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**Call for Cases of Removed Individuals Entitled to Return**

*National Immigration Project et al. v. DHS*

April 27, 2012

On April 23, 2012, the Department of Homeland Security issued guidance regarding implementation of a February 2012 “policy” for returning individuals who win their cases in federal court.[[1]](#footnote-1) The next day, the Office of the Solicitor General (OSG) released emails that formed the basis of its erroneous claim to the U.S. Supreme Court that such a policy previously existed.[[2]](#footnote-2) The OSG further notified the Court of its incorrect statement and steps it intends to take going forward to ensure the timely return of successful litigants.[[3]](#footnote-3) The advisory of April 25, 2012 details these developments.[[4]](#footnote-4)

The Office of Immigration Litigation (OIL) is filing letters pursuant to Federal Rule of Appellate Procedure 28(j) in cases involving stay requests. The letters suggest that the new return policy eliminates prior obstacles to return. The plaintiff organizations and counsel in *National Immigration Project et al. v. DHS*, the law suit which prompted the OSG’s letter and the return policy, strongly disagree.[[5]](#footnote-5) We encourage counsel to consider filing a response to OIL’s 28(j) letter.[[6]](#footnote-6) A sample response follows this advisory. Counsel also may wish to consider whether the “policy” complies with the process for public notice and comment requirement under the Administrative Procedures Act. *Please* contact Trina Realmuto [trina@nationalimmigrationproject.org](mailto:trina@nationalimmigrationproject.org)) or Jessica Chicco ([jessica.chicco@bc.edu](mailto:jessica.chicco@bc.edu)) if the Court orders supplemental briefing on the adequacy of the government’s return “policy.”

In addition, on April 26, 2012, the Attorney General’s Office issued a notice to certain organizations and individuals.[[7]](#footnote-7) The letter calls on advocates[[8]](#footnote-8) to contact the ICE Public Advocate if “you are aware of anyone who has been removed from this country and later prevailed in the court of appeals and should be entitled to return, but whose return has been impeded.” We ask all immigrant advocates to take such action.

**SAMPLE RESPONSE TO FRAP 28(j) LETTER ON NEXT PAGE**

**SAMPLE RESPONSE TO FRAP 28(j) LETTER**

**(Pursuant to the Rule, the body of the letter must not exceed 350 words**)

\_\_\_\_\_\_\_\_ \_\_\_, 2012

Clerk of the Court

U.S. Court of Appeals for the \_\_\_\_\_\_\_\_Circuit

ADDRESS

Re: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ v. \_\_\_\_\_\_\_\_\_\_\_\_\_

Case No. \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Dear Clerk of the Court:

Petitioner submits this letter pursuant to Federal Rule of Appellate Procedure 28(j) in response to Respondent’s letter of [Month Date, Year], informing this Court that the Office of the Solicitor General (OSG) notified the U.S. Supreme Court by letter of a misrepresentation in *Nken v. Holder*, 129 S.Ct. 1749 (2009). In *Nken*, the Supreme Court relied on the OSG’s statement that the government has a “policy and practice” of facilitating the return of noncitizens abroad who win their cases. *Id*. at 1761. The OSG now concedes that it is “not confident that the process for returning removed aliens, either at the time brief was filed or during the intervening three years, was as consistently effective as the statement in its brief in *Nken* implied.” OSG Letter, at 4. *See also*, Declaration of Jessica Chicco, *Lam v. Holder*, No. 11-2576 (7th Cir. Mar. 5, 2012) (attached).

Respondent now asks this Court to accept that its new “policy”, issued February 24, 2012, and procedures will ensure that noncitizens who prevail before this Court will not “encounter unnecessary obstacles.” 4/\_\_/2012 Letter at \_\_. Given the government’s previous bad faith in *Nken* and significant flaws in the new policy, Petitioner maintains [his/her] contention that the procedures for facilitating return are inadequate and removal would cause irreparable harm.

The new “policy” vests unfettered discretion with U.S. Immigration & Custom Enforcement regarding individuals, like Petitioner, who are not lawful permanent residents, to decide if, and under what circumstances, their presence in the U.S. is “necessary.” 2/24/2012 Policy. The “policy” also puts lower income and indigent litigants at a significant disadvantage by requiring them to pay return travel costs. Furthermore, it conditions return on possession of a valid foreign passport, without exception.

If the Court is inclined to rely on the “policy,” Petitioner asks the Court to issue a temporary stay and allow [him/her] the opportunity to provide supplemental briefing regarding the new “policy’s” inadequacies. OSG Letter, at 5 (“Lower courts will therefore have the opportunity to address the adequacy of the government’s procedures for facilitating return in evaluating requests for stays of removal”).

Respectfully submitted,

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

cc:

Office of Immigration Litigation

U.S. Department of Justice, Civil Division

P.O. Box 878, Ben Franklin Station

Washington, D.C. 20044

Encl:

Declaration of Jessica Chicco

[Note: this declaration is available for download at:

<http://www.nationalimmigrationproject.org/legalresources/J_Chicco_Declaration_for_Lam_v_Holder.pdf> ]

1. *See* February 24, 2012 ICE Return Policy, located at: <http://nationalimmigrationproject.org/legalresources/ICE_Return_Policy_Memo_Feb_2012.pdf>. [↑](#footnote-ref-1)
2. *See* OSG email communications in *Nken*, located at: <http://www.nationalimmigrationproject.org/legalresources/NIPNLG_v_DHS/OSG%20Email%20Communications%20in%20Nken%20-%20Released%20April%2024%202012.pdf>. [↑](#footnote-ref-2)
3. *See* OSG letter to the Supreme Court in *Nken*, located at:

   <http://www.nationalimmigrationproject.org/legalresources/NIPNLG_v_DHS/OSG%20Email%20Communications%20in%20Nken%20-%20Released%20April%2024%202012.pdf>. [↑](#footnote-ref-3)
4. See Advisory and Case Update: New FAQ Reveals Serious Flaws in ICE “Policy” for Facilitating Return After Removal & Disclosed OSG Emails Show Lack of Policy and Practice at the Time of *Nken*, located at:

   <http://nationalimmigrationproject.org/legalresources/NIPNLG_v_DHS/Advisory%20and%20Case%20Update%20on%20FAQ%20and%20OSG%20Emails%20-%20April%2025%202012.pdf>. [↑](#footnote-ref-4)
5. The advisory of April 25, 2012, *supra* n.4, references some (not all) of the flaws in the new return policy. [↑](#footnote-ref-5)
6. FRAP 28**(j) permits a party to promptly file a response letter provided it does not exceed 350 words.**  [↑](#footnote-ref-6)
7. The letter is available at: <http://nationalimmigrationproject.org/legalresources/NIPNLG_v_DHS/AG%20Ltr%20Calling%20for%20Cases%20of%20Noncitizens%20Entitled%20to%20Return%20-%20April%2025%202012.pdf> . [↑](#footnote-ref-7)
8. The letter is addressed to “Advocates” but it the distribution list also includes private attorneys, news agencies, policy groups, government officials, and the well-known anti-immigrant group FAIR. [↑](#footnote-ref-8)