



AMERICAN IMMIGRATION LAW FOUNDATION
LEGAL ACTION CENTER
LITIGATION CLEARINGHOUSE
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CIRCUIT COURTS CONSIDER CHALLENGES
TO *MATTER OF BLAKE*

In *Matter of Blake*, 23 I&N Dec. 722 (BIA 2005), the BIA ruled that a person found removable due to a conviction for sexual abuse of a minor is ineligible for a waiver under former section 212(c) of the INA. The BIA reasoned that the aggravated felony ground of removal (INA §§ 237(a)(2)(A)(iii) and 101(a)(43)(A)) had no statutory counterpart in the 212(a) grounds of inadmissibility.

Pending Cases Challenging *Matter of Blake**

1st Circuit – *Kim v. Gonzales*, No. 05-2462 (pet. filed Sept. 29, 2005). **2nd Circuit** – *Blake v. Carbone*, 05-2988 (pet. filed June 17, 2005); *Lake v. Gonzales*, 05-4403, 05-4204 (pet. filed Aug. 10, 2005). **5th Circuit** – *Brieva-Perez v. Gonzales*, 05-60639 (pet. filed July 7, 2005). **8th Circuit** – *Vue v. Gonzalez*, 05-3482 (pet. filed Sept. 9, 2005). **9th Circuit** – *Miramontes-Jimenez v. Gonzales*, No. 05-75711 (pet. filed Oct. 5, 2005).

*Attorneys reported these cases to AILF and thus this is not an exhaustive list of all pending cases. Please contact the Clearinghouse at clearinghouse@ailf.org if you have a pending petition for review challenging *Matter of Blake*.

Resource

“Defense Strategies for Applying for § 212(c) Relief in Light of *Matter of Blake*,” by Katherine Brady and Joseph Justin Rollins (available at <http://www.ilrc.org/criminal.html>). This article provides strategies for asserting that aggravated felonies that are not related to controlled substances can be waived under the former § 212(c).

SUPREME COURT UPDATE

On October 31, 2005, the Supreme Court granted certiorari in the Tenth Circuit case *Fernandez-Vargas v. Gonzales* on the following question: “Whether and under what circumstances INA § 241(a)(5) applies to an alien who reentered the United States illegally before the effective date of IIRIRA, April 1, 1997.”

On November 28, 2005, the Supreme Court denied certiorari in the Fifth Circuit case *Mortera-Cruz v. Gonzales*. The issue in this case was whether a person eligible for adjustment of status pursuant to INA § 245(i) is subject to INA § 212(a)(9)(C)(i)(I).

New at the LAC ...

Over the past several weeks, AILF’s Legal Action Center has filed amicus curiae briefs in the following cases.

Jiang v. Gonzales, 425 F.3d 649 (9th Cir. 2005), No. 03-71837 (Nov. 23, 2005) (supporting pet. for rehrq. in light of subsequent decision in *Bona v. Gonzales*, 425 F.3d 663 (9th Cir. 2005)/arriving alien adjustment).

Sampedro v. Gonzales, No. 13390 (11th Cir. Nov. 17, 2005) (urging court to strike down the regulatory bar on “arriving aliens” adjusting in proceedings).

Ugokwe v. Attorney General, No. 05-15237 (11th Cir. Nov. 17, 2005) (challenging *Matter of Shaar*/voluntary departure and motion to reopen).

Singh v. Gonzales, No. 05-72875 (9th Cir. Nov. 10, 2005) (arguing that INA § 242(a)(2)(D), added by the REAL ID Act, restored this court’s jurisdiction over questions of law that arose in an asylum case that had been denied because the petitioner did not apply within one year of entry into the United States).

Muluya v. Gonzales, No. 05-1829 (1st Cir. Nov. 7, 2005) (challenging *Matter of Shaar*/voluntary departure and motion to reopen).

JURISDICTION AFTER REAL ID

Section 106 of the REAL ID Act added a new section (a)(2)(D) to INA § 242. This section says that review of all constitutional claims or questions of law shall be by petition for review *regardless* of any other restrictions on review contained in INA § 242. Therefore, the jurisdictional bars based upon certain criminal offenses (INA § 242(a)(2)(C)) and discretionary decisions (INA § 242(a)(2)(B)) do not preclude review over constitutional claims or questions of law.

The following is a list of published cases interpreting INA §§ 242(a)(2)(B) and 242(a)(2)(C) in light of new INA § 242(a)(2)(D).

Cases involving discretionary decisions (INA § 242(a)(2)(B))

- Mendez-Reyes v. Attorney General*, 428 F.3d 187 (7th Cir. 2005) (cancellation of removal)
Grass v. Gonzales, 418 F.3d 876 (8th Cir. 2005) (continuance)
Schroeck v. Gonzales, 2005 U.S. App. LEXIS 24529 (10th Cir. Nov. 15, 2005) (adjustment of status)
Perales-Cumpean v. Gonzales, 2005 U.S. App. LEXIS 25569 (10th Cir. Nov. 25, 2005)

Cases involving crimes (INA § 242(a)(2)(C))

- Gattem v. Gonzales*, 412 F.3d 758 (7th Cir. 2005) (aggravated felony)
Notash v. Gonzales, 427 F.3d 693 (9th Cir. 2005) (CIMT)
Hamid v. Gonzales, 417 F.3d 642 (7th Cir. 2005) (aggravated felony/CAT)
Elia v. Gonzales, 418 F.3d 667 (6th Cir. 2005) (aggravated felony/212(c) relief)
Kamara v. Attorney General, 420 F.3d 202 (3d Cir. 2005) (aggravated felony/CAT)
Sena v. Gonzales, 428 F.3d 50 (1st Cir. 2005) (aggravated felony/212(c) relief)
Bonhometre v. Gonzales, 414 F.3d 442 (3d Cir. 2005) (aggravated felony)

- Ramos v. Gonzales*, 414 F.3d 800 (7th Cir. 2005) (controlled substance offense)
Papageorgiou v. Gonzales, 413 F.3d 356 (3d Cir. 2005) (aggravated felony)
Fernandez-Ruiz, 410 F.3d 585 (9th Cir. 2005) (crime of domestic violence)

CLEARINGHOUSE HIGHLIGHT

In each edition of this newsletter, the Clearinghouse will highlight one case in order to showcase novel arguments, creative lawyering, and issues of first impression.

***Shi Liang Lin et al. v. Gonzales*, 416 F.3d 184 (2d Cir. 2005)**

The issue in this case was whether the court should give *Chevron* deference to an immigration judge's interpretation of the INA where the BIA issued a summary affirmance (AWO) of the IJ's decision. The court held that the IJ's interpretation of the INA is not entitled to *Chevron* deference.

The court first noted that the Attorney General's construction of the INA generally is afforded *Chevron* deference, and thus, "[t]he operative question [in this case] is whether an IJ's summarily affirmed construction is 'promulgated in the exercise of the Attorney General's authority.'" The court found that the Attorney General specifically granted rule-making authority to the BIA but that no regulation suggests that IJs have such authority. Furthermore, the court held that under the BIA's regulations, "a summarily affirmed IJ decision cannot be construed as a 'rule' promulgated by the BIA on behalf of the Attorney General."

For a complete description of the case, see AILA's case summaries at www.aila.org/content/default.aspx?docid=17169.

*AILA prepares digests of all Supreme Court and significant appeals court decisions and posts them on Infonet. The digests are sorted by court and are searchable.

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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.