



AMERICAN IMMIGRATION LAW FOUNDATION
LEGAL ACTION CENTER
LITIGATION CLEARINGHOUSE
NEWSLETTER

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SUPREME COURT TO HEAR FRAUD OFFENSE CASE; CONSIDERS STAY STANDARD

The Supreme Court granted certiorari in a Third Circuit case involving removability based on an aggravated felony conviction under INA § 101(a)(43)(M)(i), an offense that involves fraud or deceit in which the loss to the victim or victims exceeds \$10,000. The Third Circuit held that the loss amount is not an element of the crime and that the categorical approach does not apply in determining whether the loss provision is satisfied. Therefore, an immigration judge may look to the underlying facts of the case to determine the loss amount. The Third Circuit's approach is consistent with the BIA's approach, set forth in *Matter of Babaisakov*, 24 I&N Dec. 306 (BIA 2007). The case is *Nijhawan v. Mukasey*, 523 F.3d 387 (3d Cir. 2008), *cert. granted*, 08-495, 2009 U.S. LEXIS 586 (U.S. Jan. 16, 2009).

On January 21, the Supreme Court heard argument in a case addressing the standard for adjudicating a stay of removal pending judicial review. The Court will consider whether courts should apply INA § 242(f)(2) (clear and convincing evidence standard) or the traditional test for preliminary injunctive relief. The case is *Nken v. Mukasey*, No. 08-0813 (4th Cir. filed Jul. 23, 2008), *cert. granted*, No. 08-681 (U.S. Nov. 25, 2008). Read the argument transcript at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/08-681.pdf.

Read about these cases and other Supreme Court cases at AILF's Supreme Court Update webpage, http://www.ailf.org/lac/supremecourt_112806.shtml.

REHEARING DENIED, TRO ISSUED IN NINTH CIRCUIT CLASS ACTION *DURAN-GONZALES*

On January 16, 2009, the Ninth Circuit denied Plaintiffs-Appellees petition for rehearing en banc in *Duran Gonzales v. DHS*, 508 F.3d 1227 (9th Cir. 2007). *Duran Gonzales* is a circuit-wide class action challenging DHS' refusal to follow *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004). In *Duran Gonzales*, the Ninth Circuit overturned *Perez-*

Gonzalez, deferring to the BIA's holding in *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006), that individuals who have previously been removed are not eligible to apply for adjustment of status (under INA § 245(i)) along with an I-212 waiver application.

On January 21, 2009, class counsel filed a motion to amend the complaint, a motion to amend and redefine the class, and a request for a temporary restraining order (TRO) and preliminary injunction. The amended complaint alleges that the government cannot apply the *Duran-Gonzales* decision retroactively to the detriment of plaintiffs and class members who relied on *Perez-Gonzalez*.
Continued on following page

NEW AT THE LAC ...

Update on *Orozco* – DHS Generally Agrees that *Matter of Areguillin* Still Applies. As reported in the last issue of the AILF Litigation Clearinghouse Newsletter, AILF submitted an amicus brief in *Matter of Orozco*, currently pending at the BIA on remand from the Ninth Circuit, *Orozco v. Mukasey*, 521 F.3d 1068 (9th Cir. 2008) (vacated Oct. 20, 2008). AILF has filed a brief in another BIA case raising a similar issue, *Matter of Patrick* (brief submitted Jan. 13, 2009). AILF's amicus brief argues that the individual was "admitted" for purposes of adjustment of status when she was inspected and allowed to enter the U.S. despite allegations that she committed fraud at entry. Significantly, in its brief, DHS generally agrees with AILF's position that "lawful entry" under INA § 101(a)(13) means procedurally lawful only, that a person who entered by fraudulent means has been admitted, and that *Matter of Areguillin*, 17 I&N Dec. 308 (BIA 1980) still applies. However, DHS argues that an exception exists where a person gains entry by falsely claiming LPR status.

Portability/*Matter of Perez Vargas*. AILF filed a brief arguing that *Matter of Perez-Vargas*, 23 I&N Dec. 829 (BIA 2005), was wrongly decided and that an immigration judge has jurisdiction to determine whether an adjustment applicant satisfies the portability provisions found in INA § 204(j). The case is *Ahmad-Mushtaq v. Mukasey*, No. 08-4081 (2d Cir. amicus brief submitted Jan. 16, 2009).

***Duran-Gonzales* Continued**

On January 23, 2009, just a few hours after the Ninth Circuit issued the mandate, the district court issued a TRO, preventing DHS from denying I-212 waiver applications and giving legal effect to denied I-212 waiver applications. The TRO applies to all *Duran-Gonzales* class members. The court has scheduled a Feb. 3 hearing to consider whether to continue the TRO and redefine the class. Class members should be aware that if the TRO is not continued, USCIS will be allowed to deny class members' I-212 applications and "give effect" to already denied applications, which could result in individuals being put in removal proceedings or being subject to reinstatement of removal. Read more about this suit, including who qualifies as a class member and who would qualify under the proposed redefined class at http://www.aifl.org/lac/lac_lit_92806.shtml.

SURVIVING SPOUSE LITIGATION, NINTH CIRCUIT CLASS CERTIFIED

A district court certified a class of plaintiffs in a suit brought by the surviving spouses of U.S. citizens. The complaint alleges that plaintiffs have been unlawfully denied immigrant visas. USCIS' position is that under INA § 201(b)(2), noncitizen spouses do not meet the definition of immediate relative if the petitioning spouse dies before the second wedding anniversary.

Although plaintiffs asked the court to certify a nationwide class, the court limited the class to the Ninth Circuit. Specifically, the class is defined as all noncitizens whose U.S. citizen spouses died before their second wedding anniversary and whose citizen spouse had filed an I-130 petition and affidavit of support, so long as the individual can also show that the petition is now pending or was adjudicated at a USCIS office within the Ninth Circuit or, at the time of death, the deceased spouse or individual lived in the Ninth Circuit. The court also certified a subclass of immigrant spouses who entered on fiancé visas. The case is *Hootkins v. Chertoff*, No. 07-05696 (C.D. Cal. filed Aug. 30, 2007).

Class counsel has prepared a FAQ about the suit and posted information about *Hootkins* and other surviving spouse litigation outside of the Ninth Circuit at <http://www.ssad.org/litigation.html>.

ARE YOU LITIGATING AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM?

AILF would like to hear from practitioners who are litigating ineffective assistance of counsel claims for their clients following the AG's decision in *Matter of Compean*, 24 I&N Dec. 70 (AG 2009). *Matter of Compean* held that there is no constitutional right to remedy ineffective assistance of counsel and overruled *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). The decision set forth new substantive and procedural requirements for motions based on "deficient performance" of counsel. AILF is posting information and resources related to *Matter of Compean* on its new Ineffective Assistance of Counsel Litigation Issue Page at <http://www.aifl.org/lac/lac-ineffective.shtml>.

Contact us at clearinghouse@aifl.org if you have a case that falls into one of the following categories:

- 1) Motion pending at immigration court or the BIA. Let us know if you have a motion pending at the BIA or before an IJ or have received a decision applying *Matter of Compean's* new rules. If your client gives his or her permission, we are interested in seeing the IJ or BIA decision (redacted is fine).
- 2) Case pending at the courts of appeals. Let us know if you have a petition for review pending and (a) the basis for the BIA's denial of the motion to reopen, (b) the circuit in which the case is pending, and (c) the status of the petition for review (e.g., briefing schedule set, briefing completed, argument scheduled, etc.).

UPDATE ON *MATTER OF SILVA-TREVINO*

In the last Litigation Clearinghouse Newsletter, AILF reported that the respondent in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (AG 2008), is seeking reconsideration of the Attorney General's decision. The decision establishes a new framework for determining whether a conviction qualifies as a crime involving moral turpitude, essentially abandoning the categorical approach and allowing judges to consider "any additional evidence ... necessary or appropriate to resolve accurately the moral turpitude question." On January 15, 2009, then Attorney General Mukasey denied the motion to reconsider.

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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