Written by **Joe Wolverton, II, J.D.** on October 5, 2011

Supreme Court to Hear Important Immigration Case

It's early October and that means it's time for the Supreme Court to begin hearing oral arguments in cases it will decide this term. One such case was placed on the docket according to an order issued by the court in September. Carlos Martinez Gutierrez was nabbed trying to smuggle three Mexican children into California. The merits of this case will now be considered by the highest court in the land.

On September 27, the court granted *certiorari* in the case of *Attorney General Eric Holder v. Carlos Gutierrez*. At the center of the case are several issues of vital importance for children of illegal immigrants.

If Gutierrez wins, some immigrants may find it easier to avoid removal and stay in the United States.

"The case is significant," Gutierrez's appellate attorney, Stephen Kinnaird, said Tuesday, adding that "you can have possible breakups of families" in certain circumstances.

The facts of the case are these. In December 2005, Carlos Gutierrez attempted to smuggle aliens into the United States through the San Ysidro port of entry (a border community in the southernmost part of San Diego). Subsequently, Gutierrez fought deportation and it is his argument in that aspect of the case that concerns the court in the present matter.

At a hearing before a federal immigration judge in March 2006, it was determined that Gutierrez, a permanent resident of the United States, had resided legally within the country long enough to merit a second chance and it was ordered that he not be deported. Therein lies the rub.

Subsequently, the Board of Immigration Appeals (BIA) overturned the ruling of the immigration judge and remanded the case for entry of an order of removal.

Upon appeal of the BIA's ruling (and the removal order issued subsequent thereto), the immigration judge's decision was upheld by the 9th U.S. Circuit Court of Appeals based in San Francisco. The Court of Appeals sent the case back to the BIA for reconsideration on the merits, effectively denying the plea of the Department of Homeland Security and the Justice Department that Gutierrez be removed from the country.

There are two principal legal questions to be decided by the Supreme Court.

First, whether a parent's years of lawful permanent resident status can be imputed to an alien who resided with that parent as an unemancipated minor, for the purpose of satisfying 8 U.S.C. 1229b(a)(1)'s requirement that the alien seeking cancellation of removal have "been an alien lawfully admitted for permanent residence for not less than 5 years."

Second, whether a parent's years of residence after lawful admission to the United States can be imputed to an alien who resided with that parent as an unemancipated minor, for the purpose of satisfying 8 U.S.C. 1229b(a)(2)'s requirement that the alien seeking cancellation of removal have "resided in the United States continuously for 7 years after having been admitted in any status."

In determining the statutorily applicable length of Gutierrez's legal residency in the United States, the immigration judge and the 9th Circuit took into account the years he spent with his family before he was granted his own legal resident status. The Obama administration argues that including these years in the calculation is overly generous and contrary to relevant case law and the interpretation given therein to the applicable federal statutes.

The Justice Department avers that the imputation of Gutierrez's father's length of time as a legal resident is improper and "ripe for review" by the Supreme Court.

Specifically, Attorney General Holder argues that there are three principal reasons that the Supreme Court should overturn the 9th Circuit's decision in this case.

> First, the Ninth Circuit's imputation rule is erroneous. Nothing in Section 1229b(a)'s text or legislative history suggests that an alien may rely on a parent's admission, residence, or LPR status to satisfy the statutory requirements that the alien have a certain period of LPR status and residence after admission in order to qualify for cancellation of removal. To the contrary, the statute's plain language makes clear that only the alien's own period of LPR status and residence after admission are relevant for purposes of Section 1229b(a)(1) and (2). Even if the lack of any statutory basis for imputation somehow rendered Section 1229b(a) ambiguous, the Board's precedential interpretations of the statute as not permitting imputation are reasonable and thus entitled to deference under *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984).
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> Second, the Ninth Circuit's imputation rule conflicts with the holdings of two other courts of appeals and the considered view of a third court of appeals — all of which have expressly rejected the Ninth Circuit's position. See *Deus v. Holder*, 591 F.3d 807, 811 (5th Cir. 2009); *Augustin v. Attorney Gen. of the U.S.*, 520 F.3d 264, 269 (3d Cir. 2008); see also *Cervantes v. Holder*, 597 F.3d 229, 236 (4th Cir. 2010) (in dicta).
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> Third, because almost half of all cancellation-of-removal applications are filed within the Ninth Circuit, the practical consequences of the Ninth Circuit's aberrant imputation rule are significant. Not only does the rule preclude uniform administration of the immigration laws, but it also impedes the government's high-priority efforts to remove criminal aliens.

A simple, non-legalese way of expressing the foregoing would be that the administration believes that the court should take into consideration only the time elapsed since Gutierrez gained independent legal status when determining whether to order him deported as a punishment for the crime he committed.

"The practical consequences of the 9th Circuit's aberrant … rule are significant," U.S. Solicitor General Donald Verrilli, Jr. stated in a brief, adding, "It also impedes the government's high-priority effort to remove criminal aliens."

The results of this case will be far-reaching as the rules established by the decision will be of legal effect throughout the states within the Ninth District's jurisdiction: Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington. This is particularly important because as Solicitor General Verrilli noted, nearly half of all so-called "cancellation of removal" applications are filed in these western states. These are cases, like that of Gutierrez, in which immigrants file applications

seeking to avoid being involuntarily removed from the United States.

When the Department of Homeland Security pursued removal of Gutierrez, he immediately issued an application for cancellation of that order invoking a federal immigration law that looks to the number of years the applicant has been legally present in the United States.

Under provisions of this law, an immigration judge may issue an order cancelling removal proceedings and permitting an immigrant to remain in the United States if, among other considerations, the immigrant has been "lawfully admitted for permanent residence for not less than five years."

In the Gutierrez case, his family left Mexico and illegally entered the United States in 1988 or 1989, when Gutierrez was about five years old. In 1991, his father attained legal U.S. residence status. The family settled near San Francisco and Gutierrez attended high school near San Jose.

In October 2003, at 19 years of age, Gutierrez attained independent permanent legal resident status, receiving his coveted "green card." Two years later, Gutierrez contracted with Mexican nationals to smuggle several children into the United States. He was to receive $1,500 for the service.

Nonetheless, a judge ruled that Gutierrez may stay in this country, in part because he met the legal residency requirement.

"The parent's admission for permanent residence (in 1991) was also imputed to the parent's minor children," Immigration Judge Zsa Zsa C. DePaolo ruled.

Contrariwise, the Attorney General argues in his brief that the clock for Gutierrez began ticking in October 2003 when he was granted his own legal status. Holder avers that "the actions and status of others, including the alien's parents, are irrelevant" in determining applicability of the statute relied upon by Gutierrez in his application for cancellation of removal.

Photo: Traffic in Tijuana, Mexico, waiting at the San Ysidro port of entry.