



AMERICAN IMMIGRATION LAW FOUNDATION
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LITIGATION CLEARINGHOUSE
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SUPREME COURT ACTIVE IN IMMIGRATION CASES

Over the past few weeks, the Supreme Court issued two decisions in immigration related cases, heard arguments in a third immigration case, and granted a petition for certiorari in a fourth case. These cases, highlighted below, and other immigration related Supreme Court cases are discussed at AILF Supreme Court Update

http://www.ailf.org/lac/supremecourt_112806.shtml.

Standard for Stay of Removal, *Nken v. Holder*, No. 08-681, 556 U.S. __ (April 22, 2009). The Supreme Court held that a court of appeals should apply the traditional criteria governing stays when adjudicating a stay of removal pending a petition for review. The Court rejected the government's argument that the stringent standard in INA § 242(f)(2) ("clear and convincing evidence" that the removal order "is prohibited as a matter of law") applies. The decision reverses the Fourth and Eleventh Circuits. The decision also sets forth the factors the court should consider under the traditional test for stays and discusses these factors.

Aggravated Identify Theft, *Flores-Figueroa v. United States*, No. 08-108, 556 U.S. __ (May 4, 2009). In a unanimous decision, the Supreme Court held that the aggravated identity theft statute, 18 U.S.C. § 1028A(a)(1), requires federal prosecutors to show that a defendant knew the means of identification belonged to another person. The Court's order reversed the Eighth Circuit's decision in the case, and overturned Fourth and Eleventh Circuit decisions, all of which held that such knowledge was not required.

Aggravated Felony (Fraud) and Categorical Approach, *Nijhawan v. Mukasey*, 523 F.3d 387 (3d Cir. 2008), cert. granted, 129 S. Ct. 988 (Jan. 16, 2009) (No. 08-495). On April 27, 2009, the Court heard argument in a case involving removability based on an aggravated felony conviction under INA § 101(a)(43)(M)(i) (fraud offense in which the loss to the victim exceeds \$10,000) and the applicability of the categorical or modified categorical approach. The Third Circuit had

Continued on following page

COURT ISSUES FINAL ORDER IN SURVIVING SPOUSE CLASS ACTION

A district court issued a decision in *Hootkins v. Napolitano*, No. 07-05696 (C.D. Cal. April 28, 2007), finding that it is bound by Sixth and Ninth Circuit decisions holding that a spouse of a deceased U.S. citizen is an "immediate relative" under INA § 201(b)(2). See *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006); *Lockhart v. Chertoff*, 561 F.3d 611 (6th Cir. 2009). The court declined to apply *Freeman* and *Lockhart* to plaintiffs outside of these circuits. The court also rejected the government's narrow application of *Freeman* to Ninth Circuit plaintiffs, as set forth in a 2007 USCIS Memorandum, instead finding that *Freeman* applies to cases in which an adjustment application was not filed prior to the U.S. citizen spouse's death. Finally, the court held that 8 C.F.R. § 205.1(a)(3)(C)(2), which revokes an I-130 on the death of the petitioner, is invalid. Read more about this case at AILF's Other Litigation Issue Page, http://www.ailf.org/lac/clearinghouse_otherissues.shtml#hootkins.

NEW AT THE LAC ...

Post Departure Motions to Reopen and Reconsider. AILF submitted an amicus brief in *Jimenez-Barrerra v. Holder*, No. 05-77110 (9th Cir. amicus brief submitted Apr. 30, 2009), arguing that the regulatory bar to motions to reopen and reconsider after a person has departed the U.S. conflicts with the statute. The amicus brief urges the court to reject the BIA's reasoning in *Matter of Armendarez*, 24 I&N Dec. 646 (BIA 2008). AILF is interested in participating in other cases challenging the post-departure bar. Please email us at clearinghouse@ailf.org if you have a case.

Litigation and Detention Meetings at AILA Annual Conference in Las Vegas. AILF is sponsoring a litigation meeting on Saturday, June 6, from 9-11 a.m. The Detention Watch Network and AILF are sponsoring a detention meeting on Thursday, June 4 from 12:45-2:30 p.m. Both meetings will be at the Palazzo/Venetian Congress Center, Zeno 4610. For more information about the AILA Annual Conference, see <http://www.aila.org/ac>.

Supreme Court Continued

held that an IJ may look to the underlying facts of the case (here, information from the indictment, sentencing documents, and judgment of conviction) to determine whether the loss amount was satisfied. The Third Circuit's approach is consistent with *Matter of Babaisakov*, 24 I&N Dec. 306 (BIA 2007), but conflicts with other circuits. The Supreme Court is deciding whether it was proper to consider this evidence.

Judicial Review Over Motions to Reopen, *Kucana v. Holder*, 533 F.3d 534 (7th Cir. 2008), cert. granted, 2009 U.S. LEXIS 3158 (Apr. 27, 2009) (No. 08-911).

The Supreme Court will hear a Seventh Circuit case addressing the scope of INA § 242(a)(2)(B)(ii), the bar to judicial review of discretionary decisions, and whether this section bars courts from reviewing motions to reopen. The circuit court had found that the discretionary decision bar applies to motions to reopen. In doing so, the Seventh Circuit relied on its prior decision *Ali v. Gonzales*, 502 F.3d 659 (7th Cir. 2007), holding that INA § 242(a)(2)(B)(ii) bars review over a request for a continuance. The Seventh Circuit's decision in *Kucana* conflicts with all the other circuit court decisions to consider INA § 242(a)(2)(B)(ii)'s applicability to motions to reopen.

RECENT HIGHLIGHTS FROM THE BIA; RELATED RESOURCES FOR IMMIGRATION LAWYERS

After a quiet February, the BIA issued nine precedent decisions between March and early May. The decisions address a variety of issues including detention during the voluntary departure period, *Matter of M-A-S*, 24 I&N Dec. 762 (BIA 2009); application of the Attorney General's CIMT analysis as set forth in *Matter of Silva-Trevino*, *Matter of Louissaint*, 24 I&N Dec. 754 (BIA 2009); and continuances while awaiting adjudication of an I-130, *Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009).

Of particular note, in an en banc decision, *Matter of Cardenas Abreu*, 24 I&N Dec. 795 (BIA 2009), the BIA addressed whether a criminal conviction is final, thus triggering adverse immigration consequences. The BIA held that even though a state court had accepted the respondent's late-filed appeal of his criminal conviction, the conviction was final for immigration purposes.

In *Matter of Almanza-Arenas*, 24 I&N Dec. 771 (BIA 2009), the BIA held that an applicant for nonimmigrant cancellation of removal (INA § 240A(b)) has the burden under INA § 240(c)(4)(B) of providing corroborating evidence requested by the IJ unless it cannot be reasonably obtained. Further, the BIA held that the applicant has the burden of establishing that he was not convicted of a crime that would bar him from relief. Because here, the applicant's criminal record was inconclusive as to whether he was convicted of a CIMT, the BIA found it was proper for the IJ to require him to submit additional evidence, such as a transcript from the criminal proceeding. Finally, the BIA held that a person convicted of a CIMT has been "convicted of an offense under" INA § 237(a)(2) and thus is ineligible for cancellation of removal, regardless of his status as an arriving alien or his eligibility for a petty offense exception under INA § 212(a)(2)(A)(ii)(II).

In *Matter of Aguilar-Aquino*, 24 I&N Dec. 747 (BIA 2009), the BIA found that an IJ lacked jurisdiction to consider a request to remove an electronic monitoring device. Under 8 C.F.R. § 1236.1(d)(1) a person may request amelioration of the conditions under which he or she "may be released" after an initial custody determination. The BIA held that the conditions placed on respondent – home confinement and an electronic monitoring device – were "terms of release" and not "custody." Because respondent was not in custody and did not request a bond redetermination hearing within 7 days after he was released, the IJ lacked authority to redetermine his custody status.

Related Resources

- AILA issued a practice advisory addressing *Matter of Aguilar-Aquino*. See <http://www.aila.org/Content/default.aspx?docid=28581>
- The Immigrant Defense Project issued a practice advisory on *Matter of Cardenas Abreu*. See http://www.immigrantdefenseproject.org/docs/09_Cardenas_Abreu_Practice_Advisory_1.pdf.
- The National Immigration Project of the National Lawyers Guild issued an article, [Living Under *Silva-Trevino*](http://www.nationalimmigrationproject.org/Living%20Under%20Silva-Trevino%20final.pdf), regarding the Attorney General's 2008 decision on CIMTs. See <http://www.nationalimmigrationproject.org/Living%20Under%20Silva-Trevino%20final.pdf>.

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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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