the Sixth Circuit cases cited by the Ninth Circuit's decision are *Melnitsenko v. Mukasey*, 517 F.3d 42 (2d Cir. 2008) and *Sarr v. Gonzales*, 485 F.3d 354 (6th Cir. 2007). The Third Circuit has held the opposite – that DHS can block a motion to reopen to adjust status by unilaterally opposing the motion. *Bhiski v. Ashcroft*, 373 F.3d 363 (3d Cir. 2004).

SUPREME COURT GRANTS CERT. TO EXAMINE STANDARD FOR GRANTING STAYS OF REMOVAL

The Supreme Court granted certiorari on November 25, 2008 to decide whether the decision of a court of appeals to stay a removal pending consideration of an individual's petition for review is governed by the standard set forth in INA § 242(f)(2), or instead by the traditional tests for stays and preliminary injunctive relief. *Nken v. Mukasey*, No. 08-681. Petitioner had initially requested a stay of removal from the Fourth Circuit. The Fourth Circuit denied the stay, holding that INA § 242(f)(2) bars a court order staying the removal of an person "unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law." The petitioner says that this application of INA § 242(f)(2) is consistent with the Eleventh Circuit, but conflicts with eight other circuits. The other circuits have held that that the heightened standard of INA § 242(f)(2) applies only to injunctions against an alien's removal, but not to temporary stays sought for the duration of the alien's petition for review. Briefing is scheduled to be completed on January 14, 2009 and oral argument is scheduled for Wednesday, January 21, 2009.

To access pleadings in this case and for updates about other immigration-related Supreme Court cases, visit http://www.ailf.org/lac/supremecourt_112806.shtml.

NEW AT THE LAC ...

Updates to AILF Arriving Alien Practice Advisories:

- USCIS Adjustment of Status of "Arriving Aliens" with an Unexecuted Final Order of Removal (Updated November 6, 2008)
- "Arriving Aliens" and Adjustment of Status: What is the Impact of the Government's Interim Rule of May 12, 2006? (Updated November 5, 2008)
- Adjustment of Status of "Arriving Aliens" Under the Interim Regulations: Challenging the BIA's Denial of a Motion to Reopen, Remand, or Continue a Case (Updated November 5, 2008)

New AILF Litigation Issue Page, *Freedom of Information Act (FOIA) Litigation*
This issue page summarizes recent FOIA lawsuits and provides information about non-litigation related developments in the FOIA context. See http://www.ailf.org/lac/clearinghouse_foia.shtml

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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.ailf.org/lac/litclearinghouse.shtml.
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