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SUPREME COURT UPDATE

Court Upholds Retroactive Application of Reinstatement of Removal

In *Fernandez-Vargas v. Gonzales*, 04-1376, 548 U.S. ___ (2006), the Supreme Court held that INA §241(a)(5) applies to persons who illegally reentered prior to the effective date of IIRIRA (April 1, 1997) and did not take any affirmative steps towards legalizing status before that date. The petitioner in *Fernandez-Vargas* was last deported in 1981 and reentered illegally the following year. In March 2001, petitioner married a United States citizen and thereafter filed an application for adjustment of status pursuant to INA § 245(i) along with a request to waive his prior deportation order. Following an interview on his adjustment application, the government reinstated petitioner's 1981 deportation order under INA § 241(a)(5). Individuals subject to §241(a)(5) are barred from eligibility for relief under the INA.

The Supreme Court rejected the petitioner's argument that §241(a)(5) should not be applied retroactively to pre-IIRIRA reentrants. In doing so, the Court reversed favorable decisions by the Sixth and Ninth Circuits. *Bejjani v. INS*, 271 F.3d 670 (6th Cir. 2001) and *Castro-Cortez et al. v. INS*, 239 F.3d 1037 (9th Cir. 2001).

The Court's decision rested on the retroactivity analysis from *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). First, the Court found that Congress did not expressly prescribe whether the statute could be applied retroactively, nor could it infer Congress' intent by using traditional statutory construction principles. Thus, the Court moved on to consider whether application of §241(a)(5) would produce a retroactive effect. The Court said that a statute has a retroactive effect only when it applies to conduct completed prior to the change in law. In the petitioner's case, "it is the conduct of remaining in the country after entry that is the predicate action." Therefore, because the petitioner continued his illegal

presence after new §241(a)(5) was enacted, his retroactivity claim failed.

Importantly, the Court stated that it was "express[ing] no opinion" about whether Petitioner's would have had a retroactivity claim had he married the mother of his son and applied for adjustment of status before April 1, 1997. However, it stated that, in such a situation, "he would at least have had a claim . . . that proven reliance on the old law should be honored by applying the presumption against retroactivity." **The Clearinghouse would like to hear about cases in which the individual applied for relief before April 1, 1997 and cases in which the individual has a viable claim to asylum. Please contact us at clearinghouse@aifl.org if you have such a case.**

AILF's Legal Action Center will soon issue an update to its Practice Advisory on reinstatement of removal. The advisory will include further analysis of the impact on *Fernandez-Vargas* decision and will be posted to Infonet and AILF's webpage (www.aifl.org).

Court Grants Certiorari, Vacates 8th Circuit "Arriving Alien" Adjustment Case

In a summary order dated June 26, 2006, the Supreme Court granted the petition for certiorari in *Mouelle v. Gonzales*, No. 05-1092, vacated the Eighth Circuit's judgment (416 F.3d 923 (8th Cir. 2005)), and remanded the case for further consideration in light of the new interim regulation regarding adjustment of status for arriving aliens. The interim rule, effective on May 12, 2006, deleted the absolute bar on an "arriving alien's" ability to adjust status if he or she is in removal proceedings. For more information about the rule, see the June 9, 2006 issue of AILF's Litigation Clearinghouse Newsletter.

Prior to the issuance of the interim regulation, four courts of appeals, the First, Third, Ninth and Eleventh Circuits, struck down the former regulation barring adjustment, finding that it violated the statute. Only two courts, the Eighth and the Fifth

Circuits, upheld the regulation. Following issuance of the interim rule, the government filed a response to Moule's petition for certiorari arguing that the issue presented in the petition now is moot.

AILF's Legal Action Center soon will issue an update to its Practice Advisory on adjustment of status for arriving aliens. The advisory will discuss strategies for proceeding under the new regulation.

FOURTH CIRCUIT VACATES BIA PRECEDENT DECISION, *MATTER OF SHANU*, ADDRESSING WHETHER ADJUSTMENT IS AN ADMISSION

In a recent Fourth Circuit decision, *Aremu v. DHS*, No. 05-1728 (4th Cir. June 19, 2006), the court granted the petition for review and vacated the underlying removal order in the case *Matter of Shanu*, 23 I&N Dec. 754 (BIA 2005). (The court acknowledged that the petitioner's correct name is "Shanu," not "Aremu" and refers to him as such in the opinion.) The court held that the date of adjustment of status does not qualify as "the date of admission" under INA § 237(a)(2)(A)(i). Because the BIA designated the underlying case a precedent decision, the court's decision not only establishes Fourth Circuit law, but also nullifies the BIA's precedent, leaving undecided the issue of whether an adjustment is "the date of admission" in the majority of circuits.

Section 237(a)(2)(A)(i) says that a person is removable if he or she is convicted of a crime involving moral turpitude within five years after "the date of admission." Shanu first was admitted to the United States in 1989 as a nonimmigrant visitor. He adjusted status in 1996 and was convicted of several crimes in 1998. In *Matter of Shanu*, the BIA said that the date of adjustment qualifies as "the date of admission" and that in cases where there is more than one admission, any of the dates qualifies as "the date of admission." The Fourth Circuit rejected the BIA's finding that Shanu's adjustment is an admission and concluded that only his 1989 admission qualifies as "the date of admission" for purposes of removability

under § 237(a)(2)(A)(i). As a result, petitioner was not removable because he was convicted more than five years after his initial admission. Importantly, the court "express[ed] no opinion" on whether the date of adjustment of status may qualify as "the date of admission" in cases where the person never had been admitted in the first instance (EWI). The court also did not decide whether "any potential date of admission qualifies as 'the date of admission.'"

The Ninth Circuit also has held that the date of the adjustment is not "the date of admission" in *Shivaramman v. Ashcroft*, 360 F.3d 1142 (9th Cir. 2004). In addition, the Seventh Circuit declined to uphold the BIA's decision in a pre-*Matter of Shanu* case; arguably, however, the Seventh Circuit case is not dispositive on the issue. The other circuits have yet to address this issue. Because *Matter of Shanu* has been vacated, individuals with cases in circuits without decisions may urge the immigration judges and the BIA to adopt the Fourth Circuit's decision.

PHILADELPHIA-BASED NGOS INVESTIGATE IMPACT OF NATURALIZATION DELAYS ON SSI ELIGIBILITY

Community Legal Services, Inc. of Philadelphia and the Philadelphia HIAS office are investigating the situation of the elderly, blind or disabled non-citizen SSI (Supplemental Security Income) recipients. Federal law limits them to seven years receipt of SSI benefits as LPRs. The assumption is that they will naturalize during this period and therefore become eligible receive SSI as United States citizens. Naturalization delays have resulted in an estimated 50,000 noncitizen SSI recipients losing their benefits now or in the near future.

Community Legal Services is considering litigation to reinstate or prevent the termination of benefits. CSC would like to hear from lawyers who have cases in which SSI has been terminated or will be soon. Please email Jonathan Stein and Richard Weishaupt at CLS, at jstein@clsphila.org and rweishaupt@clsphila.org.

AILF Legal Action Center, Litigation Clearinghouse

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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.