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SUPREME COURT SESSION BEGINS, TWO CASES AFFECTING IMMIGRANTS ON DOCKET

Next Monday, October 5, 2009, the U.S. Supreme Court opens its October session. The Court will hear two immigration-related cases. The first case, *Padilla v. Kentucky*, which will be argued on October 13, involves the criminal defense attorney's role in advising clients about the immigration consequences of a plea. The Supreme Court will consider two questions: 1) whether criminal defense counsel must inform a client of the immigration consequences of a plea and 2) whether counsel's gross misadvice about the consequences is a ground for setting aside a plea.

The second case, *Kucana v. Holder*, deals with the court of appeals' jurisdiction to review motions to reopen. It will be argued on November 10. The Seventh Circuit had held that the bar to judicial review of discretionary decisions, INA § 242(a)(2)(B)(ii), applies to motions to reopen. The Seventh Circuit's decision conflicts with all the other circuit courts to consider this issue. Interestingly, the government agrees with the petitioner that INA § 242(a)(2)(B)(ii) does not apply to motions to reopen and filed a brief supporting the petitioner. The Court invited a private attorney to brief and argue the case, as amicus curiae, in support of the judgment below.

Read more about these cases and other immigration cases recently decided by the Supreme Court at AILF's Supreme Court Update, http://www.ailf.org/lac/supremecourt_112806.shtml.

FOCUS ON ADJUSTMENT OF STATUS

A series of articles focusing on Adjustment of Status in the Courts

Judicial Review of an Adjustment Denial by USCIS

Although an applicant for adjustment of status may not file an administrative appeal to the AAO if USCIS denies the application, 8 C.F.R. § 245.2(a)(5)(ii), there are three other possible options for review of the denial: 1) filing a motion to reconsider with USCIS; 2) renewing the application before the immigration judge if placed in removal proceedings (and if not an "arriving alien"); and, 3) where the appeal involves a

non-discretionary legal issue and the applicant is not in removal proceedings, challenging the denial in federal district court. This last option is discussed below.

An adjustment applicant may file a complaint in district court seeking review of a denial of the application pursuant to 28 U.S.C. § 1331(federal *Continued on following page*)

NEW AT THE LAC ...

Second Circuit Adopts AILF's Arguments in Natz Case. In *Bustamante v. Napolitano*, No. 08-0990, 2009 U.S. App. LEXIS 21207 (2d Cir. Sept. 28, 2009), the court held that USCIS does not have jurisdiction to decide a naturalization application after an applicant files a suit seeking judicial review over a stalled application under INA § 336(b), 8 U.S.C. § 1447(b). Instead, the district court has exclusive jurisdiction over the application. In so holding, the court adopted the position urged by AILF in its amicus brief. AILF also appeared as amicus curiae in *Etape v. Chertoff*, 497 F.3d 379 (4th Cir. 2007), where the Fourth Circuit reached this same result. Read more about the issue and find a link to AILF's Practice Advisory on § 336(b) actions at http://www.ailf.org/lac/natz_delay0806.shtml.

Portability Under AC21/Matter of Perez-Vargas Update. In our last newsletter, we reported that AILF filed a brief with the BIA in *Matter of Neto*, A095-861-144, arguing that the Board erred in *Matter of Perez-Vargas*, 23 I&N Dec. 829 (BIA 2005), when it held that an IJ has no jurisdiction over the INA § 204(j) portability determination and that its decision unlawfully deprives skilled foreign workers of the ability to change jobs under AC21. The Board had indicated that it is considering whether to vacate *Matter of Perez-Vargas*. Subsequently, DHS filed a brief with the BIA, in which it reversed its previous litigation position and - adopting the arguments that AILF made in its amicus brief - urged the BIA to vacate *Matter of Perez-Vargas*. Following receipt of DHS's brief, the BIA cancelled oral argument in the case but asked for supplemental briefing on specified questions. Read the DHS brief and find out more about this case at http://www.ailf.org/lac/ina204_0806.shtml.

JUDICIAL REVIEW OF ADJUSTMENT CONTINUED

question jurisdiction) and 5 U.S.C. § 702 (Administrative Procedures Act (APA)). For more on APA suits, see AILF's Practice Advisory, "Immigration Lawsuits and the APA: the Basics of a Federal Court Action." <http://www.aifl.org/lac/pa/lac-APA-5-9-07.pdf>.

In most cases, the government will move to dismiss, usually alleging that 1) jurisdiction is barred by INA § 242(a)(2)(B) because adjustment is a discretionary benefit; and/or 2) the plaintiff has failed to exhaust administrative remedies because the adjustment application can be renewed in removal proceedings. There are defenses to both of these claims, however, at least in certain circuits.

INA § 242(a)(2)(B) does preclude jurisdiction where USCIS denies an adjustment application in the exercise of discretion. *See, e.g., Hassan v. Chertoff*, 543 F.2d 564, 566 (9th Cir. 2008); *Anaya v. DHS*, No. 07-12688, 2008 U.S. Dist. LEXIS 78549, *7 (E.D. Mich. Sept. 28, 2008). However, courts have held that § 242(a)(2)(B) does not bar review of nondiscretionary legal challenges to an adjustment denial. *See, e.g., Pinho v. Gonzales*, 432 F.3d 193, 204 (3d Cir. 2005) (finding that eligibility for adjustment – unlike the granting of adjustment – does not implicate agency discretion); *Martinez v. DHS*, 432 F. Supp. 2d 631, 635 (E.D. Mich. 2007) (finding jurisdiction to review USCIS's application of the Child Status Protection Act in deciding the statutory requirements for adjustment).

With respect to exhaustion, there is a split in authority as to whether an adjustment applicant who is not in removal proceedings has failed to exhaust administrative remedies. The government maintains that the applicant must wait to renew the application if and when removal proceedings are brought against him. Nonetheless, a number of courts hold exhaustion is not required in these circumstances, in large part because the adjustment applicant has no control over whether or when he might be placed in removal proceedings. *See, e.g., Pinho*, 432 F.3d at 201-202; *Hillcrest Baptist Church v. U.S.A.*, No. 06-1042Z, 2007 U.S. Dist. LEXIS 12782, *15-16 (W.D. Wash. Feb. 23, 2007). However, other courts have found that renewal of the application in removal proceedings is required under the exhaustion doctrine. *See, e.g., Cardoso v. Reno*, 216 F.3d 512, 518 (5th Cir. 2000); *McBrearty v. Perryman*, 212 F.3d 985, 987 (7th Cir. 2000); *Howell v. Immigration and Naturalization Serv.*, 72 F.3d 288, 293 (2d Cir. 1995).

IMMIGRANTS CHALLENGE USE OF DETAINERS

Two recently resolved lawsuits involve challenges to state and city use of ICE detainers. A detainer, issued under 8 C.F.R. § 287.7(d), advises a law enforcement agency that DHS seeks custody of a person in order to arrest and remove him or her. The detainer requests that the law enforcement agency advise DHS prior to release of the person, so that DHS may assume custody where the process of gaining immediate physical custody would be "impracticable or impossible." Further, the regulation directs the law enforcement agency to "maintain custody of the alien [who would otherwise be released] for a period not to exceed 48 hours ... in order to permit assumption of custody by the Department."

In many cases, however, law enforcement agencies maintain custody of a person for longer than the authorized 48 hours. A deported immigrant recently reached a \$145,000 settlement with the City of New York in such a case. In *Harvey v. City of New York*, No. 07-0343 (E.D.N.Y. June 12, 2009), the plaintiff had alleged that, on two separate occasions, the New York City Department of Correction (NYC DOC) unlawfully detained him pursuant to an ICE detainer at the Rikers Island Correctional Facility. Plaintiff's complaint stated that NYC DOC has a policy of holding immigrants until ICE takes them into custody, often beyond the lawful 48-hour period. The complaint alleged that defendants unlawfully deprived the plaintiff of his liberty and access to the courts, and violated the regulation authorizing detainers. Read a press release about the settlement, <http://www.lawso.ucsb.edu/faculty/jstevens/113/harveypressrelease.pdf> and a blog entry about this case, <http://stateswithoutnations.blogspot.com/2009/09/deported-new-york-city-resident.html>.

A second case involved whether ICE's issuance of a detainer is an appropriate factor in determining bail in a criminal case. In *State v. Fajardo-Santos*, A-82-08 (N.J. July 8, 2009), the prosecutor moved to increase the defendant's bail amount after ICE issued a detainer, arguing that the detainer increased the risk that defendant would not appear at his criminal trial. The trial court agreed and set a new bail. On appeal, the New Jersey Supreme Court upheld the trial court's decision, noting that "the trial judge properly responded to a change in circumstance by increasing defendant's bail." Read the decision at <http://lawlibrary.rutgers.edu/decisions/supreme/a-82-08.opn.html>.

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. Litigation Clearinghouse Newsletters are posted on AILF's web page at www.aifl.org/lac/litclearinghouse.shtml. AILF is grateful for the generous support of LexisNexis.