



AMERICAN IMMIGRATION LAW FOUNDATION
LEGAL ACTION CENTER
LITIGATION CLEARINGHOUSE
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COURTS, BIA ON DEPARTURE AND CONTINUOUS PHYSICAL PRESENCE

Applicants for non-LPR cancellation of removal must show that they accrued 10 years of continuous physical presence. The cancellation statute says that an applicant fails to maintain continuous physical presence if he or she “has departed the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days.” See INA § 240A(d)(2). In *Matter of Romalez*, 23 I&N Dec. 423 (BIA 2002), the BIA found that absences of less than the 90/180 day periods also may interrupt continuous physical presence. In that case, the BIA held that voluntary departure “under threat of deportation” breaks continuous physical presence.

Several courts have upheld the general rule set forth in the Board’s decision. However, the courts and the BIA also have distinguished between situations where the applicant makes an agreement to voluntarily depart or withdraw an application for admission in lieu of proceedings and situations where the applicant was turned around at the border and did not enter into a formal agreement. In several of the cases distinguishing *Matter of Romalez*, the applicant was detained by immigration officers.

Upholding *Matter of Romalez*: *Matter of Avilez-Nava*, 23 I&N Dec. 799 (BIA 2005); *Mendez-Reyes v. Atty. Gen.*, 428 F.3d 187 (3d Cir. 2006); *Mireles-Valdez v. Ashcroft*, 349 F.3d 213 (5th Cir. 2003); *Flores Palomino v. Ashcroft*, 354 F.3d 942 (8th Cir. 2004); *Vasquez-Lopez*, 343 F.3d 961 (9th Cir. 2003).

Distinguishing *Matter of Romalez*: *Morales-Morales v. Ashcroft*, 384 F.3d 418 (7th Cir. 2004); *Reyes-Vasquez v. Ashcroft*, 395 F.3d 903 (8th Cir. 2005); *Ortiz-Cornejo v. Gonzales*, 400 F.3d 610 (8th Cir. 2005); *Tapia v. Gonzales*, 430 F.3d 997 (9th Cir. 2005); *Ibarra-Flores v. Gonzales*, 439 F.3d 614 (9th Cir. 2006).

Let us know about your clients’ cases! Email the Clearinghouse at clearinghouse@ailf.org.

NINTH CIRCUIT PRACTITIONERS: CONTACT THE CLEARINGHOUSE ABOUT YOUR I-212, PEREZ-GONZALEZ CASES

As reported in the August 10, 2006 Litigation Clearinghouse Newsletter, USCIS headquarters issued a memo instructing field officers to deny I-212s in any case where the person is inadmissible for having been deported (INA § 212(a)(9)(C)(I)(i)(II)) and ten years have not elapsed since the applicant’s last departure from the United States. See http://www.ailf.org/lac/litclearinghouse/litclr_newsletter_81006.pdf. USCIS’ memo conflicts directly with the Ninth Circuit decision *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004). AILF and the Northwest Immigrant Rights Project would like to hear from attorneys whose Ninth Circuit clients are affected by this memo. Please email us at clearinghouse@ailf.org if you have a case where USCIS has denied relief or you anticipate that USCIS will deny relief.

NEW AT THE LAC ...

AILF’s Legal Action Center recently filed amicus briefs in the following cases:

William v. Gonzales, No. 06-1284 (4th Cir. amicus brief filed July 25, 2006). Challenge to 8 C.F.R. § 1003.2(d), which precludes noncitizens outside the United States from exercising their statutory right to obtain review of a motion to reopen. We argued that this regulation, initially promulgated in 1962, no longer has a statutory basis and is contrary to subsequent statutory authority codifying the right to file a motion to reopen.

Perez-Vargas v. Gonzales, No. 05-2313 (4th Cir. amicus brief filed June 14, 2006). Direct challenge to BIA decision, *Matter of Perez-Vargas*, 23 I & N Dec. 829 (BIA Oct. 2005), holding that IJs lack jurisdiction to determine whether an approved I-140 remains valid under INA § 204(j). We argued that the BIA’s decision improperly ties the “same or similar” occupation classification inquiry to the I-140 visa petition approval.

CLEARINGHOUSE HIGHLIGHT

In each edition of this newsletter, the Clearinghouse highlights cases that showcase novel arguments, creative lawyering, and issues of first impression.

2nd and 3rd Circuits Join Others in Holding that Courts May Stay Voluntary Departure Period

Thapa v. Gonzales, __ F.3d __, 2006 U.S. App. LEXIS 21046 (2d Cir. Aug. 16, 2006); *Obale v. Attorney General*, 453 F.3d 151 (3d Cir. 2006). In *Thapa* and *Obale* – cases of first impression in their respective circuits – the 2nd and 3rd Circuits joined five other circuits (1st, 6th, 7th, 8th, and 9th) in finding that the court of appeals has authority to stay a petitioner’s voluntary departure period during a petition for review. Only the Fourth Circuit has found explicitly that the court lacks such authority.

The courts distinguished between their power to extend or reinstate voluntary departure and the equitable power to stay the voluntary departure. Importantly, in both cases, the petitioners filed the stay request *before* the voluntary departure period expired, and therefore, the power to reinstate a lapsed voluntary departure order was not at issue. The courts concluded the INA does not restrict their traditional equitable powers to maintain the status quo during court review (here, stop the voluntary departure period from running). The courts also held that the standard for evaluating a stay of voluntary departure is the same standard as that used for other injunctive relief, including a stay of removal.

Obtaining a stay of voluntary departure can be very important because individuals who do not depart within the specified time period are barred from various forms of relief, including adjustment of status, for a period of ten years, and may be subject to a monetary fine up to \$5000. *See* INA § 240B(d). If, for example, a person overstays the voluntary departure and then moves to reopen his or her case in order to apply for newly acquired relief, the immigration court or the BIA will not reopen the case. Thus, without a stay, individuals who overstay

the voluntary departure period may end up in a worse situation than those who were ordered removed.

For more information about stays of voluntary departure during court of appeals review and an overview of the case law in other courts, see AILF’s Practice Advisory, *Protecting Voluntary Departure Period During Court of Appeals Review* (October 25, 2005) available at http://www.aifl.org/lac/lac_pa_chrono.shtml.

IDP PROVIDES LEGAL RESOURCES FOR ATTORNEYS REPRESENTING NONCITIZENS WITH CRIMINAL CHARGES

The Immigrant Defense Project (IDP) of the New York State Defenders Association says that it works to defend the legal, constitutional and human rights of immigrants facing criminal or deportation charges. IDP seeks to (1) minimize deportation and detention under current immigration laws for immigrants facing criminal charges or subsequent deportation, and (2) change the current system so that it does not result in the exile of immigrants from their homes and families in the United States. The Project serves as a legal resource for attorneys, advocates, and immigrants. It also promotes impact litigation by recruiting and mentoring pro bono attorneys and, it promotes community-based advocacy against unjust immigration laws.

IDP has a number of legal resources available on its website <http://nysda.org/idp/index.htm>. IDP has practice materials for criminal defense attorneys and immigration attorneys, including a Removal Defense Checklist and reference charts that list common criminal offenses and whether they might trigger a ground of removability. IDP also has pro se materials including “Know Your Rights” charts and guides to help unrepresented individuals understand the criminal justice and deportation systems. In addition, IDP’s webpage provides information about its litigation efforts, including its involvement as amicus curiae before the courts of appeals and Supreme Court.

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AILF’s Legal Action Center works to advance fundamental fairness in United States immigration law and to protect the constitutional and legal rights of noncitizens. The LAC conducts national impact litigation; writes amicus curiae briefs; produces practice advisories; conducts the Litigation Institute and other legal educational programs; and mentors, coordinates and provides technical support for lawyers litigating due process and fairness issues in family, removal and business immigration cases.

The Clearinghouse is a project of the 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 information about your cases.

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