CATHOLIC LEGAL IMMIGRATION NETWORK, INC.

CLINIC Newsletter
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Summary of Contents:

1. DHS Terminates Central American Minors Parole Program

By Sarah Bronstein

On August 16, 2017, the Department of Homeland Security (DHS), published a notice in the Federal Register stating that it was terminating the Central American Minors (CAM) Parole Program.

On December 1, 2014, DHS and The Department of State (DOS) announced the creation of the CAM Refugee Program and the CAM Parole Program. The CAM Refugee Program allows certain parents who were lawfully present in the United States to request refugee status for their children and certain other family members residing in Guatemala, El Salvador and Honduras. This program was created in an effort to provide an alternative to the dangerous journey many children undertake to flee violence in their home country and reunite with parents in the United States. Applicants who were denied refugee status through the CAM Refugee Program were automatically considered for parole by DHS through the CAM Parole Program as an alternative way to enter the United States lawfully. The CAM Refugee Program remains in place, but as of August 16, the CAM Parole Program is no longer available. Qualifying parents may still request access to the CAM Refugee Program for their children and other family members through a resettlement agency designated by DOS.

What was the authority for the CAM Parole Program?

INA § 212(d)(5)(A) establishes broad discretionary authority for DHS to parole non-citizens into the United States temporarily on a case-by-case basis for urgent humanitarian reasons or significant public benefit. The CAM Parole Program was established because it was determined there were "significant public benefit" reasons to offer another means of entry to children who were not admitted to the CAM Refugee Program. When a child's or other family member's request for refugee status was denied, the denial notice indicated whether the applicant had been conditionally approved for parole under the CAM Parole Program. Conditional approval meant that travel documents would be issued to allow the applicant to travel to a port-of-entry to request parole from U.S. Customs and Border Protection (CBP),

the agency that has final decision-making authority about parole at the border. Parole allows an individual to remain temporarily in the United States and apply for employment authorization. A person who has been paroled into the United States is authorized to stay in the United States until the period of parole expires or parole is otherwise terminated. Having been paroled into the United States does not constitute an "admission" into the United States. *See* INA §§ 212(d)(5)(A) and 101(a)(13)(B).

How is the program being terminated?

As of August 16, 2017, USCIS is no longer considering or approving parole under the CAM Parole Program. If a request for refugee status is denied, there is no appeal, but the applicant may submit a Request for Review of their denied refugee case from U.S. Citizenship and Immigration Services (USCIS). Requests for Review must be postmarked or received by USCIS within 90 days of the date of the denial. More information on the Request for Review process can be found here. Individuals with conditional parole approval, who have not yet traveled, will be given notice that their conditional approval has been rescinded. If a person with conditional parole approval has paid for a medical exam or for travel expenses, their parole will be rescinded, but they may be able to receive a refund for those costs. Individuals who did not file a Request for Review because they had been given conditional parole approval and planned to travel to the United States, but who have now received rescission notices, have 90 days from the date of the rescission to submit a Request for Review.

What does this mean for CAM parolees who are already in the United States?

The parole period of a person who was paroled into the United States under the CAM Parole Program does not terminate as a result of this announcement. It will remain valid until the period of parole expires or until some other basis for termination occurs such as departure from the United States. Individuals who were paroled into the United States under the CAM Parole Program will not be able to renew their parole under the CAM Parole Program when it expires. Instead, CAM parolees may seek Humanitarian or Significant Public Benefit parole by filing Form I-131 for consideration by the USCIS International Operations Division. These requests for parole are considered on a case-by-case basis. The applicant must show that there are urgent humanitarian or significant public benefit reasons for him or her to remain in the United States and that a favorable exercise of discretion is warranted. USCIS provides guidance on requesting Humanitarian or Significant Public Benefit parole here. In addition, CAM parolees should be screened carefully for eligibility for other immigration benefits, such as Special Immigrant Juvenile Status and asylum.

2. BIA Clarifies that Asylees Lose that Status When They Adjust

By Reena Arya

Asylees are able to adjust status after one year from the grant of asylum status pursuant to INA §209(b). But what happens to that asylum status after adjustment? The Board of Immigration Appeals (BIA)

recently answered that question where it held that after an asylum seeker adjusts status to become a lawful permanent resident, the prior asylum status has "terminated." *Matter of N-A-I-*, 27 I&N Dec. 72 (BIA 2017).

Factual and Procedural History

Mr. Ali, the respondent in *Matter of N-A-I,* is from Pakistan and received asylum in 1992. He subsequently adjusted status to LPR. In 2013, Mr. Ali was convicted of cocaine possession, which landed him in removal proceedings. The Immigration Judge barred Mr. Ali from readjusting his status, so he reapplied for asylum, withholding of removal and relief under the Convention Against Torture, all of which the IJ denied. Mr. Ali appealed to the BIA arguing that he could not be removed to Pakistan because he continues to be an asylee and have a fear of persecution, regardless of the fact that he adjusted his status to become an LPR.

The BIA denied his appeal relying primarily on its prior decision in *Matter of C-J-H-,* 26 I&N Dec. 284 (BIA 2014). In that case, the BIA concluded that an asylee from China, who had adjusted status and later was convicted of a deportable offense, could not readjust status in immigration proceedings. The BIA relied on its interpretation of INA §209(b), which authorizes asylees to adjust status after one year of asylum status. The BIA reasoned that since the respondent had already adjusted status, and was no longer an asylee, he was ineligible to readjust status before the immigration judge. The BIA analogized INA §209(a), which allows refugees to adjust status only if they don't already have LPR status, thus prohibiting readjustment, with INA § 209(b), which authorizes asylum adjustment but is silent on readjustment.

One of the legal issues at play in this analysis is the way refugees (who are granted refugee status abroad and arrive to the United States after the resettlement process) and asylees (who are granted asylum status in the United States) are equated under the INA. The BIA relied on the legislative history of Refugee Act of 1980, which made clear that refugees and asylees should be treated on par with one another. It concluded that INA § 209(b) implicitly prohibits asylees to readjust status because they lose their asylum status when they become LPRs. The BIA reasoned that the opposite interpretation would allow refugees and asylees to be treated unequally.

Following the dismissal of his appeal, Mr. Ali petitioned for review before the Court of Appeals for the Fifth Circuit. In *Ali v. Lynch*, 814 F.3d 306 (5th Cir. 2016), the appellate court concluded that the BIA erred in several ways in relying on *Matter of C-J-H*. The Fifth Circuit held that the BIA did not thoroughly interpret INA §§ 209(a) and (b), and more importantly, it failed to even consider INA § 208(c), which explicitly prohibits removal or deportation of an asylee to their country of fear persecution unless formal asylum termination proceedings are completed. The court further held the BIA failed to consider the DHS's regulations, which suggest asylum status may not be terminated after adjustment of status, and to thoroughly evaluate its interpretation of the similarities and differences between refugee and asylum status.

The BIA's Holding in *Matter of N-A-I-*

Upon remand from the Fifth Circuit, the BIA's decision remained unchanged. The BIA continued to hold that Mr. Ali's asylum status terminated when he adjusted status to become an LPR under INA §209(b). *Matter of N-A-I-*, 27 I & N Dec. 72 (BIA 2017). First, the BIA reasoned that the asylum termination provisions listed in INA § 208(c)(2) are not necessarily exhaustive. Second, the BIA concluded that once asylees adjust status under INA § 209(b), they are now LPRs and are no longer protected under the INA § 208(c) restrictions from removal for asylees. Third, the BIA noted that once asylees adjust status, they are not necessarily adding permanent resident status to their already asylum status, but rather they are *changing* status to LPR. The BIA relied on *Mahmood v. Session*, 849 F.3d 187 (4th Cir. 2017), where court interpreted adjustment of status under INA § 209(b) as a voluntarily surrender of asylum status. The Fourth Circuit interpreted adjustment under INA § 209(b) as "a change to and not an accretion of the second status." Finally, the BIA stated that adjusted asylees in removal proceedings are always able to reapply for asylum (unless prevented by the one-year filing deadline), withholding of removal and relief under the Convention Against Torture.

What this means for Asylees

The BIA's decision is troublesome in two regards. First, the BIA's reasoning in *Matter of N-A-I* seems to suggest that asylees have a voluntary choice: either remain asylees indefinitely so that they can never be deported to the country of feared persecution; or adjust status and move forward on the path of citizenship, but relinquish asylum protections and risk potential deportation to the country from which they sought refuge. Nevertheless, asylees are not warned when they file an adjustment application that they are surrendering statutory protections afforded under the Refugee Act of 1980. Second, the BIA has been solely focused on statutory interpretation and does take into account whether an asylee continues to have a fear of persecution after they adjust status. Presumably, most do have a fear, which is why formal termination procedures under INA § 208(c) should be the only mechanism for terminating their status. This case will most likely end up back at the Fifth Circuit; if so, it will be interesting to see if the appellate court gives deference to the BIA's interpretation of the INA.

3. New Executive Office for Immigration Review (EOIR) Operating Policies and Procedures Memorandum (OPPM) on Continuances in Immigration Court

By Michelle N. Mendez

On July 31, 2017, the Executive Office for Immigration Review (EOIR) released the first Operating Policies and Procedures Memorandum (OPPM) for 2017, OPPM 17-01. OPPM 17-01 provides guidance to Immigration Judges (IJs) on how to fairly and efficiently manage their dockets using continuances. This latest OPPM supplements and amends a prior OPPM discussing continuances, OPPM 13-01.

In the Memo, Chief IJ Mary Beth Keller instructs all IJs, court administrators, and all other court personnel and staff to consider the number of pending cases before immigration courts, which currently

exceeds 600,000, when granting continuances. Chief IJ Keller warns that granting multiple and lengthy continuances, when multiplied across the entire immigration court system, exacerbates already crowded immigration dockets. Chief IJ Keller cites to the Office of the Inspector General of the U.S. Department of Justice 2012 report "Management of Immigration Cases and Appeals by the Executive Office for Immigration Review" and the U.S. Government Accountability Office June 2017 report, "Immigration Courts, Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges," to support this warning. However, Chief IJ Keller does not address the main reason the immigration courts are overwhelmed: increased Department of Homeland Security (DHS) enforcement without prosecutorial discretion. With regard to DHS, Chief IJ Keller echoes language used by former DHS Secretary John Kelly in justifying aggressive enforcement-oriented conduct based on allegations that noncitizens "abuse" the system. Chief IJ Keller writes in the Memo that "although the appropriate use of continuances serves to protect due process, which Immigration Judges must safeguard above all, there is also a strong incentive by respondents in immigration proceedings to abuse continuances." This "abuse" language resembles former Secretary Kelly's prior allegations that, there are abuses in "the processing of unaccompanied alien children,"(February 20th "Implementing the President's Border Security and Immigration Enforcement Improvement Policies" Memo) and "the asylum process is rife with fraud and abuse," (January 25th leaked, non-final version of the "Implementing the President's Border Security and Immigration Enforcement Improvements Policies" Memo) (note this language was not included in the final version of the Memo).

In addition to alleged abuse, Chief IJ Keller reasoned that the increased case processing times and strain on overall court resources caused by these increases is why "it is critically important that Immigration Judges use continuances appropriately and only where warranted for good cause or by authority established by case law." Chief IJ Keller concedes that because the reasons for requesting a continuance vary widely, an assessment of "good cause" will depend on the specific factors of each case. Factors such as DHS opposition, the timing of the request, the respondent's detention status, the complexity of the case, the number and length of any prior continuances, and concerns for administrative efficiency are all relevant when determining whether to grant a continuance and for how long.

Chief IJ Keller cites to the "good cause" standard and case law because the Immigration and Nationality Act does not contain specific statutory authority for the adjudication of motions to continue removal proceedings. Instead, IJs derive their broad discretionary authority over continuances from the regulations, which state that "[t]he Immigration Judge may grant a motion for continuance for good cause shown." 8 C.F.R. § 1003.29; *see also* 8 C.F.R. § 1240.6 (providing that the IJ may grant a reasonable adjournment either at his or her own instance or, for good cause shown, upon application by the respondent or the DHS).

Board of Immigration Appeals (BIA) Precedent on Continuances

The BIA has defined "good cause" differently depending on the facts and circumstances presented. When formulating arguments in support of a motion to continue, practitioners should be familiar with the following precedential cases discussing "good cause" for continuances in varied circumstances. Such knowledge will be instrumental in overcoming a DHS objection to the motion or an IJ's reliance on the restrictive aspects OPPM 17-01 to deny the motion. The bottom line is that despite the abuse

highlighted in OPPM 17-01, the standard remains the same; each case must be assessed individually on its facts and decided based on the "good cause" standard.

In *Matter of Kotte*, 16 I&N Dec. 449 (BIA 1978), the respondent had a pending third-preference petition pending and was seeking to adjust status. The respondent argued that that the IJ was required to continue deportation proceedings. The BIA disagreed reasoning that the respondent had a motion to reopen as a remedy should the visa petition be approved in the future. The BIA held that a respondent does not have an absolute right to an adjournment of a deportation hearing until such time as the visa petition upon which his adjustment application is predicated has been adjudicated.

The BIA next decided *Matter of Garcia,* 16 I&N Dec. 653 (BIA 1978), involving a respondent who sought reopening to allow for an adjustment of status application. Clarifying its holding in *Matter of Kotte*, the BIA held that an IJ may, in his or her discretion, grant a motion to reopen or a request for a continuance of a deportation hearing pending final adjudication of a visa petition filed simultaneously with an adjustment application under 8 C.F.R. § 245.2(a)(2) where a prima facie approvable visa petition and adjustment application have been submitted. A prima facie qualified beneficiary of a visa petition should have an opportunity to remain in the United States pending final adjudication of the petition and adjustment application since that would result in "a substantial claim to relief from deportation under section 245 of the Act." *Id*. at 656. The BIA further reasoned, "we believe that discretion should, as a general rule, be favorably exercised where a prima facie approvable visa petition and adjustment application have been submitted in the course of a deportation hearing or upon a motion to reopen. To the extent that our decision in *Matter of Kotte,* may have been misinterpreted to require a contrary disposition in such cases, *Kotte* is herewith clarified."

In *Matter of Sibrun*, 18 I&N Dec. 354 (BIA 1983), the BIA considered an appeal of an IJ's denial of a motion to continue for case preparation purposes requested by counsel for a Haitian asylum-seeker. The BIA held that a motion for continuance based upon an asserted lack of preparation and a request for opportunity to obtain and present additional evidence must be supported, at a minimum, by a reasonable showing that the lack of preparation occurred despite a diligent good faith effort to be ready to proceed and that any additional evidence which the respondent seeks to present is probative, noncumulative, and significantly favorable to him or her. The BIA further held that a motion for continuance is within the sound discretion of the IJ, and his or her decision denying such a motion will not be reversed on appeal unless the respondent establishes—by a full and specific articulation of the particular facts involved or evidence which he or she would have presented—that the denial caused actual prejudice and harm, and materially affected the outcome of the case.

In *Matter of Garcia-Reyes*, 19 I&N Dec. 830 (BIA 1988), the BIA sustained legacy INS's interlocutory appeal after the IJ—over the INS's objection—continued the hearing for a six-month period so that the respondent would have the opportunity to show rehabilitation. In its appeal, the INS also cited the IJ's refusal to take pleadings or go on the record with any of the Service's objections. The BIA held that an IJ should not grant, *sua sponte*, a six-month continuance to enable a respondent to show rehabilitation where it had not been shown that he was eligible for any form of relief from deportation for which rehabilitation would be relevant.

In *Silva-Rodriguez*, 20 I&N Dec. 448 (BIA 1992), the BIA again sustained legacy INS's interlocutory appeal relying on *Matter of Garcia-Reyes*, 19 I&N Dec. 830 (BIA 1988). The BIA held that, despite being sympathetic to the desire of the IJ to fashion a fair result in the matter, the IJ did not act with good

cause by granting a one-year continuance so that the respondent would have more time to establish rehabilitation in furtherance of his application for a waiver of inadmissibility undersection INA § 212(c).

In *Matter of W-F-, 21 I&N Dec. 503 (BIA 1996),* the BIA contemplated an IJ's authority to properly excuse a respondent's presence at a hearing, to grant a continuance, or to change venue for good cause. The respondent was at sea working on a fishing vessel and requested a continuance of the hearing through his attorney who was present at the hearing. The IJ continued the proceedings. At the continued hearing, the attorney was again present, but the respondent was again absent. Respondent's employer had issued a letter from his employer explaining that it was "impossible" to get the respondent to disembark "at this time." The IJ denied the request for a second continuance based on a consideration of the reasons for the request, on its timing, and on his previous admonitions. In its review of the case, the BIA affirmed the IJ's decision to enter an in absentia removal order rather than grant a continuance. In particular, the BIA noted that no request for a continuance had been filed before the hearing date. The BIA held that an IJ retains the authority to grant a continuance or change venue when good cause is shown by a respondent or the INS, either prior to or at the time of the deportation hearing. In a lengthy concurrence, Lory Rosenberg further clarified the IJ's options and authority, "Indeed, as the majority acknowledges, our decision today does not tie the Immigration Judge's hands or limit his or her discretion to independently assess the individual circumstances that might warrant a result other than an in absentia deportation order." Using a judicial economy perspective, Rosenberg noted, "I see no reason to require an Immigration Judge to enter an *in absentia* order simply by virtue of the alien's failure to appear, only to be faced thereafter with the respondent's motion to rescind to reopen. Rather, the Immigration Judge could continue the case, or with the alien's consent handle it telephonically."

The BIA then decided the seminal case, *Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009). The BIA held that in determining whether good cause exists to continue removal proceedings, IJs should consider a variety of factors, including: (1) the DHS response to the motion to continue; (2) whether the underlying visa petition is prima facie approvable; (3) the respondent's statutory eligibility for adjustment of status; (4) whether the respondent's application for adjustment merits a favorable exercise of discretion; and (5) the reason for the continuance and any other relevant procedural factors. While all these factors may be relevant in a given case, the BIA said the "focus of the inquiry is the apparent ultimate likelihood of success on the adjustment application." *Id*. at 790. If the DHS's opposition is reasonable and supported by the record, the opposition may warrant denial of a continuance. But if in the totality of the circumstances DHS opposition is unsupported, it should not "carry much weight." *Id*. at 791.

In *Matter of Rajah*, 25 I&N Dec. 127 (BIA 2009), the BIA applied the *Hashmi* factors to the case of an employment-based visa petition awaiting adjudication. The BIA declined to remand the case to the IJ because the respondent had not established prima facie eligibility for adjustment of status and therefore lacked a showing of good cause. The respondent who was seeking an employment-based visa was not prima facie eligible for adjustment of status because he did not have a pending labor certification and had therefore not yet begun the three-step employment-based adjustment process (filing a labor certification filing, filing a Form I-140, Immigrant Petition for Alien Worker, with USCIS once the labor certification is approved, and, if USCIS approves the I-140 and a visa is immediately available, filing for adjustment of status under section 245(a) of the INA). The BIA held that in determining whether good cause exists to continue removal proceedings to await the adjudication of a pending employment-based visa petition or labor certification, an IJ should determine the respondent's place in the adjustment of status process and consider the applicable factors identified in *Matter of*

Hashmi. In this context, the pendency of a labor certification is generally not sufficient to warrant a grant of a continuance.

In *Matter of Sanchez Sosa*, 25 I&N Dec. 807 (BIA 2012), the BIA contemplated a continuance for a pending U nonimmigrant visa petition. The BIA held that in determining whether good cause exists to continue removal proceedings to await the adjudication of a pending U visa petition, an IJ should consider (1) the DHS response to the motion to continue; (2) whether the underlying visa petition is prima facie approvable; and (3) the reason for the continuance and other procedural factors. A respondent with a pending prima facie approvable petition for a U visa with the USCIS will ordinarily warrant a favorable exercise of discretion for a continuance for a reasonable period of time. The BIA recently applied this holding in the unpublished decision *In re Jose Emilio Alvarado*, A208 090 238 (BIA June 2, 2016). The BIA sustained the respondent's appeal and remanded the case back to the IJ for further consideration of whether to continue or administratively close proceedings in light of the respondent's intervening marriage to a primary U visa applicant and the filing of a Petition for Qualifying Family Member of U-1 Recipient. The BIA further stated that the respondent's detention was not, in itself, an independent ground to decline to further continue these proceedings. Practitioners should note that there are other unpublished decisions applying the *Matter of Sanchez Sosa* holding to the benefit of a respondent. Those unpublished decisions are available through Ben Winograd's Index of Unpublished Decisions of The Board of Immigration Appeals.

In *Matter of W-A-F-C*, 26 I&N Dec. 880 (BIA 2016), the BIA sustained DHS's appeal in a case involving improper service of a Notice to Appear in the case of a minor under 14 years of age as required by 8 C.F.R. § 103.8(c)(2)(ii). The BIA, following *Matter of E-S-I-*, 26 I&N Dec. 136 (BIA 2013), held that where DHS seeks to re-serve a respondent to effect proper service of a Notice to Appear that was defective under the regulatory requirements, a continuance should be granted for that purpose.

Finally, while no precedential decision exists regarding continuances in the Special Immigration Juvenile (SIJ) context, there are many unpublished BIA decisions in this context. In those unpublished decisions, the BIA has held that IJs should, as a general practice, continue or administratively close proceedings to await adjudication of a pending state proceeding that could serve as a predicate order for SIJ status. For example, in *In re M-A-J-, AXXX XXX 274 (BIA Sept. 30, 2015)*, the IJ's denial of the respondent's request for a continuance while the state court dependency petition was pending "was not a good utilization of Immigration Court and Board resources." For other similar unpublished decisions in the SIJ context, refer to Ben Winograd's Index of Unpublished Decisions of The Board of Immigration Appeals.

Tips for Practitioners

- **Continuance to Find Legal Counsel**: Provide a letter for clients and potential clients to use for requesting a continuance to find legal counsel. The letter should be on letterhead and reference the fact that the non-profit is actively seeking to represent the respondent or that the respondent is on the representation wait list is "good cause" for a continuance. The non-profit should note the massive uptick of demand in their services, including any specific data for the increase such as the percentage of increase in consultations for 2017, and analogize to the increase in number of cases pending with immigration courts. Non-profits should attach OPPM 08-01 "Guidelines for Facilitating Pro Bono Legal Services" highlighting the language "because clinics and pro bono entities often face special staffing and preparation constraints, judges

should be flexible and are encouraged to accommodate appropriate requests for a continuance or to advance a hearing date." Non-profits should also remind the IJ that the general policy per the OPPM 17-01 remains that *at least* one continuance should be provided to a respondent to seek legal counsel. (emphasis added).

- **Attorney Prep Continuance**: Argue that the IJ require DHS to provide specific justification when objecting to requests for continuances. When necessary, practitioners should orally ask the IJ to request from the DHS attorney his or her reasoning for the opposition, for the record, as required by *Matter of Hashmi*. Then ask the IJ to analyze that opposition in the totality of the circumstances as DHS opposition is not a determinative factor. Remind the IJ that he or she retains the authority to grant a continuance. *See e.g, Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996); *see also* OPPM 17-01 ("[OPPM 17-01] is not intended to limit the discretion of an Immigration Judge."). Support your argument for a case continuance by relying on *Matter of W-A-F-C*, 26 I&N Dec. 880 (BIA 2016). Pursuant to *Matter of W-A-F-C*, if DHS may automatically receive a continuance to prepare and correct a violation of a mandatory regulation, respondent's counsel must be given a similar opportunity for required case preparation, especially in the absence of a regulatory violation, unlike DHS in the *Matter of W-A-F-C* context.

4. Supreme Court Weighs In On Citizenship Issue

By Martin Gauto

The nuances of U.S. citizenship were front and center in an important U.S. Supreme Court decision. The Court, in a unanimous decision, struck down the law that treated certain citizen mothers and fathers differently with respect to the ability to confer citizenship on children born outside the U.S.

While it is uncommon to discover that a presumed unaccompanied child is in fact a U.S. citizen, it is still important to screen for this potential when assessing a child for all forms of relief.

Sessions v. Morales-Santana

In *Sessions v. Morales-Santana*, (June 12, 2017), the Supreme Court found unconstitutional a law that made it harder for unwed U.S. citizen fathers than unwed U.S. citizen mothers to confer citizenship on their children born abroad. Where the child is born out of wedlock to one citizen parent and one noncitizen parent, INA § 309(a) imposes strict residence requirements for citizen fathers. In order for the child to acquire U.S. citizenship, the citizen father must have been physically present in the United States for five years, with at least two of those years coming after the age of 14. On the other hand, under an exception at INA § 309(c), the citizen mother could meet the residence requirement by living in the United States continuously for just one year.

Mr. Morales-Santana, the "child" in this case, was unable to acquire citizenship because his father died just 20 days short of meeting the physical presence requirement. Hoping to get the more lenient one-year physical presence requirement applied to him, he challenged the law, arguing that the different treatment based on gender was unconstitutional under the Equal Protection clause of the Fifth Amendment.

The Court agreed, finding that the law relied on "overbroad generalizations about the different talents, capacities or preferences of males and females." However, instead of applying the more favorable one-year physical presence requirement to citizen fathers of children born out of wedlock, the court struck down the exception that granted more favorable treatment to citizen mothers. The Court ruled that the longer period of physical presence should apply *prospectively* to citizen mothers as well as fathers. Thus, Mr. Morales-Santana was unable to acquire citizenship, and this case has important implications going forward.

It's not clear how this ruling will be applied prospectively. It may mean that the decision will only have an impact on children born abroad after the decision was issued. But we will have to wait to see how USCIS interprets and implements this decision.

Example: Greta is a U.S. citizen who was born in Chicago on May 5, 1995. Two years later, in 1997, Greta and her family moved to Germany, and she has resided there since then. Greta, who is not married, is now pregnant and is due to give birth next month. Before the *Morales-Santana* decision, Greta's child would have acquired citizenship because Greta had resided in the United States continuously for one year prior to her child's birth. Now, however, Greta's child will acquire U.S. citizenship only if Greta can show five years of residence in the United States before her child's birth, with two of those years coming after age 14. Since Greta only lived in the U.S. for two years before moving to Germany, her child will not acquire citizenship.