AMERICAN IMMIGRATION LAW FOUNDATION
LEGAL ACTION CENTER

LITIGATION CLEARINGHOUSE NEWSLETTER

Vol. 3, No. 11 October 23, 2008

NINTH CIRCUIT VACATES *OROZCO V. MUKASEY*

On October 20, 2008, the Ninth Circuit Court of Appeals granted the parties' joint motion to dismiss *Orozco v. Mukasey* and vacated its published decision, 521 F.3d 1068 (9th Cir. 2008), after the BIA granted a joint motion to reopen the case. See the court's order, which can be found on the Ninth Circuit Court's website: http://www.ca9.uscourts.gov/.

In *Orozco*, the court had held that the petitioner had not been "admitted" for purposes of adjustment of status after concluding that an entry achieved with fraudulent documents is not a "lawful entry" and does not satisfy the statutory definition of "admitted." INA 101(a)(13)(A). The court also held that *Matter of Areguillin*, 17 I&N Dec. 308 (BIA 1980), did not have "persuasive value" because it predated the current statutory definition of "admission."

In *Areguillin*, the BIA held that an admission occurs when an inspecting officer "permits the applicant to pass through the port of entry." Thus, the BIA found that Areguillin was "inspected and admitted" within the meaning of the adjustment statute, INA § 245(a), when she was waived through the port of entry, even though she was inadmissible at that time due to lack of proper documents. Now that *Orozco* is vacated, *Areguillin* again is binding BIA precedent in the Ninth Circuit.

Attorneys whose clients had adjustment applications denied by USCIS based on *Orozco* now may be able to have these applications reopened or have their clients reapply for adjustment. Similarly, attorneys whose clients had adjustment applications denied by an Immigration Judge or by the BIA may be able to get these cases reopened. For cases that fall outside of the time period for a motion to reopen, the DHS trial attorney may be willing to join in a motion to reopen.

Please contact AILF at clearinghouse@ailf.org if 1) you have trouble obtaining relief for your client, or 2) DHS, the Immigration Judge or the BIA raise questions about whether the reasoning behind *Orozco* should apply notwithstanding that the decision has now been vacated.

NINTH CIRCUIT UPHOLDS ARIZONA EMPLOYER SANCTIONS LAW

The Ninth Circuit Court of Appeals upheld an Arizona law that imposes sanctions on employers who hire undocumented immigrants. The Legal Arizona Workers Act makes the federal E-Verify program mandatory for Arizona employers and allows the state to suspend an employer's business license for non-compliance. Plaintiffs – civil-rights and business organizations – argued that the Act is preempted by federal law and strips employers of due process rights because it denies them the chance to challenge the employees' status before sanctions are imposed.

The Ninth Circuit affirmed the district court's holding that the Act is not preempted by federal law. The federal law provision at issue, 8 U.S.C. § 1324a(h)(2), preempts state sanctions for hiring unauthorized immigrants "other than through licensing and similar laws." The court reasoned that because the Act was a "licensing" law within the meaning of 8 U.S.C. § 1324a(h)(2), it was not expressly preempted. The court further held that the provision of the law requiring employers to use E-Verify is not expressly or impliedly preempted by federal policy.

The court also found that the Act does not violate employers' due process rights because it allows employers to present evidence at a hearing to rebut the presumption of an employee's unauthorized status. The court noted that the statute has not yet been enforced, and that when the factual background is developed, other challenges to the Act may arise.

Plaintiffs filed a petition for rehearing on October 1, 2008. The case is *Chicanos Por La Causa, Inc. v. Napolitano*, 2008 U.S. App. LEXIS 19723, No. 07-17272, No. 07-17274, No. 08-15357, No. 08-15359, No. 08-15360 (9th Cir. Sept. 17, 2008). Visit AILF's Local Law Enforcement Issue Page for more information, http://www.ailf.org/lac/clearinghouse_120706.shtml.

SUPREME COURT TO HEAR IDENTITY THEFT CASE

The Supreme Court granted certiorari to determine what federal prosecutors must show to prove aggravated identity theft under 18 U.S.C. § 1028A(a)(1). The provision applies when a person "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person."

The defendant in the case used an alien registration number and Social Security number that were not his. He argued that the government must prove that he knew the means of identification belonged to another person because "knowingly" in 18 U.S.C. § 1028A(a)(1) modifies not only "transfers, possesses, or uses," but also the phrase "of another person." The Eighth Circuit disagreed, holding that the word "knowingly" modifies only "transfers, possesses, or uses." Therefore, the government need not prove that the defendant knew that the means of identification belonged to another person.

The Court will clarify whether federal prosecutors must show that the defendant knew that the means of identification he or she used belonged to another person. The case is *U.S. v. Flores-Figueroa*, 274 Fed. Appx. 501, No. 07-2871 (8th Cir. April 23, 2008) (per curiam), *cert. granted sub nom. Flores-Figueroa v. U.S.*, No. 08-108, 2008 U.S. LEXIS 7827 (U.S. Oct. 20, 2008). Visit AILF's Supreme Court Update webpage for more information about Supreme Court cases, http://www.ailf.org/lac/supremecourt_112806.shtml.

SECOND CIRCUIT UPHOLDS POST-9/11 CALL-IN PROGRAM

The Second Circuit Court of Appeals affirmed a BIA ruling finding a post-9/11 Special Call-In Registration Program valid. The program, part of the National Security Entry-Exit Registration System (NSEERS), required certain male non-immigrants over the age of 16 from designated countries to appear for registration and fingerprinting. When plaintiffs complied with the program, they were placed in deportation proceedings. Plaintiffs sued, alleging, *inter alia*, that the program lacks statutory authorization, is unconstitutional, and that regulatory violations occurred during implementation. The court held the program is statutorily authorized by 8 U.S.C. § 1303(a) and (b) and does not violate the Constitution. The court did find that defendants violated regulatory provisions during the course of the program but held that the violations did not require suppression of evidence or termination of proceedings.

The case is *Rajah v. Mukasey*, No. 06-3493 (2nd Cir. Sept. 24, 2008). Court documents are available at AILF's Other Impact Litigation Issue Page, http://www.ailf.org/lac/clearinghouse_otherissues.shtml.

NEW AT THE LAC …

AILF Files Amicus Brief Urging Greater Protection Against Ineffective Assistance of Counsel (October 6, 2008).

The Attorney General (AG) certified three cases addressing ineffective assistance of counsel in immigration proceedings, signaling that he may eliminate immigrants' ability to reopen their removal case when former counsel was ineffective. AILF filed an amicus brief outlining immigrants' constitutional, statutory and regulatory right to protection against ineffective assistance of counsel. The brief recommends that the AG not change the current process for evaluating ineffective assistance claims by further restricting immigrants' ability to pursue their claims. The brief also urges the AG to adopt ameliorative changes through notice and comment and develop a better system for remedying simple errors to avoid needless litigation. AILA and other organizations and individuals signed on to the AILF brief. The brief is available at http://www.ailf.org/lac/chdocs/IACBrief.pdf.

***Updated Practice Advisory*, Adjustment of Status of "Arriving Aliens" Under the Interim Regulations: Challenging the BIA's Denial of a Motion to Reopen, Remand, or Continue a Case** (Updated September 2, 2008).

This practice advisory focuses on the BIA's failure to implement the interim regulations; suggests arguments why the BIA should grant motions of "arriving alien" parolees who seek to reopen, remand or continue removal cases while USCIS adjudicates their adjustment applications; and cites recent circuit court decisions adopting these arguments. Available at http://www.ailf.org/lac/lac_pa_topics.shtml.

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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.

AILF is grateful for the generous support of LexisNexis.