LITIGATION CLEARINGHOUSE NEWSLETTER

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SUPREME COURT HOLDS SECOND POSSESSION OFFENSE IS NOT AN AGGRAVATED FELONY

In a unanimous decision in *Carachuri v. Holder*, the Supreme Court held that a second or subsequent simple drug possession conviction does not qualify as an aggravated felony under INA § 101(a)(43)(B) ("drug trafficking crimes") and therefore does not bar a lawful permanent resident from applying for cancellation of removal. The case followed from the Supreme Court's decision, *Lopez v. Gonzales*, 549 U.S. 47 (2006), finding that a single drug possession conviction is not an aggravated felony. After *Lopez*, a circuit split developed regarding whether a second possession conviction can qualify as an aggravated felony. Under federal law, a person with a previous possession conviction may receive a felony sentence for a subsequent possession offense but only if the prosecutor seeks a recidivist sentencing enhancement.

The Supreme Court rejected the government's argument that hypothetically, Carachuri-Rosendo's conduct could have received felony treatment under federal law. The Court found that immigration officials must look to what the person was actually convicted of as opposed to what might have been charged by prosecutors. It also noted that Carachuri-Rosendo was not afforded the notice and process required for a felony possession charge. Read more about this case at the LAC's Supreme Court Update website, http://www.legalactioncenter.org/supreme-court-update.

CHALLENGE TO H-1B/NEUFELD MEMO ON EMPLOYER-EMPLOYEE RELATIONSHIP

Several employers and trade associations filed a suit challenging the January 8, 2010, USCIS memo providing guidance, in the H-1B context, on determining employer-employee relationships. The memo, signed by USCIS's Associate Director Donald Neufeld, adds requirements for H-1B petitions that are not covered by the H-1B regulations. *Inter alia*, the memo restricts many employers from placing H-1B workers at third party worksites.

The plaintiffs in the suit allege that USCIS issued the memo in violation of the Administrative Procedure Act's notice and comment requirements; that USCIS failed to perform a Regulatory Flexibility Act analysis; that the memo is inconsistent with existing regulations addressing the employee-employer relationship and the term "contractor" and conflicts with the plain language of the INA; and that it is arbitrary and capricious. Plaintiffs ask the court to preliminarily and permanently enjoin USCIS from implementing the memo. The case is *Broadgate et al. v. USCIS et al.*, No. 1:10cv00941 (D.C.D. filed June 8, 2010). Read more about the memo and the legal challenge at http://www.legalactioncenter.org/clearinghouse/litigation-issue-pages/h-1bneufeld-memo-employer-employee-relationship.

NEW AT THE LAC …

Securing Access to Court Review. *Barenboy v. Napolitano*, No. 10-1802 (3d Cir. amicus brief submitted Jun. 7, 2010). The LAC is urging a narrow and strict interpretation of the statutory bars to court review in a case where USCIS denied an immigrant visa petition. We argue that INA § 242(a)(2)(D) expands the court of appeals' jurisdiction and in no way limits district court jurisdiction over legal and constitutional questions.

Post Departure Motions to Reopen. *Prestol Espinal v. Attorney General*, No. 10-1473 (3d Cir. amicus brief submitted Jun. 8, 2010). The LAC and the National Immigration Project continue to challenge the regulatory bar to motions to reopen after a person has departed the U.S. In this case, we are urging the court to strike down the regulation. If you have a case challenging the post departure bar, please email us at clearinghouse@immcouncil.org.

Child Status Protection Act. In amicus briefs filed in cases at the Fifth and Ninth Circuit Courts of Appeals, the LAC argues that the Child Status Protection Act allows a derivative beneficiary of any family preference, employment, or diversity visa petition to retain the priority date of that petition when he or she is found to have "aged-out" by turning 21. The LAC argues that the BIA, in *Matter of Wang*, was mistaken in limiting INA §203(h)(3) to beneficiaries of family second preference visa petitions.

EOIR Resources on BIA Decisions

The Executive Office for Immigration Review (EOIR) regularly updates a chart of court of appeals decisions that are related to BIA precedents. The chart is available on the EOIR Virtual Law Library at http://www.justice.gov/eoir/vll/intdec/ID%20Chart_Updated2009.html. In addition, EOIR has compiled the headnotes from BIA precedents (1995 to the present) and organized them by topic. See http://www.justice.gov/eoir/vll/intdec/precedent_chart/precedent_chart_TOC.html. BIA precedent decisions are posted at http://www.justice.gov/eoir/vll/intdec/lib_indecitnet.html.

Second Circuit Vacates BIA Precedent on Finality of Conviction

The Second Circuit issued a summary order, vacating and remanding the Board of Immigration Appeals' precedent decision, *Matter of Cardenas Abreu*, 24 I&N Dec. 795 (BIA 2009). In *Cardenas Abreu*, the Board had held that a conviction was final for purposes of removability even where the noncitizen had a pending appeal of his conviction if the appeal was filed "late," but nonetheless reinstated and accepted by the criminal court. The Board analyzed the finality requirement of "conviction," defined for the first time in IIRIRA. The Board reasoned that Congress intended to give "broad effect" to the definition of "conviction" in INA § 101(a)(48)(A) and that, unlike a direct appeal, the state's "late" appeal procedure created "significant uncertainty and delay in reaching an ultimate resolution regarding the existence of an otherwise final conviction."

The Second Circuit disagreed. It found that the Board misinterpreted the state law when it attempted to distinguish petitioner's reinstated appeal from a timely filed direct appeal because a reinstated appeal is "equivalent to any other direct appeal for the purposes of finality." However, the court determined that remand to the Board was appropriate to address in the first instance whether IIRIRA's definition of conviction is ambiguous with respect to the finality requirement and "whether a conviction is sufficiently final to warrant removal when a petitioner has a direct appeal pending." The case is *Cardenas Abreu v. Holder*, No. 09-2349, 2010 U.S. App. LEXIS 10498 (2d Cir. summary order May 24, 2010).

Update on Litigation Challenging Arizona Immigration Law SB 1070

As reported in the last issue of this newsletter, at least five suits have been filed challenging the legality of Arizona's immigration enforcement law (SB 1070, as amended by HB 2162). The following are updates on some of the pending cases. Also, the Legal Action Center has posted a Litigation Issue Page focused on these cases. Read more about all the suits and view selected pleadings, briefs, and related materials at http://www.legalactioncenter.org/clearinghouse/litigation-issue-pages/arizona-legal-challenges.

On June 4, 2010, plaintiffs in *Friendly House v. Whiting*, a class action filed on behalf of several organizations and individuals, submitted a motion for a preliminary injunction. Plaintiffs are asking the court to enjoin enforcement of SB 1070 pending the resolution of the lawsuit. Numerous organizations, including AILA, submitted amicus briefs in support of the motion for preliminary injunction. In addition, several of the defendants in the suit, including county attorneys and sheriffs, have filed their answers to the complaint, asserting that the plaintiffs do not have standing, the action is not ripe because SB 1070 is not yet being enforced, and asking that the court dismiss them as nominal parties to the case.

In *Escobar v. Brewer*, Arizona police officers are alleging that SB 1070 is unconstitutional and asserting that they cannot enforce the law absent a judicial declaration that it is lawful. On May 26, 2010, the city of Tucson, a defendant in the suit, filed an answer admitting many of the allegations in the complaint. It also alleged cross claims against co-defendants and is seeking declaratory relief that SB 1070 is unconstitutional. Tucson subsequently filed a motion for a preliminary injunction on behalf of itself and the named plaintiff. Several other Arizona cities moved to join the suit as plaintiff intervenors.

In *Frisnacho v. Brewer*, a resident of the District of Columbia who plans to visit Arizona, is alleging that SB 1070 is unconstitutional. On June, 11, 2010, the defendants filed motions to dismiss asserting that the plaintiff's claims do not present a justiciable case or controversy and that the plaintiff lacks standing to pursue them. Specifically, the motions state that the plaintiff fails to state an actual, imminent injury in fact and that the allegations in the complaint are speculative and hypothetical.

Legal Action Center, Litigation Clearinghouse
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The Litigation Clearinghouse is a project of the American Immigration Council's Legal Action Center. Litigation Clearinghouse Newsletters are posted on our web page http://www.legalactioncenter.org/clearinghouse/newsletter. To be added to our newsletter distribution list, email clearinghouse@immcouncil.org. The LAC thanks law clerk Kalie Moody for her assistance with this newsletter. *The LAC is grateful for the generous support of LexisNexis.*