National Immigration Litigation Alliance
Immigrant justice through the courts

AMERICANBARASSOCIATION
CILA Children's Immigration Law Academy

Litigation for Unaccompanied Children: Updates and Foundational Cases

A webinar series presented by:

The ABA Children's Immigration Law Academy (CILA) and
The National Immigration Litigation Alliance (NILA)

Webinar 1 of 4, Written Materials

Wednesday, January 26, 2022

Cases reviewed:

Godinez, et al. v. U.S.DHS, et al., No. 20-00828-CV-W-GAF (W.D. Mo. Feb. 10, 2021) (denying in part and granting in part defendants' motion to dismiss)

Issue

Whether individuals granted SIJ status are parolees for purposes of employment authorization documents.

Facts and Case History

The plaintiffs are three Guatemalans who entered the United States as minors and subsequently were successful in petitioning for Special Immigrant Juvenile (SIJ) status. Thereafter, each applied for an employment authorization document (EAD) with proof of their SIJ status. U.S. Citizenship and Immigration Services (USCIS) denied their EAD applications, finding that they could not prove that they were parolees and thus were ineligible for EADs as humanitarian or public interest parolees under 8 C.F.R. § 275a.12(c)(11). As result, the plaintiffs could not obtain drivers' licenses or social security numbers, could not work and faced obstacles continuing their education.

Plaintiffs sued the Department of Homeland Security (DHS) and USCIS under the Administrative Procedure Act (APA) (first claim) and the U.S. Constitution (second claim), seeking injunctive and declaratory relief. Specifically, they asked the court to declare that defendants' determination that they—as individuals with SIJ status—were not parolees was arbitrary and capricious and in violation of the law; and to order USCIS to reopen their EAD applications and readjudicate them in accordance with the law.

Relevant here, defendants moved to dismiss the case under Federal Rule of Civil Procedure 12(b)(6) for alleged failure to state a claim, arguing that, under 8 U.S.C. § 1255(h), those with SIJ status are parolees only for purposes of adjustment of status.

Notable Holdings and Rationale

Applying traditional rules of statutory interpretation, the court denied defendants motion to dismiss with respect to plaintiffs' APA claim. First it noted that § 1255(h) states that a person with SIJ status is "deemed, for purposes of [8 U.S.C. § 1255(a)], to have been paroled into the United States." The court rejected defendants' argument that those with SIJ status are deemed parolees *only* for purposes of adjustment of status, finding that defendants impermissibly read the word "only" into the statute. Instead, it concluded that, while the statute does expressly deem these individuals to be parolees for adjustment purposes, it does not preclude them from being deemed parolees for other purposes. It further found that the SIJ statute's humanitarian purpose and the legislative history behind Congress' adoption of § 1255(h) evidenced Congress' desire to safeguard the humanitarian and public interest relief for abandoned and neglected children. Based upon this, the court concluded that those with SIJ status are paroled for humanitarian purposes, and thus eligible for work authorization.

Finally, with respect to plaintiffs' constitutional claim, the court granted defendants' motion, finding that, because plaintiffs only have a right to apply for an EAD and not an automatic right to be granted an EAD, they do not have either a property or liberty interest protected by the due process clause.

Practice Pointers

- Be aware of ongoing developments in the law on this issue.
    - Because the decision involved a motion to dismiss, the court did not make a final ruling on the correct interpretation of the law. Subsequently, the court dismissed the case on the parties' joint motion without reaching a final decision.
    - A pending putative class action in Massachusetts, *L.F.O.P. v. Mayorkas*, No. 21-cv-11556-TSH (D. Mass. filed Sept. 21, 2021), raises the same issue. In that case, defendants DHS and USCIS have advised the court that USCIS is reviewing its policy and may determine that SIJs are eligible for EADs.
- Surviving a motion to dismiss in a federal court immigration case often will lead to a settlement of the case.
- Constitutional claims in immigration-related cases are almost always more difficult than statutory, regulatory or other claims brought under the APA.

L.F.O.P., et al. v. Mayorkas, et al., No. 21-cv-11556-TSH (D. Mass. filed Sept. 21, 2021) (Second Amended Complaint)

Issue:

Whether USCIS' policy of refusing to issue employment authorization documents (EADs) to Special Immigrant Juveniles (SIJ) is unlawful.

Facts and Case History:

In their second amended complaint, four individuals in SIJ status filed this putative class action against the Department of Homeland Security (DHS) and U.S. Citizenship and Immigration Services (USCIS), alleging that the agencies' policy and practice of finding that SIJs are not paroled for purposes of an EAD is unlawful. The complaint alleges that Congress' intent in adopting the SIJ provisions, and particularly 8 U.S.C. § 1255(h)—which deems an SIJ to be paroled for purposes of adjustment of status—was to ensure that SIJs were deemed paroled for urgent humanitarian reasons under 8 U.S.C. § 1182(d)(5). Further, by deeming SIJs paroled for urgent humanitarian reasons under § 1182(d)(5), Congress intended that they be eligible for both adjustment of status and also an EAD under 8 U.S.C. § 1324a and 8 C.F.R. § 275a.12(c)(11). These latter provisions render noncitizens who have been paroled into the United States for urgent humanitarian reasons eligible for an EAD.

Plaintiffs further assert that defendants' policy is to not issue an EAD under 8 C.F.R. § 274a.12(c)(11) unless the person has an I-94 and that USCIS fails to issue I-94s to SIJs. Consequently, SIJs are precluded from obtaining an EAD unless they qualify for one on an independent basis—such as an application for asylum or adjustment of status. Plaintiffs detail the irreparable harm that results from this policy to them and putative class members. Finally, the complaint challenges USCIS' policy as violating the Immigration and Nationality Act (INA), its implementing regulations, and the Administrative Procedure Act (APA). Plaintiffs seek a declaration from the court that defendants' policy violates the law and an injunction prohibiting defendants from denying EADs to plaintiffs and putative class members based on this policy.

On December 27, 2021, defendants moved for a stay of all proceedings on the basis that USCIS was considering a new process by which SIJs would be eligible for EADs and that a decision could be forthcoming within 45 days. Plaintiffs opposed staying the case.

On January 10, 2022, plaintiffs filed a motion for class certification, seeking to certify a class of SIJs in Massachusetts whose EAD applications have been or will be denied under this policy or who have not applied because of the futility of doing so.

Both the stay motion and the motion for class certification remain pending.

Practice Pointers:

- Be aware of ongoing developments with respect to both this case and this issue. In particular, watch for an announcement of a change in policy from USCIS

***Rodriguez v. Garland*, 15 F.4th 351 (5th Cir. 2021)** (vacating and remanding BIA denial of a motion to rescind an in absentia order where petitioner did not receive a sufficient Notice to Appear and thus did not receive notice as required by 8 U.S.C. § 1229a(b)(5)(C)(ii))

Facts:

Petitioner was served with a Notice to Appear (NTA) that did not include the date and time that removal proceedings would be held as required by 8 U.S.C. § 1229(a)(1)(G)(i). Subsequently, the Executive Office for Immigration Review (EOIR) sent a Notice of Hearing (NOH) to Petitioner's address on file. However, Petitioner did not receive the NOH because he no longer resided at the address. He did not appear at the removal hearing and an immigration judge (IJ) ordered him removed in absentia on March 12, 2018.

About four months later, Petitioner filed a motion to rescind and reopen the order, arguing that he had not received sufficient notice because the NTA did not include information required by 8 U.S.C. § 1229(a). The IJ denied the motion and the BIA affirmed the denial, finding that Petitioner had not established that he did not receive the NOH and that the NTA, combined with the NOH, provided sufficient notice. Petitioner filed a petition for review.

Notable Holding and Rationale:

The Court found that the BIA erred in holding that the notice requirements for an in absentia order could be satisfied by an NTA that lacked time and date information and a subsequent NOH. *See* 15 F.4th at 355.

Pursuant to 8 U.S.C. § 1229a(b)(5)(C)(ii), individuals who receive an in absentia removal order can seek rescission and reopening of the order if they "demonstrate that [they] did not receive notice in accordance with paragraph (1) or (2) of [8 U.S.C. § 1229(a)]." Section 1229(a) provides written notice requirements for NTAs and NOHs, including that NTAs must provide "[t]he time and place at which [removal] proceedings will be held."

The Fifth Circuit recognized that the Supreme Court interpreted the requirements of 8 U.S.C. § 1229(a) in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), and *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021). *See* 15 F.4th at 354-55. The Fifth Circuit found that *Niz-Chavez* required "that the § 1229(a) notice requirements must be included in a single document," in the context of the cancellation of removal stop-time rule. *Id*. at 355. Because the in absentia recission statute similarly references the notice requirements of 8 U.S.C. § 1229(a), the Fifth Circuit found that *Niz-Chavez*'s holding also applies in the in absentia context. *Id*. Therefore, because Petitioner's NTA did not contain the required time and date information, the NTA did not "'satisf[y] the written notice requirements of [8 U.S.C. § 1229(a)],' directly contrary to the Supreme Court's interpretation of § 1229(a) in *Niz-Chavez*," despite the subsequent NOH. *Id*. The Fifth Circuit vacated the BIA's decision and remanded "for further proceedings consistent with *Niz-Chavez*."

Practice Pointers:

- Be aware of ongoing developments in this case and this area of law:

- The U.S. Attorney General filed a petition for rehearing in November 2021 and Petitioner filed an opposition in December 2021. The petition remains pending before the Court.
- Subsequently, the BIA issued a contrary ruling, holding that an individual can receive sufficient notice for in absentia proceedings through a non-*Pereira* compliaint NTA followed by a statutorily sufficient NOH. *See Matter of LaParra*, 28 I&N Dec. 425 (BIA 2022). Thus, outside of the Fifth Circuit, the BIA will deny a motion to rescind on this basis; individuals could then seek review from the relevant court of appeals.

- Note that this argument provides for reopening and rescission *only* for individuals who received *in absentia* removal orders.
- There is no time limit for filing a motion to rescind an in absentia order based on lack of notice, so such motions can be filed even for removal orders issued many years ago.
- Be aware of Fifth Circuit decision finding that individuals who provide EOIR with a "deficient address" forfeit their right to notice of proceedings and thus cannot obtain rescission of an in absentia removal order for lack of notice. *See, e.g.*, *Spagnol-Bastos v. Garland*, 19 F.4th 802 (5th Cir. 2022).

***Spagnol-Bastos v. Garland*, 19 F.4th 802 (5th Cir. 2021)** (holding that individuals who provide EOIR with a "deficient address" forfeit their right to notice of proceedings and thus cannot obtain rescission of an in absentia removal order based on lack of notice)

Facts:

Petitioner was served with a Notice to Appear (NTA) by the Immigration and Naturalization Service shortly after entering the United States. The NTA did not include the date and time that removal proceedings would be held as required by 8 U.S.C. § 1229(a)(1)(G)(i) but did provide a warning that Petitioner was required to provide immigration officials with a current mailing address. Petitioner provided immigration officials with a mailing address and was released from detention. Subsequently, the Executive Office for Immigration Review (EOIR) sent Petitioner a notice of hearing (NOH), but it was returned as undeliverable. Petitioner was ordered removed in absentia. A copy of the order was also returned to the immigration court as undeliverable.

Many years later, Petitioner filed a motion to rescind and reopen the in absentia removal order based on lack of notice, stating that the immigration officer had erred in recording his mailing address prior to his release from detention. An immigration judge denied the motion, rejecting Petitioner's testimony and finding that he had not provided EOIR with his correct address. The BIA affirmed the decision and also found that Petitioner was not eligible for cancellation under *Pereira v. Sessions*, 138 S. Ct. 2105 (2018). Petitioner filed a petition for review.

Notable Holding and Rationale:

The Fifth Circuit affirmed the BIA's decision and found that Petitioner had forfeited his right to notice and that he was ineligible for cancellation of removal. *See* 19 F.4th at 806-08.

Pursuant to 8 U.S.C. § 1229a(b)(5)(C)(ii), individuals who receive an in absentia removal order can seek rescission and reopening of the order if they "demonstrate that [they] did not receive notice in accordance with paragraph (1) or (2) of [8 U.S.C. § 1229(a)]." However, "[n]o written notice shall be required" for an in absentia order if an individual "has failed to provide the address required under [8 U.S.C. § 1229(a)(1)(F)]," which requires providing "a written record of an address and telephone number (if any) at which the [individual] may be contacted," as well as updates to changes in address and telephone number. 8 U.S.C. §§ 1229a(b)(5)(B), 1229(a)(1)(F).

The Fifth Circuit affirmed that an individual "who forfeits his right to notice by failing to provide a viable mailing address cannot seek to reopen the removal proceedings and rescind the in absentia removal order for lack of notice." 19 F.4th at 806. Because the Court found that Petitioner did not do so, it affirmed the BIA's decision finding he was not entitled to seek rescission based on lack of notice. *Id*. at 806-07.

The Fifth Circuit also affirmed the BIA's holding that Petitioner was not eligible for cancellation. Petitioner has argued to the BIA that he was eligible for cancellation based on the interpretation of the stop-time rule in *Pereira* but conceded his argument was foreclosed in his opening brief to the Fifth Circuit based on the Court's precedent regarding correcting deficient NTAs with subsequent NOHs. After the Supreme Court issued its decision in *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021) and the Fifth Circuit decided *Rodriguez v. Garland*, 15 F.4th 351 (5th Cir. 2021), both requiring NTAs to include all information required by 8 U.S.C. § 1229(a), regardless of subsequent

NOHs, Petitioner sought to re-raise his cancellation argument. However, the Court found that the argument was forfeited because it was not raised in the opening brief. *Id*. at 808.

Practice Pointers:

- Be aware of ongoing developments in this case and this area of law:
    - Petitioner has received an extension of time in which to file a petition for rehearing until February 2022.
- Note that the Court distinguished *Rodriguez* because, in that case, the petitioner "provided immigration authorities with a viable mailing address and therefore did not forfeit his right to notice." 19 F.4th at 807 n.2.
- Consider arguments—and evidence—that an individual *did* provide a sufficient address and/or that EOIR had a sufficient address at the time of the relevant hearing notice and/or hearing.
- Be sure to preserve *all* arguments, even those apparently foreclosed by BIA or court of appeals case law, at all levels of the case, including IJ, BIA, and court of appeals briefing.

***Kholyavskiy v. Mukasey*, 540 F.3d 555 (7th Cir. 2008)** (remanding case because age "may bear heavily on the question of whether an applicant was persecuted")

Facts:

Petitioner, a native of the former Soviet Union faced religious and ethnic discrimination by other children because he is Jewish from approximately ages 8 to 13. The mistreatment included: name-calling; being urinated on; having his pants pulled down and kids laughing at his circumcision; a beating that led to a broken arm; and having a girl "sic" her dog on him. This mistreatment ultimately caused him to drop out of school and hide in the attic of his family's apartment. His family was also the subject of threats and harassment. In 1992, the family was granted refugee status and petitioner later became a lawful permanent resident (LPR).

As a result of his emotional trauma, petitioner experienced panic attacks and was later diagnosed with severe social anxiety disorder and depression. During the time he experienced panic attacks, petitioner sustained a number of convictions, which led to his placement in removal proceedings. Before an Immigration Judge (IJ), petitioner applied for asylum. He and his mother testified to his past abuse, and a medical expert testified about his mental conditions. The IJ denied asylum and the BIA later affirmed.

After filing a petition for review, the case was initially remanded to the BIA to consider two issues related to petitioner's particular social group and future persecution claim. On remand, the BIA again affirmed the denial and petitioner's counsel filed a second petition for review, raising several issues.

Notable Holding and Rationale:

Relevant here, the court held that the BIA did not apply the correct standard to petitioner's past persecution claims because it failed to consider either his age at the time of the actions at issue or the impact of the actions on a child between the ages of 8 and 13. The court reasoned that persecution assessments require examining both the nature of the abuse and the age of the petitioner at the time the abuse occurred. The court concluded that the BIA did not accurately depict or assess petitioner's experience of having his genitals exposed or the dog attack. The court also found that these incidents must be evaluated against the pervasive background of harassment and threats endured by petitioner and his entire family. The court remanded the question of past persecution to allow the BIA to re-evaluate the evidence under the proper standard.

The Seventh Circuit also ruled on petitioner's claims related to expert testimony, IJ bias, prior refugee status, and his future persecution claims. Those rulings are not discussed here.

Practice Pointers:

- The BIA has an obligation to consider both the person's age at the time the harm was inflicted and the impact of such harm when assessing past persecution.
- In addition to evidence of the person's age at the time of persecution, include evidence of the psychological and emotional impact of the harm in question on a child of that age.
- To qualify as persecution, the amount of harm to a child may be less than that to an adult.