

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NATIONAL IMMIGRATION PROJECT OF THE
NATIONAL LAWYERS GUILD, AMERICAN
CIVIL LIBERTIES UNION FOUNDATION,
IMMIGRANT DEFENSE PROJECT, POST-
DEPORTATION HUMAN RIGHTS PROJECT, and
RACHEL ROSENBLOOM,

Specifically, in 2009, in a brief addressed to the Supreme Court, the Office of the Solicitor General ("OSG") represented that, "[b]y policy and practice, the government accords aliens who were removed pending judicial review but then prevailed before the courts effective relief by, inter alia, facilitating the aliens' return to the United States by parole under 8 U.S.C. 1182(d)(5) if necessary, and according them the status they had at the time of removal." Brief for Respondent at 44, Nken v. Holder, 129 S. Ct. 1749 (2009) (No. 08-681), 2009 WL 45980 at *44. Although the OSG did not support this assertion with any citation, id., the Supreme Court in Nken, in holding that deportation of an alien before the resolution of an appeal from her order of removal does not constitute irreparable injury, expressly relied on this representation, stating that, "those who prevail can be afforded effective relief by facilitation of their return, along with restoration of the immigration status they had upon removal. See Brief for Respondent 44." Nken, 129 S. Ct. at 1761.

Court in Nken and other government officials. See Decl. of Patricia

Although a party requesting summary judgment must demonstrate that there is "no genuine dispute as to any material fact" and that she is "entitled to a judgment as a matter of law," Fed. R. Civ. P. 56(a), here the essential facts are undisputed:³

On December 17, 2009, plaintiffs filed a FOIA request with the DOJ, the DHS, and the DOS seeking information about the factual basis for the representation made in Nken, viz., that the Government has a policy and practice of facilitating deported aliens' return and restoring their prior immigration status if they successfully appeal their removal decisions. Plaintiffs' Rule 56.1 Statement of

The DHS referred plaintiffs' FOIA request to three of its

email from 2009, an undisclosed person writes, "How this is handled has alw [redacted] haphazard." Id. ¶ 44, Ex. X. Other records admit that the Government's use of parole would not restore the status that removed aliens had prior to their removal. Id. ¶ 48. ICE records do not contain any publicly accessible forms or instructions for individuals whose removal orders have been reversed or vacated. Id. ¶ 50.

On August 8, 2011, the Government directed plaintiffs' attention to a Memorandum of Agreement ("MOA") between CIS, ICE and CBP. Id. ¶ 45. As noted, supra, the MOA is also one of the two

Patricia L. Buchanan dated October 28, 2011, Ex. A (MOA). An Addendum to the MOA provides that:

ICE will adjudicate parole requests relating to aliens in

Against this factual background, the Court turns to the issues of law. "Upon request, FOIA mandates disclosure of records held by a federal agency, see 5 U.S.C. § 552, unless the documents fall within

1987).⁶ These arguments, however, apply only to the portions of the

in removal proceedings or who have final orders . . . regardless of whether the alien is within or outside of the United States."

As described below, the emails themselves (reviewed by the Court in camera) refute this argument ment ment ment ment ment ment ment ment

testimonial use" on appeal of the substance of the facts set forth in the email chain renders inapplicable the Government's recourse to the work-product privilege.

and counsel that (2) was intended to be and was in fact confidential, and (3) was made for the purpose of obtaining providing legal advice." Id. at 419. As with work-product, discussed above, a party can waive attorney-client privilege by disclosing the information voluntarily and calculated to benefit the disclosing party." In re Grand Jury Proceedings, 219 F.3d 175, 184 (2d Cir. 2000).

Turning finally to the deliberative-process privilege, this privilege has "a number of purposes:"

it serves to assure that subordinates within an agency will feel free to provide the decisionmaker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism; to protect against premature disclosure of proposed policies before they have been finally formulated or adopted; and to protect against confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's action.

Coastal States Gas Corp., 617 F.2d at 866. "Manifestly, the ultimate purpose of this long-recognized privilege is to prevent injury to the quality of agency decisions." NLRB v. Sears, Roebuck & Co., 421 U.S. 134, 142.

testimonial use" of attorney work-product at trial and then claim that
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the Government to disclose the portions of the email chain that contain factual descriptions of the putative T-7'F†RW†-7FVæ6RÖ` which the OSG asserted in Nken. Based on its in camera review of the email chain, the Court concludes that the following portions contain such descriptions:

(1) in the email sent Wednesday, December 31, 2008 at 5:13 PM, the following portions of the email contain such descriptions:

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