No. 07-55337

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMADOU LAMINE DIOUF,

Petitioner-Appellee,

v.

ALBERTO GONZALES, et al.,

Respondents-Appellants.

INTERLOCUTORY APPEAL OF A PRELIMINARY INJUNCTION
FROM THE UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA
NO. CV 06-7452 (AJW)

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CORPORATE DISCLOSURE STATEMENT

There are no corporations involved in this case.

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INTRODUCTION

Petitioner Amadou Lamine Diouf was incarcerated by the Bureau of Immigration and Customs Enforcement ("ICE") for over 20 months during the pendency of his removal proceedings, even though he is married to a U.S. citizen and has never been convicted of a removable offense. During those 20 months, he never received a hearing as to whether his detention was justified. Applying this Court's precedents in *Nadarajah v. Gonzales*, 443 F.3d 1069, 1075-76 (9th Cir. 2006), and *Tijani v. Willis*, 430 F.3d 1241, 1242 (9th Cir. 2006), the district court granted Mr. Diouf's motion for a preliminary injunction, ordering the government to provide a custody hearing before an immigration judge ("IJ") within 30 days. After hearing testimony and considering other evidence, the IJ found that Mr. Diouf did not pose a danger to the community or a flight risk and ordered his release on a $5,000 bond. *See* Bond Memorandum Order at 5 (copy attached as Appendix 1). Mr. Diouf posted bond and for over three months, he has been living with his U.S.-citizen wife and complying with all conditions of supervision.

On this appeal, the government seeks to overturn the district court's preliminary injunction so that it can re-incarcerate Mr. Diouf. As the district court correctly recognized, however, no provision of the Immigration and Nationality Act permits prolonged and indefinite detention without a hearing.

See Tijani, 430 F.3d at 1242 (construing 8 U.S.C. § 1226(c) to authorize mandatory detention only when removal proceedings are "expeditious" in order to avoid serious constitutional problem, and ordering a bond hearing); *Nadarajah*, 443 F.3d at 1078, 1080-81 (holding that "general immigration detention statutes do not authorize the Attorney General to incarcerate detainees for an indefinite period" and ordering release of detainee held for four-and-a-half years under 8 U.S.C. § 1225(b)). Those precedents recognize that although the government has discretion to detain persons for purposes of removal, once the length of detention becomes prolonged and indefinite, different standards must apply. Immigration detention can be imposed only for the purpose of removal, and when detention becomes prolonged to the point of years, it may no longer be sufficiently tied to the purpose of removing a person from the United States.

The government attempts to avoid these precedents by engaging in a long discussion about which statute governs Petitioner's detention – 8 U.S.C. § 1231 (which governs detention after a removal order is final), or 8 U.S.C. § 1226 (which governs detention while removal proceedings are still pending). While Mr. Diouf disagrees with the government's view, the discussion is entirely irrelevant for purposes of this appeal. Under this Court's precedent *neither* of these two statutes can be construed as authorizing Petitioner's prolonged and

indefinite detention without a constitutionally-adequate hearing. Moreover, the government wrongly argues that the district court improperly put the burden on the government to justify Mr. Diouf's continued detention. This Court's decision in *Tijani*, as well as a substantial body of Supreme Court precedent from other contexts, makes it clear that when administrative detention becomes prolonged and indefinite, the government has the burden to justify it.

Rather than tackle the immigration detention statutes and this Court's precedents head on, the government sets out a lengthy and skewed recitation of Mr. Diouf's challenges to the removal order against him. The government repeatedly mischaracterizes Mr. Diouf's petitions as "meritless." Those arguments fail for two reasons. First and most important, assertions about the merits of Mr. Diouf's removal are relevant in this detention case in one respect only: An immigration judge may consider the likelihood of removal in determining whether continued detention is justified.[1] That consideration is one for the immigration judge, however, and has no bearing on whether the Constitution or the Immigration and Nationality Act require a hearing before an immigration judge in the first place. Second, the government is simply wrong

[1] For example, if it appears that a detainee will lose on the merits within a very short time, the immigration judge may determine that the detainee poses a greater flight risk, or that continued detention is not excessive because it will end shortly.

about Mr. Diouf's case against removal. It is not "meritless" at all. His pending petition for review before this Court sets forth a strong claim that his previous counsel's outright failure to file a key administrative pleading led directly to the removal order. That Mr. Diouf previously filed a number of *pro se* petitions that were dismissed for technical deficiencies (such as failure to provide a copy of the removal order) does not detract from the strong merits of his pending case against removal. Indeed, in apparent recognition of those merits, this Court has granted Mr. Diouf's motion for a stay of removal. *See Maharaj v. Ashcroft*, 295 F.3d 963, 966 (9th Cir. 2002) (discretionary stays granted only when petition presents substantial legal claims); *Abassi v. INS*, 143 F.3d 513, 514 (9th Cir. 1998) (same).

The government also glosses over the deferential standard of review that applies to the district court's grant of a preliminary injunction. District courts have broad discretion to rule on preliminary injunctions, based on a balancing of the hardships to each party and a determination of the parties' relative likelihood of success on the merits. In this case, the balance of hardships tipped entirely in Mr. Diouf's favor, as he was incarcerated for almost two years and separated from his U.S.-citizen wife, while a grant of the preliminary injunction only required the government to hold a hearing in order to make its case for continued detention before an immigration judge. Mr. Diouf is also very likely

to prevail on the merits, as this Court's precedents make it clear that prolonged immigration detention without a hearing is not permitted under the Immigration and Nationality Act, and if it were, such a statute would be unconstitutional. The district court did not commit any legal error in granting the preliminary injunction, much less the clear error that is necessary for reversal at this stage of the litigation.

JURISDICTION

The district court had jurisdiction pursuant to, *inter alia*, the general federal habeas statute. 28 U.S.C. § 2241. This Court has jurisdiction pursuant to 28 U.S.C. § 1292, as this is an appeal of an interlocutory order granting a motion for preliminary injunction.[2]

STATEMENT OF THE ISSUES

1. Whether the district court's preliminary injunction granting a bond hearing before an immigration judge rested on an erroneous legal premise or constituted an abuse of discretion, when it was based on clear Ninth Circuit precedent holding that prolonged immigration detention without a hearing is not

[2] To the extent that the government's brief could be read to suggest that the district court lacked jurisdiction to review the government's discretionary decision to detain Mr. Diouf, *see* Gov't Br. at 17 (citing 8 U.S.C. § 1226(e)), this is erroneous. Mr. Diouf argued that the government lacks statutory authority to detain him and that his detention violates the Constitution. Both claims are cognizable under 28 U.S.C. § 2241. *See Nadarajah v. Gonzales*, 443 F.3d 1069, 1075-76 (9th Cir. 2006).

authorized under the Immigration and Nationality Act and is constitutionally suspect.

2. Whether the district court's preliminary injunction rested on an erroneous legal premise or constituted an abuse of discretion, by requiring the government to justify the continued detention of a person detained for a prolonged and indefinite period, when this Court has ordered the same relief with the same burden on the government in *Tijani v. Willis*, 430 F.3d 1241, 1242 (9th Cir. 2005).

STATEMENT OF THE CASE

The government appeals from the district court's order granting a motion for preliminary injunction. Based on Mr. Diouf's arguments that this Court's decisions in *Nadarajah* and *Tijani* construe the general immigration detention statutes[3] not to permit prolonged and indefinite detention without a hearing, the district court issued the following order:

[3] In this context and throughout this brief, the phrase "general immigration statutes" refers to provisions of the Immigration and Nationality Act that govern the detention of immigrants who are not alleged to have engaged in terrorist activity or otherwise to pose a national security risk. *See, e.g.*, 8 U.S.C. § 1225(b)(1)(B)(ii) (detention of noncitizen applying for admission as asylee); 8 U.S.C. § 1226 (detention of noncitizens pending removal proceedings); 8 U.S.C. § 1231 (detention of noncitizens after removal proceedings). Congress has made different provisions for noncitizens who are alleged to pose a national security risk. *See* 8 U.S.C. § 1226a; 8 U.S.C. §§ 1531-37. *See infra* Part II.C.1.

> Petitioner must be within thirty days afforded an individual hearing before an immigration judge concerning whether his prolonged detention is justified. At the hearing, the immigration judge shall order Petitioner released on reasonable conditions unless the government shows by clear and convincing evidence that Petitioner presents a sufficient danger or risk of flight to justify his detention in light of how long he has been detained already and the likelihood of his case being finally resolved in favor of the government in the reasonably foreseeable future.

Excerpts of Record ("ER") at 112.

The district court's order granting the preliminary injunction relief should be affirmed. The district court properly balanced the relative hardships of the parties, recognizing that the *status quo* would leave Mr. Diouf in continued incarceration after 20 months, and that the preliminary injunction would merely require the government to justify continued detention before an immigration judge with expertise in making custody determinations. The district court's order also did not rest on an erroneous legal premise. To the contrary, it applied this Court's precedents holding that immigration detention statutes do not permit prolonged and indefinite detention without a hearing.

STATEMENT OF FACTS

Background Facts

Petitioner Amadou Diouf is a citizen of Senegal. He came to the United States in 1996, at the age of 21, on a student visa. *See* Supplemental Excerpts of Record ("SER") at 5, 21. He graduated from the California State University

at Northridge with a degree in information systems. *Id.* After his graduation, he remained in the United States even though his student visa had expired.

In 2001, Mr. Diouf began a romantic relationship with Renae Campbell, a U.S. citizen. *Id.* Within a year, Mr. Diouf and Ms. Campbell began living together. *Id.* They became engaged during the second year of their relationship. *Id.* They were married on June 17, 2003. *Id.*

Administrative Removal Proceedings

As set forth below, the merits of Mr. Diouf's removal proceedings are not relevant to the issues in this appeal. Nonetheless, the government focuses on the removal charges against Mr. Diouf at length. The government's version is incomplete and inaccurate, and therefore Mr. Diouf sets forth the relevant facts below.

On January 24, 2003, the government issued a Notice to Appear charging Mr. Diouf with removability on the grounds that (1) he had stayed in the United States after his student visa expired; (2) that he changed his nonimmigrant status and failed to maintain or comply with the conditions of the change of status; and (3) that he was convicted of a controlled substance offense. ER at 24-25. The government initiated the removal proceedings against Mr. Diouf after he was convicted in Washington State of possession of less than 30 grams

of marijuana and sentenced to 75 days in the county jail, with 30 days suspended.[4] ER at 20-21.

One month after Mr. Diouf's arrest by the Bureau of Immigration and Customs Enforcement ("ICE"), he appeared before an immigration judge ("IJ"). The IJ granted Mr. Diouf's request for voluntary departure in lieu of removal. ER at 27-28. The IJ also set a $5,000 bond and Mr. Diouf was released. ER at 26, 29. Pursuant to the IJ's voluntary departure order, Mr. Diouf was given a deadline of June 24, 2003, to leave the United States. ER at 27.

Mr. Diouf retained an immigration attorney for purpose of reopening his removal proceeding and adjusting his status based on his upcoming marriage to his long-time fiancée, Ms. Campbell. SER at 21, 22; Appendix II at 4-5. On June 17, 2003, before his voluntary departure deadline, Mr. Diouf and Ms. Campbell were married. Mr. Diouf had set the wedding date in reliance upon the advice of counsel, who advised him that his marriage would protect him from removal so long as it took place before his voluntary departure deadline. *See* Appendix II at 4. This was a serious error on the part of his attorney, as Mr. Diouf should have held his long-planned wedding prior to the May 2003

[4] Although the Washington state statute of conviction penalizes possession of less than 40 grams of marijuana, Mr. Diouf pled guilty to possessing less than 30 grams of marijuana. *See Diouf v. Gonzales*, No. 06-71922, Br. for Pet'r at 3 n.3 (copy attached as Appendix II). Thus, his conviction is not a removable offense. *See id.* (citing 8 U.S.C. § 1227(a)(2)(B)(i)).

deadline for filing a motion to reopen the removal case. At the very least, counsel should have filed the motion to reopen prior to the May 2003 deadline based on the imminent marriage. But counsel did not do so. After the wedding, Mr. Diouf's attorney filed a Petition for Alien Relative on behalf of Mr. Diouf's wife. ER at 43-53. However, counsel made a second grave error by failing to file the motion to reopen the removal case, which was required in addition to the Petition for Alien Relative to keep Mr. Diouf in the United States. SER at 21-22; Appendix II at 4-5. Mr. Diouf did not know about his attorney's failure to file the necessary papers, and had no reason to know about the error, as he had signed a motion to reopen prepared by his attorney and had every reason to believe that his attorney was going to file it. *Id.*

On March 29, 2005, the government arrested Mr. Diouf at his home because of his failure to leave the United States pursuant to the IJ's voluntary departure order. ER at 34. From that date until his release pursuant to the preliminary injunction order and the IJ's subsequent setting of bond, Mr. Diouf remained incarcerated in immigration jail. During the approximately 20 months that Mr. Diouf was detained, he never received any custody hearing. On July 25, 2006, ICE conducted its own "file review," which involved no hearing or testimony, and informed Mr. Diouf that it had decided to continue his incarceration. ER at 60. The purported reasons for continuing custody were his

"criminal history" – even though Mr. Diouf only had one conviction for possession of less than 30 grams of marijuana – and "lack of family support," even though he was and is married to a U.S. citizen and has a brother lawfully residing in the United States. *Id.*

On May 27, 2005, two years after the motion to reopen was due and two months after Mr. Diouf was detained, his immigration attorney, Nana Boachie-Yiadom, filed the motion to reopen. ER at 40-42. Boachie-Yiadom filed the motion without Mr. Diouf's knowledge. Appendix II at 5. The IJ denied the motion to reopen on June 28, 2005. ER at 55. The IJ noted in his order that "[n]o complaint is made about the work of former counsel of record." *Id.* In fact, there was no "former" counsel to complain of, as it was Mr. Boachie-Yiadom's own prior mistake that was the cause of the problem. It was no surprise that he did not call attention to his own egregious error in failing to file the motion to reopen when it was due in 2003.

During the pendency of Mr. Diouf's incarceration, he made every effort to correct his attorney's enormous blunder. In early September 2005, he filed through new counsel a second motion to reopen. *See* ER at 96-98.[5] The IJ denied that motion to reopen and the Board of Immigration Appeals ("BIA")

[5] The government does not include the briefing or immigration judge order on Mr. Diouf's September 2005 motion to reopen in the Excerpts of Record, but does include a BIA order referring to the motion.

affirmed. *Id.* On July 3, 2006, acting *pro se*, Mr. Diouf filed a third motion to reopen based on Mr. Boachie-Yiadom's ineffective assistance.[6] ER at 79-90. The IJ denied the third motion to reopen and the Board of Immigration Appeals ("BIA") affirmed. ER at 96-99.

Petitioner's Appeals to this Court

Mr. Diouf also tried to overcome Mr. Boachie-Yiadom's error through *pro se* petitions to this Court. In June 2005, August 2005 and February 2006, Mr. Diouf filed *pro se* petitions which were all dismissed for technical deficiencies such as failure to submit a copy of the administrative order or failure to provide an alien number. ER 58, 65-66, 68-69. None of those orders addressed the merits of Mr. Diouf's claims against removal. Thus, contrary to the government's assertions in the opening brief, these petitions for review were not deemed "meritless" by this Court.

In April 2006, Mr. Diouf filed another *pro se* petition for review, No. 06-71922. ER 71-73. This time, Mr. Diouf finally met the technical requirements for a petition for review, and this Court granted his motion for a discretionary stay of removal. ER 72 (docket entry dated July 21, 2006). The Court also

[6] According to the government's opening brief, on May 5, 2006, Mr. Diouf filed an appeal to the BIA from the immigration judge's voluntary departure order. Gov't Br. at 9. However, the cited pages of the Excerpts of Record do not contain corresponding documents, merely a cover letter for a BIA decision dated June 8, 2006. ER at 100. The actual decision is not included.

granted Mr. Diouf's motion for appointment of counsel. *See* Appendix III (docket entry dated Jan. 17, 2007).

In August 2006, Mr. Diouf filed a separate petition for review, No. 06-73991, appealing from the BIA's denial of his motion to reopen. ER at 75-77. That petition for review was consolidated with the one filed in April 2006, ER at 76, and both cases remain pending before this Court.

Proceedings Below

Mr. Diouf filed a petition for writ of habeas corpus challenging his prolonged and indefinite detention without a hearing on November 21, 2006.[7] SER at 1-23. In his habeas petition, he argued that he was entitled to immediate release without any further hearing both because no statute authorized his detention and because the sheer length of his detention rendered it excessive in violation of Due Process. SER at 13-14. In the alternative, he argued based on the detention statutes and the Due Process Clause that he was entitled to a hearing at which the government would have to show that his detention was justified. SER at 10-13.

[7] Before filing the habeas petition at issue here, Mr. Diouf was a named plaintiff in a proposed class action lawsuit challenging prolonged immigration detention. *See Mussa v. Gonzales*, No. CV-06-2749-TJH (JTL) (C.D. Cal. 2006). On October 17, 2006, the district court dismissed the class action complaint on the grounds that the plaintiffs were improperly joined, without prejudice to filing individual petitions. Mr. Diouf subsequently filed the instant habeas case.

Mr. Diouf also filed a motion for a preliminary injunction in support of these requests on November 21, 2006. See SER 32-38 (Notice of Motion and Motion); SER 39-62 (Petitioner's Memorandum of Points and Authorities). On January 4, 2007, the district court granted the preliminary injunction motion and ordered a custody hearing before an IJ. ER 110-13. Specifically, the district court ordered:

> Petitioner must be within thirty days afforded an individual hearing before an immigration judge concerning whether his prolonged detention is justified. At the hearing, the immigration judge shall order Petitioner released on reasonable conditions unless the government shows by clear and convincing evidence that Petitioner presents a sufficient danger or risk of flight to justify his detention in light of how long he has been detained already and the likelihood of his case being finally resolved in favor of the government in the reasonably foreseeable future.

ER at 112-13.

Pursuant to the district court's order, an IJ held a hearing to determine whether Mr. Diouf's prolonged and indefinite detention was justified. After taking evidence from both sides, the IJ held that Mr. Diouf did not present a sufficient danger or flight risk to justify his detention in light of the length of his detention and the likelihood of his immigration case being resolved in the government's favor in the reasonably foreseeable future. The IJ therefore ordered Mr. Diouf released on a $5,000 bond. Appendix I (IJ's bond order).

ICE filed an appeal of the bond order. That appeal is now pending before the BIA.

The government timely appealed the district court's ruling. Subsequently, the parties completed their briefing and submission of evidence before the district court. The district court has yet to rule on the merits.

ARGUMENT

I. UNDER THE DEFERENTIAL STANDARD OF REVIEW APPLICABLE ON REVIEW OF A PRELIMINARY INJUNCTION, THE DISTRICT COURT'S DECISION MUST BE AFFIRMED.

In its opening brief, the government recites the standard of review for appeals from preliminary injunctions, but fails to recognize the full import of those precedents. As set forth below, the district court's preliminary injunction order was compelled by this Court's precedents. Thus, the district court did not make any legal error, much less commit the type of clear legal error that would warrant reversal of a preliminary injunction.

The government acknowledges that a preliminary injunction should be disturbed only if the district court's order rested on an erroneous legal premise or was an abuse of discretion. *Gregorio T. by and through Jose T. v. Wilson*, 59 F.3d 1002, 1004 (9th Cir. 1995). But the government fails to recognize that this standard of review is far more deferential than the ordinary standard for an

appeal from a final judgment on the merits. *See Sports Form, Inc. v. United Press International, Inc.*, 686 F.2d 750, 752 (9th Cir. 1982). This Court does not engage in a *de novo* determination of the law in reviewing a preliminary injunction. A "district court … will not be reversed simply because the appellate court would have arrived at a different result if it had applied the law to the facts of the case." *Sports Form, Inc.*, 686 F.2d at 752. *See also Lands Council v. Martin*, 479 F.3d 636, 639-41 (9th Cir. 2007) (acknowledging that "[p]laintiffs may ultimately succeed on the merits," but affirming the denial of their motion for a preliminary injunction because there was no "clear legal error."); *Gregorio T.*, 59 F.3d at 1004 ("The parties have briefed this issue as if we were to decide de novo the merits of the abstention decisions of the district court. . . . but that is not the issue before us . . . we do not review the underlying merits of the case."). In these cases, the Court has emphasized that when the losing party contests the district court's application of a legal rule to a particular case, such claims should be raised on appeal from the merits ruling, rather than through interlocutory appeal from the preliminary injunction. If this were not the rule, this Court would essentially have to decide the case twice. Under this very deferential standard, the district court's preliminary injunction cannot be reversed.[8]

[8] The rule counseling against addressing the merits at this early stage of

The government seeks reversal of the decision below based on an alleged misapplication of this Court's precedent governing immigration detention. The government's arguments fail because the district court's decision was not based on a clear error (and indeed was not based on an error at all). The government does not dispute that prolonged detention without a hearing pending completion of removal proceedings can raise serious constitutional concerns, and that this Court therefore construes statutes authorizing such detention narrowly. Gov't Br. at 21 (acknowledging *Tijani* and *Nadarajah* as binding authority). In a vain effort to avoid those precedents, the government argues that the district court incorrectly applied this Court's cases governing prolonged immigration detention to the facts of Mr. Diouf's case. *See, e.g.*, Gov't Br. at 25 n.7, 31 (arguing that *Tijani* and *Nadarajah* are distinguishable). That argument fails. *See infra* Part II. But in any event, the government's argument should be

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litigation is especially apt here because the record on the merits appeal will be more complete than the record presented in the appeal of the preliminary injunction, and other issues will likely be presented if and when the merits appeal arrives at this court. For example, in his habeas petition, Mr. Diouf contended that he is entitled to immediate release without the need for a hearing pursuant to this Court's decision in *Nadarajah*, 443 F.3d at 1080. The district court rejected that argument at the preliminary injunction stage. In addition, since his release from custody, Mr. Diouf has been living with his U.S.-citizen wife and has complied with all requirements of his bond order. That information obviously was not before the district court at the time it granted the preliminary injunction in its limited form, and is not before this Court on this interlocutory appeal.

addressed by this Court upon appeal only after the district court completes its review (assuming that the district court reaches the same conclusion on the merits and there is an appeal). The government's arguments are not appropriate for resolution by way of an appeal of a preliminary injunction.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT PETITIONER IS SUBSTANTIALLY LIKELY TO SUCCEED ON THE MERITS.

The district court did not abuse its discretion in granting the preliminary injunction and ordering a custody hearing. To rule in Petitioner's favor, the district court only had to find that Petitioner demonstrated "either (1) a combination of probable success on the merits and the possibility of irreparable injury or (2) that serious questions are raised and the balance of hardships tips sharply in [his] favor." *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1234 (9th Cir. 1999) (internal quotations omitted). In light of this Court's precedents, as set forth below, the district court correctly determined that Mr. Diouf was "substantially likely" to succeed on the merits of his claim that his prolonged and indefinite detention without a hearing violated either the immigration laws or the Due Process Clause.[9]

[9] Indeed, although the government fails to address Mr. Diouf's constitutional claim, that independent ground is sufficient to sustain the district court's ruling. *See infra* Section II.D. *See also Harper v. Poway Unified School Dist.*, 445 F.3d 1166, 1174 (9th Cir. 2006), *vacated on other grounds*, *Harper ex rel.*

The government argues at length that the district court erred in implicitly determining that Mr. Diouf was detained under Immigration and Nationality Act ("INA") § 236(a), 8 U.S.C. § 1226(a). According to the government, Mr. Diouf's detention was governed instead by INA § 241, 8 U.S.C. § 1231, on the theory that when a detainee obtains a stay of removal from a court, his detention is taken out of the realm of § 236(a) and falls within § 241. That argument is incorrect. But in any event, under either statute, prolonged and indefinite detention is not permitted. The Due Process Clause also forbids such detention.

A. Prior to the District Court's Preliminary Injunction Order, Mr. Diouf Was Subjected to Prolonged and Indefinite Detention.

Mr. Diouf suffered over 20 months in detention, with no end in sight, until the district court ordered a custody hearing and the IJ ordered his release on a $5,000 bond. As an initial matter, the sheer length of detention at issue unquestionably rendered it "prolonged." Mr. Diouf was detained for 20 months – more than three times longer than the six-month period presumed reasonable. *See Nadarajah*, 443 F.3d at 1079-80 (holding that six months is the presumptively "brief and reasonable" time period for which detention is authorized under the general detention statutes).

Harper v. Poway Unified School Dist., 127 S. Ct. 1484, 1484 (2007) (district court's preliminary injunction ruling may be affirmed on any ground supported by the record).

Moreover, Mr. Diouf's detention was also indefinite because his removal is not significantly likely to occur in the reasonably foreseeable future. This is so for two reasons. First, he has strong arguments that his removal will never occur because his removal order will be found invalid based on his former attorney's ineffective assistance of counsel. Because of his former attorney's failure to file a timely motion to reopen, Mr. Diouf lost the opportunity to remain in the United States by adjusting his status through his U.S.-citizen wife – relief that was otherwise available to Mr. Diouf because he has never been convicted of a removable offense. Contrary to the government's implication, this Court has not yet addressed the merits of Mr. Diouf's ineffective assistance claim, which is still pending. *See infra* Part II.B. Under these circumstances, his removal is not reasonably foreseeable, and detention during that process would be indefinite.

In addition, whatever the ultimate outcome of Mr. Diouf's petition for review in the Ninth Circuit, his removal is not significantly likely to occur in the reasonably foreseeable future because his case will take additional months, if not years, to be resolved. Mr. Diouf has just filed his opening brief in his removal case before this Court. Appendix III (No. 06-71922 docket entry dated June 8, 2007). The government has not yet filed its answering brief. As a result, Mr. Diouf's case likely will not be decided for more than a year, even if

he does not ultimately prevail. *See Tijani*, 430 F.3d at 1242 ("the foreseeable process in this court, where the government's brief in [Petitioner's] appeal of the removal has not yet been filed, is a year or more.").

The government argues that Mr. Diouf's detention is not truly indefinite because this Court will someday decide the merits of his removal case. But that argument was rejected in both *Tijani* and *Nadarajah*. In the latter case, the government argued that the petitioner was being detained pending completion of the administrative review process, and therefore was not subject to indefinite detention. This Court definitively rejected the government's claim:

> Nor are we persuaded by the government's argument that because the Attorney General will someday review Nadarajah's case, his detention will at some point end, and so he is not being held indefinitely. No one can satisfactorily assure us as to when that day will arrive. Meanwhile, petitioner remains in detention.

Nadarajah, 443 F.3d at 1081. In *Tijani*, the Court also granted relief from prolonged and indefinite detention, while recognizing that judicial review of the removal order would someday end – typically, after "a year or more." 430 F.3d at 1242.[10]

[10] Courts have adopted two different remedial approaches when faced with prolonged and indefinite detention under statutes that do not authorize such detention. In some cases, the courts have ordered the petitioner's release. In others, the courts have ordered hearings to ensure that the detention remains reasonable. *Compare Ma v. Ashcroft*, 257 F.3d 1095, 1115 (9th Cir. 2001) (holding that "the INS may not detain Ma any longer"); *Nadarajah*, 443 F.3d at

Similarly, in *Ly v. Hansen*, the Sixth Circuit held unconstitutional the detention of an alien pending completion of removal proceedings and explained that

> appeals and petitions for relief are to be expected as a natural part of the process. An alien who would not normally be subject to indefinite detention cannot be so detained merely because he seeks to explore avenues of relief that the law makes available to him. Further, although an alien may be responsible for seeking relief, he is not responsible for the amount of time that such determinations may take. . . . The entire process, not merely the original deportation hearing, is subject to the constitutional requirement of reasonability.

351 F.3d 263, 272 (6th Cir. 2003). *See also Welch v. Ashcroft*, 293 F.3d 213, 227 (4th Cir. 2002) ("The *Zadvydas* Court [which held that prolonged post-order detention is not authorized under statute] stresses repeatedly that post-order detention may be 'indefinite, perhaps permanent.' [Petitioner's] detention pending a final removal order is similarly indefinite."); *id*. at 231-32 (Williams, J., concurring) ("With respect to the *Zadvydas* majority's reliance on the potentially indefinite duration of detention . . . the detention authorized by [the general detention statute authorizing mandatory detention pending completion of removal proceedings] suffers from similarly lengthy delays."); *Oyedeji v. Ashcroft*, 332 F. Supp. 2d 747, 753 (M.D. Pa. 2004) (ordering release of non-

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1084 (ordering petitioner's "immediate release"); *Ly v. Hansen*, 351 F.3d 263, 271-72 (6th Cir. 2003) (ordering release rather than hearing) *with Tijani*, 430 F.3d at 1242 (ordering hearing); *Welch v. Ashcroft*, 293 F.3d 213, 227 (4th Cir. 2002) (affirming district court's decision ordering hearing rather than release).

citizen detained approximately four years pending completion of removal proceedings because "[t]he price for securing a stay of removal should not be continuing incarceration … [The Petitioner] should not be effectively punished for pursuing applicable legal remedies."). In short, the federal courts have rejected the government's argument that detention is not indefinite because appeals will someday be exhausted. To hold otherwise would punish people for availing themselves of judicial review and create an incentive to forgo even meritorious challenges to removal.

Essentially, the government's argument is that Congress has given it unfettered authority to detain noncitizens without any time limit, as long as the detention happens *after* the noncitizen obtains a stay of removal to litigate his immigration case. Thankfully, that draconian view has already been rejected by this Court and others. Because detention pending completion of removal proceedings can last for years and has no fixed termination point, it must be subject to limitations similar to those imposed upon post-removal order detention.

Contrary to the government's suggestion, adopting the district court's interpretation would not allow noncitizens to win their release from detention by pursuing frivolous appeals. First, if this Court finds a challenge to a removal order to be frivolous, then that challenge will not present a substantial legal

claim sufficient to warrant a stay of removal. *See Maharaj*, 295 F.3d at 966; *Abassi*, 143 F.3d at 514. Here, Mr. Diouf obtained a discretionary stay of removal from this Court. ER at 72 (docket entry dated July 21, 2007). Second, the government is free to argue at a detention hearing before an IJ that the noncitizen has filed a frivolous challenge and therefore should not be released on bond. Mr. Diouf was ordered released after a hearing before an IJ, during which the government had the opportunity to make any such arguments. Thus, the government's suggestion that noncitizens may file frivolous petitions in order to win their release is meritless.

B. The Supreme Court and This Court Have Repeatedly Held that Prolonged and Indefinite Detention Without a Hearing Is Not Permitted Under the General Immigration Detention Statutes.

As set forth below, the Supreme Court and this Court have held repeatedly that prolonged and indefinite detention is not permitted under the general immigration detention statutes, absent a constitutionally sufficient hearing to determine whether such detention is justified. The government acknowledges those precedents but attempts to distinguish them on various irrelevant facts and by engaging in a red-herring discussion about which particular detention statute applies to Mr. Diouf. Those efforts are unavailing, as the precedents establish fundamentally that *none* of the general immigration

statutes – including the two that the parties respectively argue are applicable here – authorize indefinite and prolonged detention without a hearing, and that even if Congress did attempt to authorize such detention, such a statute would be unconstitutional.

The Supreme Court first addressed the issue of prolonged immigration detention in *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001). The Court considered the detention of two noncitizens, both of whom had been ordered removed and had exhausted all appeals. Both petitioners remained detained because their deportation could not be effectuated due to problems in obtaining travel documents.[11] The government claimed that the detention provision at 8 U.S.C. § 1231(a)(6) authorized their prolonged and indefinite detention, because that provision authorizes the detention of aliens beyond a 90-day "removal period" after entry of a final removal order. The Supreme Court rejected that interpretation of the statute. The Court first noted that construing the statute to permit prolonged and indefinite detention without a

[11] In the case of one of the men, Mr. Zadvydas, it was not clear that he was a citizen of any country because of the time and place of his birth. At the time of the Court's decision, his application for Lithuanian citizenship remained outstanding, while several other applications had been rejected. *Id*. at 684-85. With the other, Mr. Ma, there was no doubt that he was Cambodian, but the government of Cambodia had not issued a travel document authorizing his return, apparently due to diplomatic difficulties between that country and ours. *Id*. at 685-86.

constitutionally adequate hearing would pose an "obvious" constitutional problem. 533 U.S. at 692. To avoid this problem, the Court imposed a clear statement requirement, and found the general detention statute at issue insufficiently clear to authorize prolonged and indefinite detention. *Id.* at 697 ("[I]f Congress had meant to authorize long-term detention of unremovable aliens, it certainly could have spoken in clearer terms."). *See also id.* at 699 (granting petition after finding nothing in text or history of statute "that clearly demonstrates a congressional intent to authorize indefinite, perhaps permanent, detention.").[12] Similarly, in *Clark v. Martinez*, the Supreme Court again applied the clear statement rule and construed a different immigration detention statute, 8 U.S.C. § 1225, not to authorize prolonged and indefinite detention. 543 U.S. 371, 385 (2005) (rejecting argument that a different detention statute authorized prolonged and indefinite detention because "we find nothing in this text that affirmatively authorizes detention, much less indefinite detention.").

Following *Zadvydas*, this Court has also interpreted the immigration detention statutes not to permit prolonged and indefinite detention. Those cases are dispositive of the instant case, despite the government's efforts to

[12] The Supreme Court could have held the statute unconstitutional for failing to provide adequate procedures. Instead, applying the doctrine of constitutional avoidance, the Court construed the statute to require such procedures. 533 U.S. at 689. *See also Ly v. Hansen*, 351 F.3d 263, 270 (6th Cir. 2004) (applying constitutional avoidance doctrine in construing 8 U.S.C. § 1226(c)).

distinguish them. In *Tijani v. Willis*, 430 F.3d 1241 (9th Cir. 2005), the petitioner was ordered removed by the immigration judge and the BIA based on an alleged aggravated felony conviction, and his appeal was pending before the Ninth Circuit. *Id.* at 1250 n.1 (Callahan, J., dissenting) (setting out procedural history). Like Mr. Diouf, the petitioner in *Tijani* already had been detained for a prolonged period of time and was facing additional detention while his removal case was on appeal. *Id.* at 1242.

The Ninth Circuit stated that "it is constitutionally doubtful that Congress may authorize imprisonment of this duration [two years and eight months] for lawfully admitted resident aliens who are subject to removal." *Id.* Construing the applicable detention statute, 8 U.S.C. § 1226(c) (governing detention of noncitizens convicted of certain crimes), to avoid this constitutional issue, the Ninth Circuit ordered that the petitioner should be released unless the government proved at a hearing before an immigration judge that the petitioner was a flight risk or danger to community.[13] *Id.*

Tijani's holding, in the context of a noncitizen who was charged with removal based on an alleged aggravated felony conviction, applies *a fortiori* to

[13] In *Nadarajah v. Gonzales*, 443 F.3d 1069, 1077-78 (9th Cir. 2006), the Court applied similar reasoning in construing another immigration detention statute, 8 U.S.C. § 1225(b)(2)(A), which applies to noncitizens who are deemed inadmissible. The Court ordered the release of the petitioners, who had been detained for five years. *Id.* at 1080.

Mr. Diouf, who has no such criminal conviction. *See supra* n.4. The government nonetheless attempts to distinguish *Tijani* on the grounds that "Tijani's *timely direct* appeal of the challenge to his order of removal was still pending at this Court, and his removability remained in doubt." Gov't Br. at 31 (emphasis in original). The government claims that Mr. Diouf has filed "multiple subsequent collateral attacks" on his removal order, and that this case is therefore distinguishable from *Tijani*. As an initial matter, this argument finds no basis in *Tijani*, which does not specify whether the petitioner had filed any previous appeals to the Court and certainly does not limit its holding in such a way. As explained above, neither 8 U.S.C. § 1226(c) – the statute found to govern in *Tijani* – nor any other immigration detention statute, distinguishes anywhere between an initial level of judicial review and a subsequent one. To the contrary, the only relevant distinction drawn by the statutes is between cases where a noncitizen has obtained a stay of removal and is awaiting the reviewing court's decision, as was the case in both *Tijani* and here, and cases in which *all* judicial review is complete, at which point 8 U.S.C. § 1231 applies. *See infra* Part II.C.1. Perhaps for this reason, as far as Petitioner is aware, no decision of *any court* draws the distinction advanced by the government.[14]

[14] The government argues *Tijani* is distinguishable because the noncitizen there did not concede his removability. However, the same is true of Mr. Diouf. His

In any event, the government simply mischaracterizes the record about Mr. Diouf's filings before this Court. As set forth above at 12-13, Mr. Diouf has not filed "collateral attacks." He made several *pro se* efforts to fix his prior counsel's grave error, by filing petitions with this Court (as well as the BIA). His first three efforts were dismissed because of his failure to comply with technical requirements – *without any adjudication of the merits*. However, his two last efforts were consolidated and are now pending before this Court. Moreover, recognizing the merits of his case, this Court granted a discretionary stay of removal. ER at 72 (docket entry dated July 21, 2006). *See Maharaj v. Ashcroft*, 295 F.3d 963, 966 (9th Cir. 2002); *Abassi v. INS*, 143 F.3d 513, 514 (9th Cir. 1998). Thus, contrary to the government's assertion, Mr. Diouf has not filed "multiple collateral attacks."[15]

C. Neither 8 U.S.C. § 1226 nor 8 U.S.C. § 1231 Authorizes Prolonged and Indefinite Detention Without a Hearing.

As set forth above, in cases like *Zadvydas*, *Tijani*, and *Nadarajah*, as well as others, the courts have repeatedly construed immigration detention statutes not to permit prolonged and indefinite detention. Rather than confront the

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challenge to removal is pending before this Court in consolidated cases, Nos. 06-71922 and 06-73991.

[15] The government's characterization of a petition for review as a "collateral" attack is incorrect as a matter of law. A petition for review is the sole direct review of a removal order specifically provided by Congress. *See* 8 U.S.C. § 1252(b).

reasoning and holdings of these Courts, the government engages in a long discussion of which particular immigration detention statute governs Mr. Diouf. The government reaches the wrong conclusion and in any event, ignores the fundamental conclusion that whichever statute applies, it does not permit prolonged and indefinite detention.

1. Petitioner's Detention is Governed by Section 1226, Not Section 1231(a)(1).

Contrary to the government's argument, Mr. Diouf's detention is governed by 8 U.S.C. § 1226, not 8 U.S.C. § 1231. As a general matter, section 1226 governs before a final administrative order of removal, and section 1231 governs afterwards. *Compare* 8 U.S.C. § 1226(a) ("On a warrant issued by the Attorney General, and alien may be arrested and detained *pending a decision on whether the alien is to be removed* from the United States.") (emphasis added) *with* 8 U.S.C. § 1231(a)(1)(A), 1231(a)(2) (providing that "[e]xcept as otherwise provided in this section, *when an alien is ordered removed*, the Attorney General shall remove the alien [within a 90-day "removal period"] and that "[d]uring the removal period, the Attorney General shall detain the alien.") (emphasis added). However, section 1231 does not govern during the pendency of any judicially-entered stay of removal. Section 1231(a)(1)(B)(ii) provides:

> (a) Detention, release, and removal of aliens ordered removed.
> (1) Removal period.

> (A) In general. Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the "removal period").
>
> (B) *Beginning of period. The removal period begins on the latest of the following:*
>
> (i) The date the order of removal becomes administratively final.
>
> (ii) *If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order.*
>
> (iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.
>
> (C) Suspension of period. The removal period shall be extended beyond a period of 90 days and the alien may remain in detention during such extended period if the alien fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal.

8 U.S.C. § 1231(a)(1) (emphasis added). Thus, under section 1231(a)(1)(B)(ii), the 90-day "removal period" does not begin until the completion of any judicial review for which a noncitizen has obtained a stay of removal. In this respect, the statute makes perfect sense – if a federal court has ordered a stay of removal, the government should not attempt to remove the noncitizen until the judicial review associated with the stay has come to an end.

However, the government reads the statute differently. Under the government's interpretation, the removal period does not begin when judicial review ends, but rather when the noncitizen has received an administratively

final order of removal (typically, a final decision from the Board of Immigration Appeals). When a noncitizen seeks judicial review of that order and obtains a stay, the government asserts that the noncitizen is then "conspir[ing] or act[ing] to prevent his removal" under Section 1231(a)(1)(C). Thus, on the government's view, Mr. Diouf's action in filing a petition for review and obtaining a stay of removal from this Court operates to "suspend" the removal period under Section 1231(a)(1)(C), such that that provision permits his prolonged and indefinite detention.

The government's interpretation is at war with the plain language of the statute. As 8 U.S.C. § 1231(a)(1)(B)(ii) expressly states, the "removal period" does not begin upon issuance of an administratively final order if the noncitizen seeks judicial review and obtains a stay of removal from the court. Rather, when the noncitizen has obtained a stay of removal, the "removal period" begins when judicial review has concluded. It follows that the "act" of obtaining a stay of removal does not serve to suspend the removal period, because the removal period can only be "suspended" after it has begun, and it does not begin until all review associated with the stay is complete. Because Mr. Diouf has obtained a stay of removal from the Ninth Circuit, 8 U.S.C. § 1231 provides no authority to detain him.

Petitioner's argument based on the plain language of the statute has already been accepted by this Court. In *Tijani*, 430 F.3d at 1242, this Court applied 8 U.S.C. § 1226(c) to the petitioner's detention, even though that petitioner had filed a petition for review and obtained a stay of removal. Like the petitioner in *Tijani*, Mr. Diouf has obtained a stay from this Court and is detained pending completion of judicial review of his removal order. Thus, under *Tijani*, his detention is governed by 8 U.S.C. § 1226.[16]

But even if this Court were to conclude that *Tijani* does not govern and that 8 U.S.C. § 1226 does not apply to this case, the government's argument must fail. This Court has clearly held that *none* of the "general detention statutes" – *i.e.* those statutes that do *not* explicitly authorize prolonged and indefinite detention under the national security laws (*see supra* n.3) – are sufficiently clear to authorize prolonged and indefinite detention. *Nadarajah*, 443 F.3d at 1079. While 8 U.S.C. § 1226(a) was not the particular statute at issue in *Nadarajah*, its holding repeatedly referred to "the general detention statutes" rather than the particular statute at issue in that case. *See id*. at 1078-80 (referring to the "general detention statutes" on five different occasions).

[16] Because Mr. Diouf has never been convicted of an aggravated felony or two crimes involving moral turpitude, subsection (c) of 8 U.S.C. § 1226 (which is known as a "mandatory" detention statute) does not apply to him. Rather, he is subject to 8 U.S.C. § 1226(a).

Moreover, *Nadarajah*'s holding was based on reasoning in *Demore v. Kim*, 538 U.S. 510 (2003), which involved a different subsection of 8 U.S.C. § 1226, subsection (c), which favors detention far more strongly than subsection (a), the section that applies to Mr. Diouf. *See Nadarajah*, 443 F.3d at 1080 ("*Demore* endorses the general proposition of 'brief' detentions, with a specific holding of a six-month period as presumptively reasonable."). Thus, *Nadarajah* establishes that none of the general detention statutes, including 8 U.S.C. § 1226, authorize prolonged and indefinite detention. Rather, they authorize only "brief and reasonable" detention. *Id*.

In addition to this Court's holdings in *Tijani* and *Nadarjah*, the weight of authority from other courts supports Petitioner's position. *See, e.g.*, *Wang v. Ashcroft*, 320 F.3d 130, 147 (2d Cir. 2003) ("[W]here a court issues a stay pending its review of an administrative removal order, the alien continues to be detained under § 236 until the court renders its decision."); *Alafyouny v. Chertoff*, 2006 U.S. Dist. LEXIS 40854 at *39 (D. Tex. 2006) ("Because the entry of a stay pursuant to § 1231(a)(1)(B)(ii) delayed the commencement of the removal period, this delay precludes applicability of § 1231(a)(2) and (a)(6)."); *Kothandaraghupathy v. Dep't of Homeland Security*, 396 F. Supp. 2d 1104, 1107 (D. Ariz. 2005) (holding that petitioner was detained under section 1226 after Ninth Circuit had granted a stay of removal); *Morena v. Gonzales*,

2005 WL 3277995, at *3-4 (M.D. Pa. 2005) (same); *Yang v. Chertoff*, 2005 WL 2177097, *3 (E.D. Mich. 2005) (same); *Milbin v. Ashcroft*, 293 F. Supp. 2d 158, 161 (D. Conn. 2003) (same); *Clavis v. Ashcroft*, 281 F.Supp.2d 490, 493 (E.D.N.Y. 2003) (same); *Lovell v. INS*, 2003 WL 22282176, *3 (E.D.N.Y. 2003) (same).[17]

In the face of these authorities, the government nonetheless contends that (1) section 1231 applies; and (2) moreover that it permits prolonged and indefinite detention merely because a noncitizen has successfully sought a stay of removal. But with only one exception that is neither binding on this Court nor persuasive, the government's citations offer no support for this position. While a few out-of-circuit authorities have stated that section 1231 governs when a judicial stay of removal is in place, they have not concluded that section 1231 permits prolonged and indefinite detention pending such a stay.

Indeed, the government's reliance on *Lawrence v. Gonzales*, 446 F.3d 221, 227 (1st Cir. 2006) is misplaced since the First Circuit did not even rule on the legality of detention pending completion of removal proceedings. *Lawrence* involved a petition for review in which the petitioner challenged the merits of

[17] The government argues for the first time on appeal that the district court erred in failing to accord *Chevron* deference to the agency's interpretation of what statute governs. Gov't Br. at 23. However, where the language of the statute is plain, or prior precedent dictates the result, *Chevron* deference has no application. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-48 (1987).

his removal and also his detention. While the court opined that detention pending completion of proceedings was necessary to effectuate the petitioner's removal, the court dismissed the detention claim because removal was at that point "imminent" in light of the court's having affirmed the removal order. The court did not cite, let alone analyze, either 8 U.S.C. § 1226 or 8 U.S.C. § 1231. The First Circuit certainly did not determine which of the statutes would govern detention pending a stay of removal, or whether either statute would authorize prolonged and indefinite detention during pendency of a stay.

The government's citation to two Eleventh Circuit cases is similarly unavailing. Neither one upholds prolonged and indefinite detention pending a stay of removal. Rather, they can be read at most to hold that 8 U.S.C. § 1231 governed the detention under the facts of those cases. *See De La Teja v. United States*, 321 F.3d 1357, 1363 (11th Cir. 2003) (upholding detention under 8 U.S.C. § 1241 of an alien with final order of removal who did *not* request a stay); *Akinwale v. Ashcroft*, 287 F.3d 1050, 1052 n.4 (11th Cir. 2002) (upholding detention of alien held for four months, and briefly stating in *dicta* that he was detained under 8 U.S.C. § 1231 even while he sought judicial review). The cases are utterly silent on the legality of prolonged and indefinite detention.

The only circuit court case cited by the government that does actually uphold prolonged detention pending completion of removal proceedings is *Soberanes v. Comfort*, 388 F.3d 1305 (10th Cir. 2004), where the court upheld the petitioner's two-year detention. *Soberanes* is both distinguishable and unpersuasive. First, the Tenth Circuit assumed that the alien's petition for review would be resolved "in due course" and explicitly left open the possibility that evidence of a delay in resolving the immigration case might lead to a different outcome. *Id*. at 1311. In addition, the court's assumption that detention pending judicial review necessarily has a "definite and evidently impending termination point," *id*., has been rejected by this Court's decisions in *Nadarajah* and *Tijani* as well as decisions from the Sixth and Fourth Circuits. *See supra*, Part II.A. The Tenth Circuit's assumption is also demonstrably false in cases like this one, where Mr. Diouf has been in removal proceedings for more than two years and faces an indefinite additional wait while his case continues to be litigated.[18]

[18] As the government correctly notes, there are a number of district court decisions ruling both for and against its position.

2. Even if it Applied, Section 1231(a)(1)(C) Would Not Authorize Petitioner's Prolonged and Indefinite Detention.

Even assuming *arguendo* that the provision relied upon by the government –8 U.S.C. § 1231(a)(1)(C) – governs Mr. Diouf's detention notwithstanding the fact that his removal has been stayed by order of this Court, it does not authorize his prolonged and indefinite detention without a hearing. First, as this Court explained in *Nadarajah*, the structure of the immigration laws as a whole reveals that when Congress intended to authorize prolonged and indefinite detention, *i.e.*, in cases involving specific types of national security risks, it did so clearly. *See Nadarajah*, 443 F.3d at 1079. In contrast, the "general detention statutes" contain no such language and therefore authorize detention only for "brief and reasonable" time periods. *Id*.

Contrary to the government's assertion, 8 U.S.C. § 1231(a)(1)(C) does not authorize Mr. Diouf's prolonged detention. Indeed, far from containing any express language authorizing prolonged detention of noncitizens with stays of removal, section 1231(a)(1)(C) merely provides that the removal period can be extended "beyond a period of 90 days" and an alien detained during the extended period "if the alien fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal."

This language clearly addresses willful and improper efforts to stop removal, such as obstructing the government's efforts to obtain a travel document. Nothing in section 1231 provides that seeking *legal* remedies, such as the filing of a petition for review and application for a stay of removal, constitutes an "act" to prevent removal.

In addition to the plain terms of section 1231(a)(1)(C), the structure of section 1231 also demonstrates that Congress provided for extension of the removal period in section 1231(a)(1)(C) only to address acts not related to litigation. Congress specifically addressed litigation-related activities through a separate subsection, 8 U.S.C. § 1231(a)(1)(B)(ii), which provides that the removal period commences only after a judicial stay of removal is lifted. This Court's cases applying section 1231(a)(1)(C) also support this interpretation. *See Pelich v. INS*, 329 F.3d 1057, 1059 (9th Cir. 2003) (noncitizen deemed to be acting to prevent his removal because he refused to apply to his home country for a travel document); *Lema v. INS*, 341 F.3d 853, 856-57 (9th Cir. 2003) (same, for noncitizen who made misleading statements concerning his nationality).

Moreover, nothing in section 1231(a)(1)(C) states for *how long* the removal period may be "extended" pending completion of judicial review. This Court has required far greater specificity before upholding prolonged and

indefinite detention. *See Ma v. Ashcroft*, 257 F.3d 1095, 1112 (9th Cir. 2001) ("[T]o say that the INS may hold persons *beyond* a particular date does not answer the question 'for how long?'") (emphasis in original); *Nadarajah*, 443 F.3d at 1076-77 (holding that provision stating that noncitizen "shall be detained" for further consideration of an asylum application does not clearly authorize prolonged and indefinite detention); *Tijani*, 430 F.3d at 1242 (holding that mandatory detention provision does not clearly authorize prolonged detention without a hearing).

Finally, adopting the strained reading advanced by the government would effectively punish people for obtaining stays of removal by giving the government unfettered authority to detain them during the appeals process. As the Sixth Circuit explained when rejecting that argument, the noncitizen cannot be penalized with prolonged detention for appealing a removal order. *Ly v. Hansen*, 351 F.3d 263, 272 (6th Cir. 2003) ("[A]ppeals and petitions for relief are to be expected as a natural part of the process. An alien who would not normally be subject to indefinite detention cannot be so detained merely because he seeks to explore avenues of relief that the law makes available to him."). If this were the rule, many noncitizens with meritorious challenges to an unlawful removal order might forgo judicial review simply because they cannot tolerate the months or years of detention while such review is pending.

Thus, 8 U.S.C. § 1231(a)(1)(C) undoubtedly does not clearly authorize the prolonged and indefinite detention of noncitizens without any kind of detention hearing pending completion of judicial review of their removal orders. Assuming *arguendo* that it governs Mr. Diouf's case, it does not authorize his detention without a hearing.

On balance, this Court's precedents and the weight of other courts' decisions make it clear that 8 U.S.C. § 1231 does not apply here and would not authorize prolonged detention in any event. But even if the government's position had some support in the law, it has not demonstrated the propriety of reversal on appeal from a preliminary injunction in light of all the other authorities to the contrary. The district court's straightforward application of this Court's precedents obviously does not constitute the kind of clear legal error subject to reversal on appeal from a preliminary injunction. *See Sports Form*, 686 F.2d at 752.

D. Under Controlling Precedent, the Constitution Forbids Mr. Diouf's Prolonged and Indefinite Detention Without a Hearing.

Although the government concedes that the district court adopted the arguments advanced by Mr. Diouf in support of the preliminary injunction, Gov't Br. at 14 n.5, it fails even to address the constitutional arguments he raised below. Petitioner argued at length to the district court that the Due

Process Clause does not permit his prolonged and indefinite detention without a hearing. SER at 12-15, 56-59, 80-82. Those arguments independently require this Court to affirm the decision below, as they constitute an alternative basis on which to affirm the district court's decision.[19]

Mr. Diouf's 20-month detention without a hearing violated due process. "Freedom from imprisonment -- from government custody, detention, or other forms of physical restraint -- lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas*, 533 U.S. at 690. For this reason, detention must always be reasonable in relation to its purpose. *Jackson v. Indiana*, 406 U.S. 715, 738 (1972). In the immigration context, the principal purpose of detention is to effect the noncitizen's deportation in the event that removal proceedings have finally concluded in the government's favor. *Zadvydas*, 533 U.S. at 699 (holding that the "statute's basic purpose" is to "assur[e] the alien's presence at the moment of removal"). *See also Demore v. Kim*, 538 U.S. 510, 527-29 (2003) (holding that brief period of mandatory detention pending removal proceedings was reasonably related to government's

[19] While the constitutional ground for decision is properly presented here, this Court should rule on that basis only if it cannot resolve the case in Mr. Diouf's favor on statutory grounds. *See Nadarajah*, 443 F.3d at 1076 ("[P]rior to reaching any constitutional questions, federal courts must consider nonconstitutional grounds for decision.") (internal citations omitted) (alteration in original).

purpose of insuring appearance for removal). Under these fundamental principles, Mr. Diouf's detention without a hearing violated due process because it became so prolonged that it was no longer sufficiently tied to the purpose of effecting his removal.

In addition, even when civil detention serves an appropriate purpose, it must also be accompanied by adequate procedural safeguards. *Zadvydas*, 533 U.S. at 691. As detention becomes prolonged, the deprivation of liberty at issue becomes greater and correspondingly more rigorous procedures are required. *Id*. at 690-91. *See also Kansas v. Hendricks*, 521 U.S. 346, 368 (1997) (upholding involuntary civil commitment for periods of one year at a time, subject to "strict procedural safeguards" including right to jury trial before state court and burden of proof beyond a reasonable doubt). While the Supreme Court upheld the constitutionality of detention without hearings pending completion of removal proceedings in *Demore*, it repeatedly limited its holding to brief periods of detention. *See Demore*, 538 U.S. at 513, 523, 527. On the other hand, two circuit courts have found that *prolonged* detention without a hearing pending completion of removal proceedings violates the Due Process Clause. *See Welch v. Ashcroft*, 293 F.3d 213, 223 (4th Cir. 2002); *Ly v. Hansen*, 351 F.3d 263, 272 (6th Cir. 2003).

Mr. Diouf did not receive the procedural safeguards required by the Due Process Clause. In this case, the only process provided by the government during the 20 months of Mr. Diouf's incarceration was a single, cursory "file review," after which ICE concluded that detention would be continued on the basis of "criminal history and your lack of family support." *See* ER at 60. That conclusion was not based in fact, as Mr. Diouf had a single conviction for a possessing less than 30 grams of marijuana, which is not a removable offense, and did have family support in the form of his U.S.-citizen wife. This "review" was totally inadequate to authorize his prolonged detention. The file review did not even involve a personal interview, let alone a hearing. Moreover, nothing in the ICE decision gave any indication that the reviewing officer had considered the evidence submitted by Mr. Diouf, and it gave no description of what Mr. Diouf could ever do to show that he was no longer a danger or flight risk. *See* ER at 60; SER at 8-9.

Shockingly, in the 20 months during which Mr. Diouf was detained prior to the district court's decision, this single rubber-stamp "file review" by an ICE officer is the sum total of the process he received concerning whether or not his prolonged detention was justified. This review process obviously does not suffice for the "strict procedural safeguards" required by the Constitution. *Cf. Ngo v. INS*, 192 F.3d 390, 398 (3d Cir. 1999) (criticizing INS's "rubber-stamp

denials based on temporally distant offenses" under file review system). The Due Process Clause does not permit such prolonged detention in the absence of any meaningful procedural safeguards. *See Zadvydas*, 533 U.S. at 692; *Tijani*, 430 F.3d at 1242.[20]

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN HOLDING THAT THE GOVERNMENT IS SUBSTANTIALLY LIKELY TO BE REQUIRED TO CARRY THE BURDEN OF PROOF UNDER THIS COURT'S PRECEDENT.

The government's argument that the district court abused its discretion by ordering that the government carry the burden of proof at the detention hearing is meritless.[21] The government argues in its opening brief that the regulations governing standard immigration bond hearings place the burden of proof on the

[20] In contrast, at the hearing provided pursuant to the district court's preliminary injunction order, Mr. Diouf was represented by counsel, given an opportunity to testify, and allowed to present witnesses and other evidence before an impartial immigration judge. The government was given a corresponding opportunity to present witnesses and evidence, and to argue that Mr. Diouf was responsible for any unjustifiable delay in the process which might warrant his otherwise lengthy detention. At the conclusion of the hearing, the IJ determined that his detention was not justified. Evidence from that hearing has been made part of the record before the district court, but was not in the record at the preliminary injunction stage, and therefore is not in the record before this Court.

[21] Notably, the government has not challenged any other aspect of the standard set forth in the district court's order. Thus, the government has not argued that the district court abused its discretion by ordering that the IJ require proof by clear and convincing evidence, or by requiring the IJ to consider danger, flight risk, the length of detention, and the likelihood of the government ultimately prevailing in removal proceedings in the reasonably foreseeable future.

noncitizen. *See* Govt' Br. at 33-34. Mr. Diouf does not dispute that this is the case so long as detention has not become prolonged and indefinite. Rather, he contends, and the district court agreed, that when detention has become prolonged and indefinite, the detention statute must be read to shift the burden of proof to the government. This Court has imposed this burden shift in cases of prolonged detention in light of the serious constitutional problems that would arise if a noncitizen were to bear the burden of proof in any proceeding where a substantial deprivation of liberty such as prolonged and indefinite detention is at stake.

This Court has already held that the government must bear the burden of proof in a prolonged detention hearing. *See Tijani v. Willis*, 430 F.3d 1241, 1242 (9th Cir. 2005). *Tijani* in turn relied on the Supreme Court's unanimous decision in *Cooper v. Oklahoma*, 517 U.S. 348, 363 (1996), which held that "due process places a heightened burden of proof on the State in civil proceedings in which the individual interests at stake … are both particularly important and more substantial than mere loss of money" (internal citations omitted). This is the rule in a variety of other civil contexts as well. *See, e.g.*, *Kansas v. Hendricks*, 521 U.S. 346, 368 (1997) (upholding prolonged detention of sex offenders in part because government bore burden of proof); *United States v. Salerno*, 481 U.S. 739, 752 (1987) (same for pre-trial detention based

on dangerousness). Here, it is clear that substantial individual interests are at stake. Therefore, the government must bear the burden of proof.

The government attempts to distinguish *Tijani*, relying again on the argument that Mr. Diouf's case is distinguishable because he is "collaterally" challenging his removal order. That argument is refuted above in Part II.B. Here, it is worth noting that the government's argument that noncitizens deserve less process with respect to their detention if they are "collaterally" challenging their removal makes even less sense as applied to the burden of proof. If the government wishes to defend the prolonged and indefinite detention of a noncitizen on the ground that the noncitizen is frivolously pursuing litigation so as to avoid deportation, the government should bear the burden to prove that fact. The government makes the circular argument that it should not bear the burden of proving that the noncitizen's appeal is frivolous, because the appeal is frivolous.[22] Obviously, that argument must be rejected.

[22] Relatedly, the government misunderstands the issue in this case when it suggests that "immigration judges lack delegated authority to make detention decision [sic] concerning aliens under an administratively final order of removal." Gov't Br. at 33. While this may be what the regulations prescribe, the district court in this case ordered the government – including the Attorney General, who is a party to the suit and the official responsible for the conduct of immigration judges – to conduct a hearing regarding Mr. Diouf's prolonged and indefinite detention in order to justify the lawfulness of his detention under this Circuit's caselaw. The district court's holding was based on this Court's statutory and constitutional holdings, which trump the immigration regulations

IV. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN CONCLUDING THAT THE BALANCE OF HARDSHIPS TIPS IN PETITIONER'S FAVOR.

Finally, although the government makes no mention of this issue in its brief, this Court cannot reverse the district court's decision without finding that the district court failed to correctly weigh the balance of hardships. Under the standard governing preliminary injunctions, the district court merely had to find that Mr. Diouf showed "either (1) a combination of probable success on the merits and the possibility of irreparable injury or (2) that serious questions are raised and the balance of hardships tips sharply in [his] favor." *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1234 (9th Cir. 1999) (internal quotations omitted). Here, the government has not articulated any harm it suffered merely by being forced to hold a hearing before an IJ. In contrast, Mr. Diouf's lengthy incarceration without a hearing works an obvious and severe harm on him and his U.S.-citizen wife, Renae Campbell. That Mr. Diouf has complied with all supervision conditions without incident for four months since his release only underscores the fact that the district court's comparative harm analysis did not constitute an abuse of discretion.

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to the extent they conflict. Nothing in the immigration detention statutes forbids such a court-ordered hearing before an immigration judge.

Indeed, where the balance of hardships tips so sharply in Mr. Diouf's favor, he merely has to show that his legal claims raise "serious questions." *See id*. Mr. Diouf more than met this standard. The district court's decision in his favor does not constitute an abuse of discretion.[23]

[23] Mr. Diouf argued at some length before the district court that the balance of hardships tipped sharply in his favor, relying on a substantial body of legal authority. He has not repeated those arguments here because the government has failed to raise the issue.

CONCLUSION

For the foregoing reasons, the district court's decision granting in part Petitioner's Motion for a Preliminary Injunction should be affirmed.

Respectfully submitted,

Date: June 19, 2007

_____

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached Answering Brief of Petitioner-Appellee is proportionally spaced, has a 14-point Times New Roman typeface and contains 16,500 words or less including headings, footnotes and quotations.

Dated: June 19, 2007

_____
Cecillia D. Wang

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, counsel for Petitioner states that the following cases pending in the Ninth Circuit may raise closely related issues concerning the prolonged and indefinite detention of aliens pending completion of removal proceedings:

Martinez v. Gonzales, No. 07-55332

Soeoth v. Gonzales, No. 07-55380

Soeoth v. Gonzales, No. 07-55549

The following cases relate to Petitioner's claims against removal:

Diouf v. Gonzales, No. 06-71922

Diouf v. Gonzales, No. 06-73991

Counsel is not presently aware of other cases raising the same or closely-related issues pending before this Court.

APPENDICES

APPENDIX I - Bond Order of the Immigration Judge (February 9, 2007)

APPENDIX II - Opening Brief for Petitioner, *Diouf v. Gonzales, et al.* (9th Cir. No. 06-71922) (case pending)

APPENDIX III - Docket for *Diouf v. Gonzales, et al.* (9th Cir. No. 06-71922) (case pending, docket as of June 18, 2007)

APPENDIX I

Bond Order of the Immigration Judge
(February 9, 2007)

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
SAN PEDRO, CALIFORNIA

FILE A#79 768 086

POST REMOVAL BOND PROCEEDINGS

07 FEB -9 AM 8:05

IN THE MATTER OF:
Amadou Diouf

ON BEHALF OF RESPONDENT:

Ahilant T. Arulanantham.Esq.

ON BEHALF OF INS:

Tara Naselow,
Deputy Chief Counsel

BOND MEMORANDUM ORDER

Based upon a review of the evidence and the prior decisions in this case, there is a final administrative order of removal. The government has argued this Court does not have jurisdiction under §241 of the Act to hear this case. Apparently United States District Court Judge Terry J. Hatter disagrees with the government. Judge Hatter has conferred jurisdiction on this Court and issued the following guidelines to conduct this custody hearing within 30 days:

> This Court is to determine if respondent's prolonged detention is justified. At the hearing this Court shall order respondent released on reasonable conditions unless the government shows by clear and convincing evidence that respondent presents a sufficient danger or risk of flight to justify his detention in light of how long he has been detained already and the likelihood of his case being finally resolved in favor of the government in the reasonably foreseeable future.

This order is dated January 3, 2007.

Respondent's counsel filed a motion to continue these proceedings with this Court on January 30, 2007, arguing he had contracted a viral laryngitis and had completely lost his voice. He further filed a motion for extension of time with Judge Hatter on January 31, 2007. This Court denied the motion because of the time constraints placed in the original order issued by

Judge Hatter. On January 31, 2007, Judge Hatter granted an extension of time for only one week until February 9, 2007.

Respondent's attorney appeared in this Court on February 1, 2007, and was remarkably healthier. He acknowledged this in court. Based upon the improvement in his health, this Court set the bond hearing for February 5, 2007, and granted his continuance until that date. Mr. Arulananthan then requested additional time because he argued he had little time to prepare. Both sides blamed the other for failing to file the motion for a timely bond redetermination before this Court. The government stated they were ready to proceed. DHS argued respondent had more than ample time to prepare knowing Judge Hatter had issued a 30 days time limit on the original order of January 5, 2007.

Respondent's counsel should have been prepared for hearing on the issue of bond when he was before Judge Hatter in district court on his writ or shortly thereafter. Counsel for respondent has disregarded Judge Hatter's original order of January 5, 2007 which stated the bond hearing had to be completed within 30 days and now with the new deadline of February 9, 2007. In addition, respondent has failed to articulate sufficient facts to show "reasonable cause" as to why a second continuances should be granted in this case. His second request for bond continuance was denied on February 1, 2007.

The following evidence was presented during the February 5, 2007 bond hearing:

Documentary Evidence

Exhibit #1	The Notice to Appear dated January 24, 2003;
Exhibit #2	Respondent's conviction for possession of less than 30 grams of marijuana;
Exhibit# 3	Orders of the immigration judges in 2003 and two orders in 2005; and BIA dismissal of respondent's appeal in 2006;
Exhibit #4	Ninth Circuit Court of Appeals 2007 decision granting respondent appointment of counsel; Ninth Circuit decision referring respondent's case to mediation and additional evidence related to his pending Ninth Circuit petitions; Declaration of Alioune Diouf (respondent's brother); and Documentation relating to his marriage and his pending I-130 petition;
Exhibit #5	Respondent's witness list.

Testimony of Witnesses

Amadou Lamine Diouf

Respondent testified he is 31 years old and married. He is from the country of Senegal. Respondent entered the United States with a F-1 visa in 1996, and subsequently overstayed his visa. The reason why he overstayed his visa was because he became romantically involved with his wife who is a United States citizen. After they met the couple began living together and had

plans to marry; however, respondent was arrested in early January 2003 for possession of marijuana in Washington State. Respondent and another individual traveled to Seattle to deliver a set of drums. Two pounds of marijuana were found in the vehicle, however, there was a stipulation for his plea for less than 30 grams. Respondent was sentenced to 75 days with 45 days actual time served. This is respondent's only conviction.

Once respondent served his time, he came into DHS custody in Seattle. He was represented by a lawyer at the immigration court hearing and respondent posted bond. Respondent told the judge he had a common law partner because he had been living with his wife since 2001. Respondent testified he was not aware that he had to depart the country after his immigration hearing. His lawyer told him not to leave the country and marry his wife in the United States instead of Senegal. Respondent's lawyer told him if he left the United States he may have problems upon attempting to re-enter. Respondent married June 17, 2003.

Respondent testified his attorney filed an I-130 petition on his behalf June 19, 2003. To this date, the I-130 has not been adjudicated. In March 2005, respondent was taken into custody by DHS after he failed to depart the United States. Respondent hired another lawyer to file a motion to reopen May 2005 once he realized what was going on in his case. Respondent also filed a complaint with the State Bar of California for ineffective assistance of counsel against his former attorney. Respondent testified his motion to reopen immigration proceedings was denied by the immigration judge and the BIA. Respondent could no longer pay for an attorney so he filed a pro se petition and received an order staying his departure from the Ninth Circuit. (See Exhibit 4 Tab G). He also filed a second motion to reopen which was denied by the BIA. The Ninth Circuit appointed him counsel January 17, 2007. His case was referred to the mediation unit for determination. Respondent testified his two prior Ninth Circuit petitions were denied because he was physically moved to Santa Anna jail while in DHS custody. Based upon the transfer, respondent was told he would receive his mail which either did not occur or he received his mail extremely late.

On cross examination respondent testified he was taken by DHS to the airport to be deported, however, he did not agree to leave at that time. The reason he refused to get on the airplane on that date is because he was not given advanced notice that he was going to depart that day and he did not have clothing nor any money to travel with.

Respondent testified that he was last detained by DHS on March 29, 2005, and he has been in detention for 22 months. This has been a financial and emotional hardship on his wife whom he helps to support.

Rene Campbell

Mrs. Campbell testified she is 24 years old and a United States citizen by birth. She is married to respondent. They have no children. They met at a friend's party in 2001. Mrs. Campbell works for Good Will in the resources department.

Mrs. Campbell testified she and respondent had plans to get married in Senegal in 2003. however, they advance the date by a few months based upon their lawyer's advise. The lawyer filed some papers on behalf of the respondent relating to their marriage, however, the lawyer

disappeared. When she checked she was told nothing had been filed on respondent's behalf. She has not checked with CIS recently.

Mrs. Campbell testified respondent has been detained for almost 2 years. This has been difficult for her. Respondent helped to supported her financially. She had to move out of her apartment after respondent's arrest by DHS and she moved back into her parents home where she now lives. She does not own a car.

Mrs. Campbell testified respondent is not violent or dangerous. She would help him comply with any orders of supervision. If released, respondent would live with her at her parents. She would support him if he needed time to find a job. Respondent also has a brother, Alioune Diouf, who is extremely supportive of respondent. (See Exhibit 4 Tab B). Mrs. Campbell finally testified, respondent would appear for removal if necessary and she would return to Senegal with her husband.

Analysis of this Bond Hearing

Under Judge Hatter's order, the government has the burden of proof to establish by clear and convincing evidence that respondent presents a sufficient danger or risk of flight to justify his detention in light of how long he has been detained already and the likelihood of his case being finally being resolved in favor of the government in the reasonably foreseeable future.

The marijuana conviction is respondent's only conviction. DHS argues and respondent admits there were 2 pounds of marijuana found in the car, however, it is clear from the conviction documents he was only found guilty of 30 grams or less. The government even admitted in court that respondent is not a serious danger.

Based upon the testimony of the witnesses this Court finds them to be credible. In light of the totality of the evidence presented I find that DHS has failed to establish that the respondent is a sufficient danger to warrant his continued detention without bond after 2 years.

DHS argued respondent did not leave the country on his order of voluntary departure and then later refused to leave at the airport, therefore, he is a risk of flight. In 2005 the immigration judge's order (Exhibit 3 Tab 5) indicates that respondent was advised of the formal "Limitation on Discretionary Relief" for failure to voluntary deport and he failed to comply. Respondent testified he was given misinformation about his immigration proceedings and the consequences of failing to depart by his attorney. Respondent appears to have had multiple problems with attorneys in the past and has filed a complaint with the State Bar. The fact that he has made multiple attempts to correct those mistakes by filing addition motions or petitions in court does not make him a flight risk for purposes of bond. Even if respondent is a college graduate, as the government has pointed out, it does not mean he was provided accurate information by his attorneys in this very complex area of the law.

According to respondent, DHS failed to notify him of his departure until he was taken to the airport. He had no money nor clothing when he was taken to the airport and that is why he refused to leave. DHS failed to present evidence to rebut respondent's version of events at the airport.

Respondent entered the United States in 1996. Respondent's wife testified respondent will have stable living conditions with her family. Respondent has always been both an

emotional and financial support to her. Mrs. Campbell also made reference to their problems with immigration lawyers in the past and her lack of understanding of the immigration process.

This Court must also point out that respondent and his wife have had an I-130 petition pending since 2003 and DHS counsel did not explain why this application had not been adjudicated when it has been pending for over 3 years.

This court was only provided with speculation during this hearing as to how long it would take in the foreseeable future to finally resolved the respondent's case in favor of the government with the pending petitions before the Ninth Circuit. Therefore, this Court cannot reasonably speculate on this prong of Judge Hatter's instructions.

Based upon Judge Hatter's guidelines, DHS has failed to show respondent is a risk of flight or a danger. There is insufficient evidence to establish respondent's prolonged detention without a reasonable bond. This Court hereby enters the following order:

ORDER

Based on the totality of the facts in this case, including weighing respondent's conviction in light of his equities in this country, respondent should be released on a bond of $5,000.

D.D. SITGRAVES
U.S. Immigration Judge
February 9 , 2007

CERTIFICATE OF SERVICE
THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P)
TO: ( ) ALIEN ( ) ALIEN c/o Custodial Officer ( ) Alien's ATT/REP ( ) INS
DATE: 2-9-07 BY: COURT STAFF Ana Benko Faxed by DHS
Attachments: ( ) EOIR-33 ( ) EOIR-28 ( ) Legal Services List ( ) Other

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The DHS Attorney will serve this document by electronic mail to:

Attorney Ahilan T. Arulanantham/ACLU

and

U.S. Attorney Robert Laster
The U.S. Attorney will forward this document to District Court.

APPENDIX II

Opening Brief for Petitioner,
Diouf v. Gonzales, et al.
(9th Cir. No. 06-71922) (case pending)

No. 06-71922
PRO BONO

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMADOU LAMINE DIOUF
Petitioner

v.

ALBERTO R. GONZALES, Attorney General
Respondent

PETITION FOR REVIEW OF AN ORDER OF
THE BOARD OF IMMIGRATION APPEALS

BRIEF FOR PETITIONER

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TABLE OF AUTHORITIES

CASES

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STATEMENT OF JURISDICTION

This Petition is for review of a final order of removal; this Court has exclusive jurisdiction to review such orders under Section 242 of the Immigration and Nationality Act, 8 U.S.C. § 1252. The Board of Immigration Appeals properly exercised its jurisdiction over the Immigration Judge's decision, pursuant to 8 C.F.R. § 1003.1(b)(3), and entered a final order on July 26, 2006. A.R. 25.

STATEMENT OF ISSUES

-Did the BIA err when it ruled that Petitioner was not prejudiced by his attorney's failure to file a motion to reopen?

-Did the BIA err when it ruled that Petitioner was not prejudiced by his attorney's failure to appeal his removal order?

-Did the BIA err when it ignored Petitioner's attorney's advice as a source of prejudice to Petitioner?

-Does the statutory 10-year "voluntary departure overstay" bar apply when the overstay was directly caused by ineffective assistance of counsel?[1]

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[1] See INA § 240B(d). The BIA did not rely on the 10-year overstay bar in its decision; however, any possible relief on remand will require resolution of the issue because it could be raised by the government or by the IJ or BIA sua sponte, and because the parties may wish to engage in settlement discussions which may hinge on the application of the overstay bar. The ordinary remand rule does not apply because this Court would owe no deference to a BIA ruling, insofar as ineffective assistance of counsel is a constitutional claim grounded in the Due Process Clause. The scope of the effective representation right, accordingly, is not a question of statutory interpretation of the INA. Thus the BIA is entitled neither to first crack at it (under the ordinary remand rule) nor to deference (under *Chevron* et al.). Furthermore, as detailed below this Court has already granted the precise relief sought in this case—remand for reopening for consideration of an adjustment claim—where the alien overstayed his voluntary departure period based on the ineffective assistance of counsel. This Court did so after engaging in precisely the inquiry Petitioner proposes here. Thus the issue is properly before this Court in two respects: first, because even if it were a matter of first impression, the governing principles of administrative law would not stand in the way of its resolution, and second, it is *not* a matter of first impression: this Court's precedent logically entails the proposition asserted by Petitioner.

STATEMENT OF FACTS

Petitioner Amadou Diouf, a native and citizen of Senegal, came to the U.S. in February 1996 on a student visa. A.R. 47. He enrolled at Cal-State Northridge, and graduated in May 2003, with a Bachelor of Science degree in Information Systems.[2]

On January 24, 2003, Petitioner was served with a Notice To Appear charging him with removability for overstaying his visa.[3] A.R. 196-97. Following a hearing on February 24, 2003, Immigration Judge Kenneth

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[2] As a pro se IAC claim, this case presents a relatively sparse record, and present counsel has thought fit to supply this detail about Petitioner's educational history, insofar as it is the sort of fact of which this Court might reasonably take judicial notice, *see* FRE 201(b), and more generally might want to know. For Petitioner's description of his educational history, see Complaint, *Diouf v. Gonzales*, No. 06-7452 (CDCA, filed Nov. 21, 2006) Exhibit 1 (Declaration of Amadou Diouf).

[3] The Notice To Appear also alleged removability due to a qualifying drug offense under INA §237(a)(2)(B)(i). A.R. 197. This charge, however, was in error: Petitioner has no such qualifying conviction. *See* A.R. 169 (state stipulation in Petitioner's statement on guilty plea to misdemeanor marijuana possession that Petitioner possessed less than 30 grams). It is present counsel's understanding that the government does not contest the error of that NTA charge, and that the undisputed posture of the case is that Petitioner is removable solely for overstay.

Based on the record, and present counsel's understanding of the relevant chronology, it may be that the overstay charge was in error as well, insofar as Petitioner did not graduate from Cal-State Northridge until May 2003, five months after the NTA was issued. However, it does not appear that the issue of Petitioner's student status at the time was raised before the IJ or the BIA; thus it is probably not exhausted under this Court's issue exhaustion jurisprudence, *see e.g. Barron v. Ashcroft*, 358 F.3d 674 (9th Cir. 2004).

Josephson issued a removal order, granting Petitioner voluntary departure by June 24, 2003. A.R. 24. Shortly thereafter, in March 2003, Petitioner hired attorney Nana Boachie to appeal or reopen the removal proceedings, and to pursue adjustment of status for Petitioner based on Petitioner's upcoming wedding to his longtime girlfriend Renae Campbell, a U.S. citizen. A.R. 98-99, 150-51. Petitioner and Campbell had planned to hold their wedding that summer, and Petitioner asked Boachie whether he should move the date forward. Boachie told Petitioner he would motion to reopen and an adjustment application, and advised Petitioner that as long as the marriage took place within the removal period, he could remain in the country. A.R. 123. Petitioner paid Boachie $3500, A.R. 98, and proceeded with a June wedding, per Boachie's advice. On June 17, 2003, he and Campbell were married. A.R. 151.

Boachie, however, never filed the motion to reopen, nor did he appeal the removal order. Petitioner, now married, followed Boachie's advice regarding the legality of overstaying the departure period, and remained in the U.S. until he was arrested and detained in March 2005. He remained in detention, often in solitary confinement, for the next two years. Following a habeas corpus petition filed in the District Court for the Central District of

California, Petitioner was released. *Matter of Diouf*, No. A79-768-086 (Immigration Court, San Pedro, Cal., Jan. 31, 2007).

In May 2005, during Petitioner's detention, Boachie filed, on his own initiative and without Petitioner's approval, a motion to reopen. The motion was at that point more than two years late. A.R. 8-9, 129-31, and it was dismissed as untimely on June 8, 2006, A.R. 2. Petitioner, after learning that Boachie had failed to file the initial motion and had taken no other action on his case for two years, separately filed, on May 5, 2006, a pro se motion to reopen due to ineffective assistance. Petitioner's pro se motion was dismissed on the merits on July 26, 2006, A.R. 26. Present pro bono counsel was appointed by this Court by order of March 6, 2007.

STATEMENT OF THE CASE

The instant Petition is for review of the BIA's July 26, 2006 decision, *see* A.R. 26, on the merits of Petitioner's pro se motion, filed on May 5, 2006, to reopen based on his ineffective assistance claim, *see* A.R. 8-10. (The BIA also issued an opinion, on June 8, 2006, denying as untimely the May 2005 motion to reopen filed by Boachie. A.R. 2.) The government waived its objection to the numerical limit of one motion to reopen and requested that the BIA rule on the merits of the ineffective assistance claim,[4] because Petitioner alleged that the untimely motion was filed without his

[4] It would appear that by requesting a BIA decision on the merits of the ineffective assistance claim, the government has waived arguments invoking the procedural prerequisites to such claims outlined in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). And the BIA reached the merits without alluding to those procedural prerequisites. Thus the government would appear to be barred from raising them now (by waiver) and this Court would be barred from relying on them (by the ordinary remand rule, *see, e.g. INS v. Ventura*, 537 U.S. 12, 16 (2002) (per curiam)). In any event (and although Petitioner has arguably satisfied its requirements), *Lozada* is not the law in this Circuit. *See, e.g.*, *Granados-Oseguera v. Gonzales*, 464 F.3d 993, 998 (9th Cir. 2006) ("While these so-called *Lozada* requirements help to provide notice and ensur[e] that a legitimate claim actually exists, they "are not sacrosanct. In fact, we have not hesitated to address ineffective assistance of counsel claims even when an alien fails to comply strictly with *Lozada* where the record shows a clear and obvious case of ineffective assistance.") (internal citations, quotations omitted); *Castillo-Perez v. INS*, 212 F.3d 518, 525-27 (9th Cir. 2000) (explaining why *Lozada* does not govern where the record is clear); *Rodriguez-Lariz*, 282 F.3d at 1227 ("[The Lozada] factors are not rigidly applied, especially when the record shows a clear and obvious case of ineffective assistance."; *Fong Yang Lo*, 341 F.3d 934 n.4 (9th Cir. 2003) ("We seldom reject ineffective assistance of counsel claims *solely* on the basis of *Lozada* deficiencies.").

authorization or knowledge, by the same attorney whose ineffective assistance was the basis for Petitioner's pro se motion. A.R. 31. The BIA then ruled, on the merits, on petitioner's pro se ineffective assistance claim, and dismissed it. A.R. 26. The BIA held that Boachie's conduct had not prejudiced Petitioner. The BIA reasoned that because the filing period for the motion to reopen expired one month prior to Petitioner's wedding date, any motion filed after the wedding date would have been untimely; and second, that because the IJ's removal order included an apparent appeal waiver, no appeal of the removal order would have been possible. A.R. 27.

ARGUMENT SUMMARY

The BIA erred when it ruled that Petitioner was not prejudiced by his attorney Boachie's failure to file a motion to reopen, because it ignored two obvious options that a competent attorney could have pursued.

First, Boachie could have timely filed the motion to reopen, and then supplemented it with the relevant documents after the wedding took place. The applicable regulations facially contemplate the possibility of such a procedure, and certainly do not rule it out as impermissible, and this Court's caselaw demonstrates that it does in fact occur. The BIA's argument, that a post-wedding filing would have been untimely, ignores the relevant issue, which is whether a timely, pre-wedding filing had a plausible claim of success. Because the BIA ignored this issue, it failed to apply the proper prejudice inquiry as set out by this Court in *Ray v. Gonzales*, 439 F.3d 582, 587 (9th Cir. 2006) (holding that the prejudice inquiry requires analysis of whether a forfeited claim to relief was "plausible.").

Second, Boachie could have advised Petitioner to move his wedding date forward. The prejudice inquiry on the facts of this case must look to Petitioner's plausible claim for relief as of March 2003, when he hired Boachie, and ask whether Petitioner forfeited that claim because of

Boachie's ineffective representation. When Petitioner hired Boachie in March 2003, he had planned on holding his wedding that summer. Boachie advised Petitioner to move the date forward to June—within the *voluntary departure* period—as opposed to May, within the *filing* period. Boachie further advised Petitioner that once he was married, he could stay in the U.S. beyond the expiration of the voluntary departure period. This erroneous and highly prejudicial advice, particularly when coupled with Boachie's failure to file the necessary motion, the filing of which was the legal basis for the advice in the first place, falls squarely within the limits of this Court's ineffective assistance caselaw, and the BIA erred by failing to take it into account as a prejudice to Petitioner.

The BIA also erred when it ruled that Petitioner was not prejudiced by Boachie's failure to appeal the removal order because Petitioner had waived appeal. The BIA's reasoning is patently circular, because the *basis* for that appeal would have been precisely the argument that Petitioner's apparent appeal waiver was not made knowingly and intelligently. That argument had plausible grounds for success because the record lacks any evidence of Petitioner's waiver besides the IJ's reference to it in his removal order and subsequent oral decision.

The statutory 10-year "voluntary departure overstay" bar to relief, see INA § 240B(d), does not apply when the overstay was caused by ineffective assistance of counsel. This Court's decision in *Granados-Osegura*, 464 F.3d 993 (9th Cir. 2006), which granted relief following overstay in an ineffective assistance of counsel case identical to the instant case in every material respect, logically entails that proposition.

ARGUMENT

I. PETITIONER WAS PREJUDICED BY HIS COUNSEL'S FAILURE TO FILE A MOTION TO REOPEN OR APPEAL HIS REMOVAL ORDER, BECAUSE HE THEREBY FORFEITED RELIEF FOR WHICH HE HAD A PLAUSIBLE CLAIM.

"Ineffective assistance of counsel in a deportation proceeding rises to the level of a due process violation where the proceeding was 'so fundamentally unfair that the alien was prevented from reasonably presenting his case.'" *Castillo-Perez v. INS*, 212 F.3d 518, 526-27 (9th Cir. 2000) (quoting *Lopez v. Immigration & Naturalization Service*, 775 F.2d 1015, 1017 (9th Cir. 1985)); *see also Matter of Grijalva*, 21 I&N Dec. 472 (BIA 1996) (noting that ineffective assistance of counsel can amount to "exceptional circumstances" justifying reopening under INA § 242B(f)(2), 8 U.S.C. § 1252b(f)(2)). To make out the prejudice element of an ineffective assistance claim, an alien need not show that he would necessarily have prevailed in his claim but for ineffective assistance, but rather must show simply that he forfeited relief for which he had "plausible grounds" for success. *Ray v. Gonzales*, 439 F.3d 582, 587 (9th Cir. 2006) (holding that

"where an alien is prevented from filing an appeal in an immigration proceeding due to counsel's error, the error deprives the alien of the appellate proceeding entirely," and that, accordingly, the proceedings are subject to a "presumption of prejudice" such that this Court will find that a petitioner has been denied due process if he can demonstrate "plausible grounds for relief" on his underlying claim) (internal citations omitted).

A. PETITIONER IS PRIMA FACIE ELIGIBLE FOR I-130 ADJUSTMENT OF STATUS, BECAUSE HE IS MARRIED TO A U.S. CITIZEN AND HAS NO QUALIFYING CRIMINAL CONVICTIONS.

Petitioner has been married to a U.S. citizen for four years. A.R. 151. There is no allegation that the marriage was not undertaken in good faith. However, because the marriage took place during removal hearings, Petitioner would be required to rebut the bad-faith presumption that applies to marriages that occur during the pendency of removal proceedings. *See* 8 U.S.C. § 1255(e) (an alien filing for adjustment of status based on a marriage entered into while deportation proceedings are pending must show "by clear and convincing evidence . . . that the marriage was entered into in good faith"). Petitioner is prepared to meet this burden by proving that he

and his wife had been together for more than two years prior to the commencement of removal proceedings. A.R. 105. Hence his application for adjustment has a plausible claim of success. In any event, any application of § 1255(e) would require remand for an evidentiary hearing.

B. DUE TO THE INEFFECTIVE ASSISTANCE OF COUNSEL PETITIONER'S MOTION TO REOPEN WAS NOT TIMELY FILED.

After his initial removal hearing in February 2003, Petitioner hired attorney Nana Boachie in March 2003 specifically to file a motion to reopen based on his marriage to a citizen. A.R. 8, 98-99. The filing deadline for that motion was May 27, 2003. A.R. 27. Attorney Boachie did not file the motion within that period; in fact, he did not do so until May 27, 2005, more than *two years* later. A.R. 100. At that point, the motion was dismissed by the IJ and BIA as untimely. A.R. 2. Failure to file documents in an immigration case is straightforwardly ineffective assistance, as this Court has held. *E.g., Ray v. Gonzales*, 439 F.3d 582 (9th Cir. 2006) (failure to file a motion to reopen); *Singh v. Gonzales*, 416 F.3d 1006 (9th Cir. 2005)

(failure to file a brief); Vu v. Gonzales, No. 04-70937, No. 05-75174 (9th Cir. Jan. 22, 2007[5]) (failure to file a notice of appeal).

C. THE BIA ERRED WHEN IT REASONED THAT THE PETITIONER WAS NOT PREJUDICED BY BOACHIE'S INEFFECTIVE ASSISTANCE.

The BIA does not contest that Boachie failed to file the motion to reopen, as he had been hired to do, or that he failed to appeal the IJ's ruling, or that he gave Petitioner erroneous advice. Nonetheless, the BIA dismissed Petitioner's ineffective assistance claim, ruling that Petitioner was not prejudiced by Boachie's actions and omissions.

The BIA reasoned, first, that because Diouf's marriage did not occur until June 17, 2003, outside the filing period, no timely motion to reopen could have been filed after the wedding; and second, that because Diouf had waived his appellate rights as part of the voluntary departure grant, no appeal would have been possible. A.R. 27.[6] In short, the BIA held that

[5] Vu is a 2007 NPO, and thus is citeable under Fed. R. App. Proc. 32, as an example of how routine this proposition of law is in this Court.

[6] Petitioner does not contest the BIA's third holding, that Boachie's failure to seek an extension of the voluntary departure period was not prejudicial, because no further extension of the voluntary departure period would have

Petitioner's case was hopeless, so Petitioner did not lose anything due to Boachie's failure to do anything.

The conclusion that Boachie's actions and omissions did not prejudice Petitioner cannot be sustained, because it ignores three obvious possible courses of action that a constitutionally effective attorney could have pursued: (1) filing the motion within the filing period, in advance of the wedding; (2) advising Petitioner to move up the wedding date to within the filing period; and (3) appealing the removal order. Furthermore, (4) it ignores the fact that Boachie's erroneous advice to Petitioner that he could legally overstay was the direct cause of Petitioner's subsequent arrest, detention, and potential loss of eligibility for adjustment for ten years.

1. BOACHIE COULD HAVE TIMELY FILED THE MOTION WITH AFFIDAVITS ATTESTING TO THE UPCOMING MARRIAGE, AND SUPPLEMENTED IT AFTER THE WEDDING.

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been statutorily possible; also, an extension of the voluntary departure period would not have affected the running of the filing period for the motion to reopen.

The BIA did not address Petitioner's claims of erroneous advice.

In holding that Boachie's failure to file a motion to reopen did not prejudice Petitioner, the BIA reasoned as follows:

> We note that a motion to reopen filed in regard to the Immigration Judge's February 24, 2003, decision was due on or before May 27, 2003, while his marriage, upon which he bases his claim of eligibility for the relief sought, took place on June 19, 2003, approximately a month after the regulatory due date for a motion to reopen. As a result, the respondent cannot now claim that he was prejudiced by his former counsel's failure to file the motion because it would be untimely even if filed on the date of the marriage.

A.R. 27.

As authority, the BIA cites only 8 CFR 1003.23(b)(1), which provides that "a motion to reopen must be filed within 90 days of the date of entry of a final administrative order of removal, deportation, or exclusion." It is obviously true that a motion to reopen filed on June 19, 2003 would have been untimely because the 90-day period specified in the regulation expired on May 27.

But even assuming—which Petitioner does not concede—that a constitutionally effective attorney would not have advised him to move up his wedding date, *see infra* Part C.2, there is nothing in the applicable regulations that prevents a motion to reopen from being filed based on an *imminent change in status that has not yet occurred*. The BIA cites no authority for its assumption that a motion to reopen based on a marriage to a U.S. citizen could not be legitimately filed, and ultimately granted, where the marriage occurred subsequent to the filing of the motion. Indeed, the plain language of the applicable regulation straightforwardly contemplates filing motions prior to the occurrence of the event that will be the basis for the relief:

> "A motion to reopen proceedings shall state the new facts that **will be proven at a hearing to be held if the motion is granted** and shall be supported by affidavits and other evidentiary material."

8 CFR 1003.23(b)(v)(iii) (emphasis added).

A motion to reopen simply sets out the facts that the alien *will* prove at a new hearing, *if* a new hearing is granted. In this case the marriage occurred less than a month after the filing period for the motion to reopen

had run. A timely motion would have stated that Petitioner *would* prove at a future hearing that he had gotten married on June 19. Absent any suggestion that that future hearing would have been held prior to June 19,[7] the BIA's reasoning collapses. Boachie could, and should, have timely filed a motion stating that Petitioner would prove that he had gotten married. (A timely filing would have tolled the voluntary departure period until a final decision on the merits. *Azarte v. Ashcroft*, 394 F.3d 1278, 1289 (9th Cir. 2004).)

To be sure, though the BIA does not cite it,[8] another regulation, 8 C.F.R. 3.2(c)(1), provides that "[a] motion to reopen proceedings for the purpose of submitting an application for relief must be accompanied by the appropriate application for relief and all supporting documentation." Under this regulation, the I-130 application from Petitioner's spouse would need to "accompany" the motion. The regulation is silent, however, on whether the I-130 might be added to a motion after filing but before the motion is decided. The question, in short, is the following: Could a motion to reopen be filed within the filing period on the basis of a marriage to be held outside

[7] The government has not made, and could not reasonably make, such a suggestion. Indeed, Petitioner's I-130 application, received by the government (then the INS) on June 27, 2003, A.R. 106, is *still* pending with the agency, four years later.

[8] And thus a jurisprudentially cautious reading of, *e.g.*, *Gonzales v. Thomas*, 547 U.S. 183 (2006), might suggest that this Court could not rely on it in affirming the BIA's decision.

the filing period, containing affidavits from the couple and other documentation regarding the upcoming marriage (such as a marriage license, receipts from caterers, etc.), and then supplemented with the I-130 once the wedding took place? Neither the regulations, nor the BIA's opinion, nor this Court's caselaw provides any support for the proposition that this could not be done—in other words, that such a motion would *necessarily* be rejected, so that filing it would be the practical equivalent of filing nothing at all.

In fact, however, this Court's caselaw provides conclusive evidence that the supplementation procedure *is* possible: the *Granados-Osegura* case discussed *infra* involved precisely that procedure: the attorney first filed a motion to reopen within the filing period, then supplemented it with the relevant documentation (an I-140 application) after the initial submission and outside the filing period:

> Granados-Oseguera's counsel filed a motion to reopen his removal proceedings a couple of months later, on December 6, 2002, [within the filing period][9] so that Granados-Oseguera could seek adjustment of status under 8 U.S.C. § 1255(i) based on his application for labor certification. Granados-Oseguera's counsel supplemented the

[9] December 6 was the last day of the filing period. 464 F.3d at 996 n.3.

> December 6, 2002 motion with proof that the Department of Labor had approved Petitioner's application for labor certification on December 12, 2002 [outside the filing period] and that Petitioner had filed a Form I-140, Petition for Alien Worker, with the Immigration and Naturalization Service (INS).

Granados-Osegura, 464 F.3d 993, 996 (9th Cir. 2006).

This example demonstrates that it is possible for an attorney to file a motion to reopen within a filing deadline, when the necessary supporting documents for 8 C.F.R. 3.2(c)(1) purposes do not yet exist, and then to supplement that motion after the filing deadline, when the supporting documents come into existence. It clearly, in short, can be done.

Yet the *necessary* basis for the BIA's holding is that it could *not* be done: that *any* motion Boachie might have filed during the filing period would *necessarily* have been rejected. That holding is demonstrably false and must be reversed.

The specific prejudice question before the BIA, assuming a June wedding and a May filing deadline, was the following: If Boachie had timely filed a motion to reopen on the basis of the imminent marriage, accompanied by affidavits attesting to the upcoming wedding date, and supplemented, on

June 17, with the I-130 application, would it *necessarily* have been denied? The example of *Granados-Osegura* indicates that such a procedure can be followed. The BIA cannot, under *Ray*, dismiss Petitioner's ineffective assistance claim on lack-of-prejudice grounds without answering the question set out above: Why wouldn't such a course of action have had plausible grounds for success? Yet so far from answering the question, the BIA has not even acknowledged that Boachie might have done anything at all other than wait until June 17 before filing.

2. BOACHIE COULD HAVE ADVISED PETITIONER TO SCHEDULE HIS WEDDING BY MAY 21.

Boachie, in any event, did not need to wait until June 17 to file the motion, *even if* he could reasonably have thought that he could file nothing until after the wedding. He could—and should—have advised Petitioner to schedule the wedding by May 21. Petitioner consulted Boachie in February 2003, and specifically asked what effect the pending removal proceedings would have on his upcoming wedding, planned for that summer. Petitioner specifically asked Boachie whether he needed to move the wedding date forward. Boachie advised him that as long as he scheduled the wedding

within the voluntary departure period (that is, within 120 days of the removal order, or before June 21), he would be eligible for adjustment.

That advice was plainly wrong: the CFR unambiguously states that the filing period for motions to reopen is 90 days from the removal order. 8 CFR 1003.23(b)(1). Boachie was retained precisely to file a motion to reopen based on Petitioner's marriage. A reasonably competent attorney, holding himself out as an immigration specialist, and billing a client $3500 for the express purpose of filing a motion to reopen, must necessarily be familiar with the applicable filing period. Yet Boachie both failed to file the motion within the period, as detailed above, and inaccurately advised Petitioner of the period within which he should schedule the wedding. A reasonably competent immigration attorney, faced with Petitioner's question about scheduling the date, would have advised his client that the wedding should be held prior to May 27, so as to avoid the very issue upon which the BIA has now based its dismissal.

As explained above, if Boachie had filed the motion within the 90-day period, there is no reason, prima facie, that the motion could not have been supplemented and then approved, even though the wedding did not take place until after the initial filing. But even granting, *arguendo*, the BIA's erroneous reasoning as to the prospects of any pre-wedding filing, Diouf *still*

forfeited relief due to ineffective assistance, because it was precisely on the basis of Boachie's erroneous advice that Diouf and Campbell scheduled their wedding for June as opposed to moving up the date to May or earlier.

3. BOACHIE COULD HAVE APPEALED THE REMOVAL ORDER.

Boachie could also have appealed the IJ's removal order. Had Boachie appealed the order to the BIA, the departure period would have been tolled pending appeal. That appeal would have entailed making the argument that the apparent appellate waiver on the removal order, *see* A.R. 124, was not entered into knowingly and intelligently by Petitioner. Inasmuch as that was, and is, precisely Petitioner's contention, that is precisely the argument that should have been made. Attorneys are hired to make arguments, and Petitioner gave Boachie $3500 to make them on his behalf. Given the complete lack of evidence in the record as to whether Petitioner was informed of the appellate waiver, *see infra* Part H, the argument would not, by any means, have been frivolous.

4. BOACHIE COULD HAVE ADVISED PETITIONER NOT TO REMAIN IN THE U.S. PAST HIS VOLUNTARY DEPARTURE DATE.

Even assuming that any appeal would have been denied, and any proper motion to reopen would have been untimely, Boachie's ineffective assistance still prejudiced Petitioner because Petitioner relied on Boachie's advice that he could legally stay in the U.S. past his voluntary departure date, and Petitioner relied on that advice:

> My wife and I were ready to go to my country where I would have applied for a spouse visa. Attorney Nana [Boachie] informed me that it was unnecessary to leave the country. According to him, the 1-130 petition for spouse once filed and submitted along with a motion to reopen would have allowed me to remain in the country legally. However, not until May 27, 2005 did he take action.

A.R. 123.

Boachie's advice would have been sound under *Azarte v. Ashcroft*, 394 F.3d 1278, 1288 (9th Cir. 2005) ("[W]e hold that in cases in which a motion to reopen is filed within the voluntary departure period and a stay of removal or voluntary departure is requested, the voluntary departure period is tolled during the period the BIA is considering the motion."), if Boachie had timely filed the motion. Under *Azarte*, if Boachie had timely filed a motion to reopen, then Diouf could have remained in the U.S. until he received a final decision on the merits of the motion. But Boachie did not file the motion, the filing of which was the very basis of his advice!

It is likely, furthermore, that the motion, if timely filed, would have been granted. It is the policy of the Departments of Justice and Homeland Security that eligible aliens seeking adjustment should be granted adjustment.[10] Petitioner's marriage made him eligible, and thus there are good grounds for supposing that a timely motion would have been granted. And the problem of the filing period expiring before the wedding date

[10] *See, e.g*, Office of Immigration Litigation, *Immigration Litigation Bulletin*, 11/30/05, at 8 (citing 10/24/05 memo from ICE Principal Legal Advisor William Howard articulating the department's position that cases should be remanded if, inter alia, the alien is potential beneficiary of clearly approvable I-130 adjustment motion, or forfeited relief for which he was prima facie eligible, due to ineffective assistance).

Petitioner recognizes, of course, that the Immigration Litigation Bulletin is not binding legal authority and creates no rights or obligations; Petitioner cites it only as an illustration of stated departmental priorities that might colorably be thought to apply to the facts of this case.

should have been straightforwardly resolved in March, when Petitioner hired Boachie.[11]

This Court has repeatedly held that ineffective assistance can be made out when an attorney gives advice to an alien that, when followed, causes the alien to forfeit otherwise-available relief. For example, this Court has found ineffective assistance where the attorney advised the alien to skip a hearing, *see Fajardo v. INS*, 300 F.3d 1018, 1019 (9th Cir. 2002); and where the attorney told the alien the wrong time for a hearing, *see Fong Yang Lo v. Ashcroft*, 341 F.3d 934, 936 (9th Cir. 2003).[12]

In each case, following the bad advice caused the alien to forfeit other relief, for which he had a plausible claim. (Indeed, in another pre-2007 NPO that counsel is prohibited from citing, this Court specifically accepted and

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[11] This is not by any means mere strategic second-guessing with the clarity of hindsight. To put the issue as plainly as possible, how could a competent attorney, hired in *March* to file a motion to reopen, due in *May*, on the basis of an upcoming wedding scheduled for *June*, possibly *not mention* to the client that the wedding date should be moved up to within the filing period? It is difficult to understand how an attorney could have accepted this representation without considering that issue, or could have gotten the answer wrong. If the wedding date could not be moved, then a competent attorney would have either declined the representation or pursued the option discussed above in Part C.1 (timely filing of motion, with post-wedding supplementation with I-130).

[12] This Court has also found, in a pre-2007 (and thus unciteable) NPO, ineffective assistance where the attorney advised the alien with a prior conviction to seek a gubernatorial pardon rather than pursue available Federal First Offender Act relief.

endorsed the alien's argument that the alien was prejudiced when ineffectiveness of counsel had deprived the alien of the opportunity to take advantage of the benefits of voluntary departure.)

Just so here: First, Boachie either advised Petitioner that the June wedding date was fine, or failed to advise him to move it forward. Second, Boachie advised Petitioner that as long as he was married, he could legally stay past the departure period—advice which was contingent as a matter of law on Boachie's filing a motion that he did not file. Petitioner has attested that but for Boachie's advice he would have left the country after his marriage, within the voluntary departure period. If Petitioner had left as he had planned, his U.S. citizen spouse could still have filed an I-130 application at any time, and he could have obtained his visa in Senegal, and not been subject to the 10-year voluntary departure bar.[13]

II. UNDER THIS COURT'S DECISION IN *GRANADOS-OSEGUERA*, THE 10-YEAR VOLUNTARY DEPARTURE BAR IS

[13] As explained below, given this Court's recent ineffective assistance jurisprudence, most recently exemplified by *Granados-Oseguera*, 464 F.3d 993 (2006), the 10-year voluntary departure bar is not is not a barrier to relief for Petitioner.

NOT A BARRIER TO REMAND IN CASES OF INEFFECTIVE ASSISTANCE.

The fact that Petitioner overstayed his voluntary departure period does not bar him from relief, under this Court's precedent, because his overstay was occasioned by ineffective assistance. The facts in this Court's recent decision in *Granados-Oseguera*, 464 F.3d 993 (2006), are uncannily on all fours with those in the instant case. In *Granados-Oseguera*, the alien was subject to removal order and granted voluntary departure. The alien hired an attorney to file a motion to reopen based on the alien's eligibility for I-140 adjustment of status.[14] *Id*. at 996. The alien was prima facie eligible for that adjustment. *Id*. However, the attorney failed to file the motion to reopen within the departure period. *Id*. Under *Azarte*, as explained *supra*, "in cases in which a motion to reopen is filed within the voluntary departure period and a stay of removal or voluntary departure is requested, the voluntary departure period is tolled during the period the BIA is considering the motion." 394 F.3d at 1289. As a result of counsel's failure to file, the departure period was not tolled, and petitioner overstayed. When counsel did file the motion (which was timely filed within the filing period), the BIA

[14] I-140 adjustment is employment-related adjustment; I-130 adjustment is family-related adjustment.

dismissed the motion because of the overstay bar. This Court explicitly rejected the BIA's reasoning, and remanded on the grounds that the overstay was the result of ineffective assistance:

> [Petitioner's] counsel . . .failed to file a motion to reopen within Petitioner's 30-day voluntary departure period where counsel knew or should have known that Petitioner would be barred from relief if he failed to file within the 30-day departure period. . . . [C]aselaw at the time was clear that motions to reopen filed after the voluntary departure period had expired would be denied as untimely. *Shaar*, 141 F.3d at 956.
>
> There is also no doubt that these failures by his counsel were prejudicial to Granados-Oseguera's claim. The BIA denied his motion to reopen for procedural reasons -- it was filed well outside of his 30-day voluntary departure period. This untimeliness was the direct result of the inadequacy of Petitioner's counsel. The government has not rebutted this.
>
> [Because t]he BIA could "plausibly" have found that Granados-Oseguera was eligible for the relief sought -- an opportunity to seek

> adjustment of status in light of his pending labor certification . . . [w]e . . . find that his counsel's inadequate performance was prejudicial.

Granados-Oseguera, 464 F.3d at 999.

There is simply no difference between *Granados-Oseguera* and the instant case.[15] Petitioner was ordered removed and granted voluntary departure in February 2003. In March 2003 he hired Boachie expressly to file a motion to reopen based on his marriage to a U.S. citizen, a marriage which would render him prima facie eligible for I-130 adjustment. Boachie failed to file the motion, and as a consequence the voluntary departure period expired and Petitioner overstayed. If Boachie had simply filed the motion he was hired to file, the voluntary departure period would have been tolled. Furthermore, regardless of the merits of Petitioner's ineffective assistance claims, it is beyond cavil that the granting of relief in *Granados-Oseguera* logically entails[16] that the 10-year overstay bar does not preclude

[15] Indeed, just as in the instant case, the factual basis for the application itself—employment authorization in Granados-Oseguera's case, marriage in Petitioner's case—came into being subsequent to the running of the filing period.

[16] Of course, logical entailment is no substitute for an explicit statement. The instant case offers this Court an opportunity to make such an explicit, black-letter statement, which would provide future litigants (as it would have provided the litigants in this case) with an unambiguous background legal rule for purposes of negotiation. Absent such a black-letter statement,

remand where the overstay was the result of ineffective assistance. It is logically impossible to reconcile *Granados-Oseguera* with an application of the overstay bar to per se preclude relief for Petitioner. Relief in this case must stand or fall on the merits of Petitioner's ineffective assistance claim, as detailed herein.

III. NOTHING IN THE RECORD INDICATES THAT PETITIONER KNOWINGLY AND INTELLIGENTLY WAIVED HIS APPELLATE RIGHTS.

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government attorneys will understandably question their discretion to recommend adjustment in overstay cases, even those with undisputed ineffective assistance claims.

An unambiguous precedential resolution of this issue would, accordingly, further the institutional commitment of the Justice Department to ensure that aliens eligible for adjustment get hearings on the merits of their applications. *See, e.g.*, Justice Dep't, Office of Immigration Litigation, *9 Immigration Litigiation Bulletin* #11, Nov. 30, 2005, at 8 (quoting guidance issued to all OIL attorneys regarding criteria for remand, and incorporating the 10/24/05 memorandum of ICE Principal Legal Advisor William J. Howard, identifying classes of cases appropriate for remand, including, inter alia, those in which the alien "may be eligible for adjustment of status (i.e. is the potential beneficiary of a clearly approvable I-130 or I 140 and 1-485)" and those in which "through ineffective assistance of counsel forfeited relief the grant of which could reasonably be anticipated.").

For Petitioner's acknowledgement that the *Immigration Litigation Bulletin* does not create any legal rights or obligations, see supra note 11.

The BIA held, as an independent reason for dismissing Petitioner's motion, that he had waived all appellate rights as a condition of receiving voluntary departure. It is true that the IJ's decision states that there was a waiver, A.R. 125, and that Petitioner was represented by counsel at the hearing. *Id*. However, Petitioner's position was, and is, that he did not knowingly execute such a waiver. He maintains that neither his attorney at the hearing, one Brent De Young, nor the IJ, advised him that accepting voluntary departure entailed waiving appellate rights. The record contains neither a transcript of the proceedings,[17] nor any document signed by Petitioner acknowledging waiver. The only pertinent document in the record, other than the IJ's decision itself, is the Feb. 24, 2003, order of the IJ, at A.R. 156-67. That document includes a box labeled "Appeal Waived" which is circled. However, the only signature on the order is that of the IJ himself. Petitioner asserts, indeed, that he never saw that document until he received the full A.R. in the course of the present appeal. The record is completely devoid of any evidence of a knowing and intelligent waiver;

[17] In a March 2, 2006 letter to the Immigration Court, Petitioner, proceeding pro se, requested a transcript of the February 24, 2003 proceedings. A.R. 82. It does not appear that he ever received it, because no transcript appears in the A.R. Accordingly, the BIA could not have relied on such a transcript in determining that Petitioner knowingly and intelligently waived his appellate rights. If a transcript exists, it would certainly be helpful on remand in settling this issue. Without it, knowing and intelligent waiver cannot be proven.

accordingly, the issue of whether the waiver was executed knowingly and intelligently can only be resolved through an evidentiary hearing on remand.

CONCLUSION

Petitioner forfeited relief, for which he was plausibly and straightforwardly eligible, due to actions and omissions of his attorney which fall squarely in the heartland of this Court's ineffective assistance caselaw. The BIA's analysis of Petitioner's ineffective assistance claim was error for the reasons detailed herein. Accordingly, like the petitioners in *Azarte* and *Granados-Osegeura*, he is entitled to remand so that he can be placed in the position he would have been in ab initio had he had minimally constitutionally effective counsel; viz., he is entitled to remand and reopening of his removal proceedings for the purpose of considering the merits of his adjustment application.

Respectfully submitted,

_____

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STATEMENT OF RELATED CASES

For purposes of Rule 28-2.6, after reasonable inquiry, the undersigned attorney is not aware of any cases which relate to the issue in the present case.

Petitioner was released from detention by order of the Immigration Court, No. A79-768-086 (Immigration Court, San Pedro, Ca., Jan. 31, 2007), pursuant to the order of Jan. 3, 2007, in the District Court for the Central District of California, No. 06-7452 (filed Nov. 21, 2006).

_____

CALEB E. MASON

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. Proc. 32(a)(7)(c), I certify that the attached brief (1) is proportionately spaced using Times New Roman typeface; (2) has a typeface of 14 points, and (3) contains 5468 words.

_____

CALEB E. MASON

CERTIFICATE OF SERVICE

I hereby certify that on May 29, 2007, two (2) copies of the Brief for Petitioner were served on Respondent by placing them for next-day delivery, postage prepaid, addressed to:

Hillel Smith, Esq.

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_____

CALEB E. MASON

APPENDIX III

Docket for *Diouf v. Gonzales, et al.*
(9th Cir. No. 06-71922)
(case pending, docket as of June 18, 2007)

Search for Case Help

General Docket

US Court of Appeals for the Ninth Circuit

Court of Appeals Docket #: 06-71922 Filed: 4/13/06
Nsuit: 0
Diouf, et al v. Gonzales
Appeal from: Immigration and Naturalization Service

- -
Case type information:
1) agency
2) review
3)
- -
Lower court information:

District: 0973-2 : A79-768-086
Date Filed: 4/13/06
Date order/judgment: **/**/**
Date NOA filed: **/**/**
- -
Fee status: in forma pauperis

- -
Prior cases:
None
Current cases:

	Lead	Member	Start	End
companion:				
	06-71922	06-73202	6/22/06	
	06-73202	06-73991	8/15/06	
consolidated:				
	06-71922	06-73991	8/15/06	
related:				
	06-71922	07-55337	3/15/07	

Docket as of June 8, 2007 11:17 pm Page 1

06-71922 Diouf, et al v. Gonzales

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ALBERTO R. GONZALES, Attorney General

Respondent

4/13/06	FILED PRO SE INS Petition for REV and Motion for Stay. Docketed Cause and Entered Appearance of Counsel. Pursuant to G.O. 6.4(c)(1)(3) A TEMPORARY STAY OF REMOVAL IS IN EFFECT pending further order. The schedule is set as follows: Pursuant to G.O. 6.4(c)(1)(3), the schedule is set as follows: Cert. Admin. Record due 6/8/06 Response to motion for stay due 7/6/06 for Alberto R. Gonzales MOATT [06-71922] (gail) [06-71922]
4/13/06	Filed Petitioner Amadou Lamine Diouf's motion to stay deportation (see schedule above) [06-71922] served on 4/10/06 [5788450] MOATT [06-71922] (gail) [06-71922]
5/1/06	Filed Petitioner Amadou Lamine Diouf's motion to proceed in forma pauperis; dated on 4/28/06 (MOATT) [5809831] [06-71922] (ba) [06-71922]
5/2/06	Filed order (Deputy Clerk: co/PROSE) A review of the record indicates that petitioner did not provide his correct alien number to this court. Within 21 days from entry of this order, petitioner must provide this court with his correct alien number and/or a copy of the Board of Immigration Appeals order challenged in this petition. A

	review of the docket reflects that petitioner has not paid the docketing and filing fees for this petition. Within 21 days after the date of this order, petitioner shall: (1) file a motion with this court to proceed in forma pauperis; (2) pay $450 to this court as the docketing fees for this petition; or (3) otherwise show cause why the petition should not be dismissed for failure to prosecute. If petitioner fails to comply with this court, the petition will be dismissed automatically by the Clerk under 9th Circuit R. 42-1. [06-71922] (ba) [06-71922]
5/15/06	Filed Petitioner Amadou Lamine Diouf's response to order to show cause of 5/2/06, served on 5/10/06 (PROSE) [06-71922] (ba) [06-71922]
5/22/06	Received Petitioner Amadou Lamine Diouf's copy of "Warning to Alien Ordered Removed or Deported. [5788450-1] Dated on 5/17/06 (PROSE) [06-71922] (ba) [06-71922]
7/21/06	Filed order (Michael D. HAWKINS, Sidney R. THOMAS,): The court's 5/2/06 order to show cause is discharged. Petitioner's motion to proceed in forma pauperis is granted. The Clerk shall amend the docket to reflect this status. Petitioner's motion for stay of removal pending disposition of this petition is granted. The certified administrative record is now due 8/7/06. The opening brief is due 11/6/06. The answering brief is due 1/6/07. The optional reply brief is due 14 days from service of the answering brief. [06-71922] (ba) [06-71922]

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8/4/06	Filed notice of appearance of Hillel R. Smith as counsel of record for Respondent Alberto R. Gonzales. [06-71922] (ba) [06-71922]
8/7/06	Filed Petitioner Amadou Lamine Diouf's request for counsel; dated on 7/28/06 (MOATT) [5913566] [06-71922] (ba) [06-71922]
10/16/06	Filed order MOATT (JZZ) The court sua sponte consolidates petition for review nos. 06-71922 and 06-73991. The Clerk shall amend these dockets to reflect their consolidation. On 7/21/06, the court issued an order in no. 06-719922 granting petitioner's motion for stay of removal pending review. Accordingly, the motion for a stay of removal filed in no. 06-73991 is denied as unnecessary. The court has received petitioner's motion to proceed in forma pauperis, filed in no. 06-73991. The motion, however, is not accompanied by a completed financial affidavit. Within 21 days after the filing date of this order, petitioner shall complete a Form 4 financial affidavit. Failure to comply with this order may result in the denial of the motion to proceed in forma pauperis filed in no. 06-73991. The certified administrative record in these consolidated petitions shall be filed on or before 11/3/06. All other pending motions will be addressed by separate order. The Clerk shall serve this order and a Form 4 financial affidavit on petitioner. [06-71922, 06-73991] (ba) [06-71922 06-73991]
10/18/06	Electronic Certified Administrative Record Filed. CD-ROMS: 1: see case number 06-73202 on immigration database for administrative record. [06-71922, 06-73991] (stev)

[06-71922 06-73991]

12/12/06 Filed order MOATT (JZZ) Petitioner has filed a motion to proceed in forma pauperis in no. 06-73991. On 10/16/06, the court directed petitioner to submit a completed Form 4 financial affidavit in support of the motion to proceed in forma pauperis. Petitioner was warned that failure to submit a completed affidavit might result in the denial of the motion to proceed in forma pauperis. To date, petitioner has not complied with the court's order. The court sua sponte grants petitioner an extension of time to submit a financial affidavit. On or before 1/5/07, petitioner shall submit a completed Form 4 financial affidavit. Failure to comply with this order may result in the denial of the motion to proceed in form pauperis. Briefing remains suspended pending further order of the court. The Clerk shall serve this order and a Form 4 financial affidavit on petitioner. [06-71922, 06-73991] (ba) [06-71922 06-73991]

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1/17/07 Filed order (Appellate Commissioner) The motion to proceed in forma pauperis filed in no. 06-73991 is granted. The Clerk shall amend the docket to reflect this status. Upon review of the record, this court has determined that the appointment of pro bono counsel in these petitions would benefit the court's review. Accordingly, the motion for appointment of counsel is granted. The court by this order expresses no opinion as to the merits of these petitions. The Clerk shall enter an order appointing pro bono counsel to represent petitioner for purposes of these petitions only, and establishing a revised briefing schedule. The petitions are stayed pending further order of this court. Respondent has filed the certified administrative record for no. 06-71922. The certified administrative record for 06-73991 is due 1/31/07. In light of the pending immigration petition filed on petitioner's behalf, this matter is referred to the court's Mediation Unit. (MOTIONS) [06-71922, 06-73991] (ba) [06-71922 06-73991]

3/6/07 Filed order (Deputy Clerk: jmr) Appting Caleb E. Mason pro bono counsel of record. These cases are referred to the circuit mediation office for a mediation assessment conference. [06-71922, 06-73991] (sb) [06-71922 06-73991]

3/29/07 Filed order (Deputy Clerk: bls/CONFATT) This immigration case is under consideration for inclusion in the mediation program. A settlement assessment conference will be held by telephone on 4/20/07, at 11:00 a.m. Pacific Time. The court will initiate the telephone call and contact counsel at the telephone number indicated on the attached list. Contact information and the procedures governing the mediation program are set out in the attached memorandum. Counsel should read the memorandum and provide a copy to their clients. The parties and counsel are bound by the confidentiality procedures. [06-71922, 06-73991] (ba) [06-71922 06-73991]

4/11/07 Rec'd notice of change of address from Amadou Lamine Diouf: 10542 E. Mary St., Los Angeles, CA 90008, (310) 876-7106. . [06-71922, 06-73991] (ba) [06-71922 06-73991]

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4/25/07	Filed order CONFATT (CLB) The court has determined that these petitions will not be selected for inclusion in the Mediation Program. All further inquiries regarding these petitions, including requests for extensions of time, should be directed to the Clerk's office. The briefing schedule previously set by the court is amended as follows: petitioner shall file an opening brief on or before 6/1/07; respondent shall file an answering brief on or before 7/2/07; petitioner may file an optional reply brief within fourteen (14) days from the service date of the answering brief. Counsel are requested to contact the undersigned should circumstances develop that warrant further settlement discussions while the petitions are pending. [06-71922, 06-73991] (ba) [06-71922 06-73991]
5/31/07	Received original and 15 copies of Petitioner Amadou Lamine Diouf's brief (Informal: n) 33 pages; served on served on 5/29/07 (Deficient: Footnotes in brief are too small and also need addendum) Notified Counsel [06-71922] (ba) [06-71922]
6/8/07	Received Petitioner Amadou Lamine Diouf's satisfaction of (major) brief deficiency, served on 5/29/07 (Corrected Brief - Footnotes and addendum) [06-71922] (ba) [06-71922]
6/8/07	Filed original and 15 copies of Petitioner Amadou Lamine Diouf's opening brief (Informal: n) 34 pages; served on 5/29/07 [06-71922] (ba) [06-71922]

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PACER Service Center

Transaction Receipt

06/18/2007 16:55:08

PACER Login:	ai0189	**Client Code:**	GEN
Description:	dkt report	**Case Number:**	06-71922
Billable Pages:	7	**Cost:**	0.56

CERTIFICATE OF SERVICE

I, Derrick Wortes, declare as follows:

I am employed in the office of a member of the bar of this Court at whose direction the following service was made. I am over the age of eighteen years and am not a party to the within action.

On this day, I served two copies of the foregoing Answering Brief for Petitioner-Appellee by U.S. Priority Mail, postage pre-paid addressed to the following:

Gjon Juncaj
U.S. Department of Justice - Civil Division
Office of Immigration Litigation
Suite 7200 South, National Place
1331 Pennsylvania Avenue, N.W.
Washington, DC 20004

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Dated: June 19, 2007
San Francisco, California

_____
Derrick Wortes