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BUSINESS GROUPS APPEAL DECISION IN E-VERIFY SUIT

The United States Chamber of Commerce and other business groups filed a lawsuit challenging a rule requiring government contractors and subcontractors to participate in the E-Verify program, an Internet-based employment authorization verification system. The new rule would, among other things, require employers to use the E-Verify program to verify the status of all workers on federal contract projects, including existing employees (until now, E-Verify requirements only applied to new hires). After the suit was filed, the government suspended the Bush Administration rule pending review by the Obama Administration, but on July 8, 2009, the government announced that the rule would go into effect on September 8, 2009. Thereafter, the district court considered the plaintiffs' motion for summary judgment and the defendants' cross motion for summary judgment. On August 26, 2009, the court granted summary judgment in favor of the defendants. Plaintiffs immediately filed their notice of appeal to the Fourth Circuit. In addition, plaintiffs asked the court to issue an injunction pending appeal in order to prevent the rule from going into effect on September 8. The court denied the request for an injunction on September 4, 2009.

Read more about this suit and the motions and court decision at AILF's Employment Authorization Verification Litigation Issue Page at http://www.ailf.org/lac/clearinghouse_nomatch.shtml.

COURTS RULE ON CLASS CERT FOR NONCITIZENS DENIED HEARINGS TO REVIEW PROLONGED DETENTION

The Ninth Circuit and the District Court for the Middle District of Pennsylvania recently issued decisions in class actions charging that the government is violating the law by incarcerating people for prolonged periods of time, in some cases for years, while they contest their deportation, without a custody hearing to determine if their prolonged detention is justified. The courts disagree about whether INA § 242(f) bars class litigation. In *Rodriguez v. Hayes*, No. 08-56156, 2009 U.S. App. LEXIS 18738 (9th Cir. Aug. 20, 2009), the Ninth Circuit reversed a district court decision denying class certification, and in *Alli v. Decker*, No, 09-0698 (M.D. Pa. Aug. 10, 2009), the district court denied class certification, but granted the habeas petition in part.

The petitioner in *Rodriguez* seeks to certify a class of noncitizens in the Central District of California who are or will be detained for longer than six months pending completion of removal proceedings, including judicial review, and who have not been afforded a hearing to determine whether their prolonged detention is justified. The suit is requesting hearings for proposed class members. The district court had denied the motion for class certification, but on appeal, the Ninth Circuit held, inter alia, that INA § 242(f)(1) does not bar class certification. Section 242(f)(1) states that "no court shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter… other than with respect to the application of such provisions to an individual alien against whom proceedings under such chapter have been initiated." The court reasoned that § 242(f)(1) prohibits only injunction of "the

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NEW AT THE LAC …

AILF recently filed amicus briefs in two BIA cases:

Interpretation of "Admitted"/*Orozco*. In *Matter of Aguilar-Cerda*, A075-819-055 (brief submitted Sept. 3, 2009), AILF argues that *Matter of Areguillin*, 17 I&N Dec. 308 (BIA 1980), remains valid and that a person is "admitted" when an immigration officer inspects him and allows his entry, regardless of whether he was, in fact, inadmissible.

Portability Under AC21/*Matter of Perez-Vargas*. In *Matter of Marcal Neto*, A095-861-144 (brief submitted Aug. 27, 2009), AILF argues that the Board's decision in *Matter of Perez-Vargas*, 23 I&N Dec. 829 (BIA 2005), holding that an IJ has no jurisdiction over the INA § 204(j) portability determination, is a wrong interpretation of the provision and unlawfully deprives skilled foreign workers of the ability to change jobs under AC21. The Board is hearing argument in this case and has indicated that it is considering whether to vacate *Matter of Perez-Vargas*.

DETENTION CONTINUED

operation of" the detention statutes, not injunction of violations of the statute.

In the second case, *Alli*, petitioners seek to represent a class of LPRs in Pennsylvania or the judicial district of the Middle District of Pennsylvania who are or will be subject to detention under INA § 236(c) for six months or more without an individualized hearing. Petitioners sought a declaration that the failure to provide all class members with individualized hearings violates the INA and due process. The court granted petitioners' habeas petition in part, stating that prolonged detention "raises serious constitutional concerns," and that § 236(c) only authorizes mandatory detention for the period of time reasonably necessary to promptly initiate and conclude removal proceedings. If a person detained under § 236(c) makes a showing that detention is no longer reasonable, the person must be afforded a hearing and the government must justify continued detention.

However, the court denied class certification. It ruled, inter alia, that INA § 242(f)(1) bars review of petitioners' class claims. The court held that the classwide declaration sought by petitioners would , in effect, "restrain" the operation of § 236(c). In addition, the court held that a classwide declaration would be a "prelude to later injunctions."

See the ACLU's website for court documents. *Alli*: http://www.aclu.org/immigrants/detention/39687res20090527.html, and *Rodriguez*: http://www.aclu.org/immigrants/detention/40794res20070516.html

CONTACT AILF: REMOVAL CASES INVOLVING VIOLATIONS OF STATUTE OF LIMITATIONS TO RESCIND ADJUSTMENT

Several courts of appeals have considered whether the five year limitation on the government's authority to rescind adjustment of status (INA § 246(a)) precludes the commencement of removal proceedings based on the unlawfulness of the adjustment after five years. The Third Circuit has found that the government may not commence removal proceedings after five years, while four other circuits have said that it may. *See Stolaj v. Holder*, No. 08-3858, 2009 U.S. App. LEXIS 18567 (6th Cir. Aug. 19, 2009); *Kim v. Holder,* 560 F.3d 833 (8th Cir. 2009); *Garcia v. Holder*, 553 F.3d 724 (3d Cir. 2009); *Asika v. Ashcroft* (4th Cir. 2004); *Biggs v. INS*, 55 F.3d 1398 (9th Cir. 1995). AILF is monitoring this litigation. Please contact AILF at clearinghouse@ailf.org if you are or will be litigating this issue in any circuit court.

GUIDED BY CIRCUIT LAW, BIA ISSUES FAVORABLE PRECEDENTS

In its two most recent precedent decisions, the Board of Immigration Appeals has followed circuit court law and ruled in favor of respondents. In *Matter of Lamus*, 25 I&N Dec. 61 (BIA 2009), the Board held that an IJ may not deny an otherwise properly filed motion to reopen under *Matter of Velarde*, 23 I&N Dec. 253 (BIA 2002), based solely on the fact that DHS opposed the motion. In *Matter of Velarde*, the BIA had set forth the factors to consider when adjudicating a motion to reopen to adjust status based on a marriage entered into after the commencement of proceedings but where the visa petition has not been adjudicated. The last factor is whether DHS opposed the motion. The government had argued that DHS' opposition is dispositive. However, the Board rejected this argument and said that though DHS's opposition should be considered, it does not preclude an IJ from exercising independent judgment. Prior to *Matter of Lamus*, three courts had similarly rejected the government's contention that DHS' opposition is dispositive. *Melnitsenko v. Mukasey*, 517 F.3d 42 (2d Cir. 2008); *Sarr v. Gonzales*, 485 F.3d 354 (6th Cir. 2007); *Ahmed v. Mukasey*, 548 F.3d 768 (9th Cir. 2008). Two courts, however, the Third and Fifth Circuits, had held that DHS can block a *Velarde* motion by opposing the motion. *Bhiski v. Ashcroft*, 373 F.3d 363 (3d Cir. 2004); *Ramchandani v. Gonzales*, 434 F.3d 337 (5th Cir. 2005). Given these court's prior treatment of the issue, the Board and IJs can be expected to follow *Matter of Lamus* even in the Third and Fifth Circuits.

In *Matter of Bulnes*, 25 I&N Dec. 57 (BIA 2009), the Board held that the regulatory bar to motions to reopen after a person's departure from the U.S. does not preclude a person from seeking to rescind an *in absentia* order of removal or deportation based on lack of notice. In reaching this conclusion, the Board noted that an *in absentia* order issued when the person did not receive proper notice is voidable from it inception. Therefore, barring motions "involving an inoperative in absentia deportation order would give that order greater force than it is entitled by law." The only court to address this precise issue was the Eleventh Circuit in *Contreras-Rodriguez v. United States Attorney General*, 462 F.3d 1314 (11th Cir. 2006), which also had held that the IJ has jurisdiction over the motion to reopen to rescind an *in absentia* order even if the person has departed the United States.

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