

1 UNITED STATES COURT OF APPEALS

2
3 FOR THE SECOND CIRCUIT

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6
7 August Term, 2010

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9 (Argued: December 6, 2010 Decided: January 26, 2011)

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11 Docket Nos. 08-6036-ag; 09-2255-cv

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14 GIORGIO GALLUZZO,

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16 *Petitioner-Appellant,*

17
18 -v.-

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20 ERIC HOLDER, JR., U.S. ATTORNEY GENERAL,

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22 *Respondent.*

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26 Before:

27 FEINBERG, B.D. PARKER, and WESLEY, *Circuit Judges.*

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29 Petition for review of an October 1, 2008 removal order
30 issued by United States Immigration and Customs Enforcement
31 and appeal from an order of the United States District Court
32 for the Southern District of New York (Rakoff, J.) entered
33 on March 28, 2009, dismissing Petitioner's civil action
34 challenging the denial of his Application to Adjust Status
35 to that of a Lawful Permanent Resident.

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37 PETITION REMANDED. JUDGMENT AFFIRMED.

1 AMANDA GRAY, Bretz & Coven, LLP, New York, NY (David
2 K. S. Kim, Matthew L. Guadagno, Jules E.
3 Coven, Kerry W. Bretz, *on the brief*), *for*
4 *Petitioner-Appellant*.

5
6 BRIENA STRIPPOLI, Trial Attorney, Office of
7 Immigration Litigation, Civil Division (Justin
8 R. Markel, Trial Attorney, Office of
9 Immigration Litigation, Civil Division, Tony
10 West, Assistant Attorney General, Carl H.
11 McIntyre, Assistant Director, *on the brief*),
12 *for* Eric H. Holder, Jr., United States
13 Attorney General, Washington, D.C.

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17 PER CURIAM:

18 Petitioner Giorgio Galluzzo, a native and citizen of
19 Italy, seeks review of an October 1, 2008 Order of Removal
20 issued under § 217 of the Immigration and Nationality Act
21 ("INA"), 8 U.S.C. § 1187. U.S. Immigration and Customs
22 Enforcement ("ICE") issued the removal order without
23 affording Galluzzo a hearing on the ground that Galluzzo
24 waived any right to be heard when he entered the United
25 States through the Visa Waiver Program ("VWP") established
26 by § 1187. Galluzzo objects that he did not waive his right
27 to a hearing and that his due process rights were therefore
28 violated by the issuance of the removal order without a
29 prior hearing. Additionally, Galluzzo appeals from an order
30 of the United States District Court for the Southern

1 District of New York (Rakoff, J.) entered on March 28, 2009,
2 dismissing for lack of jurisdiction Galluzzo's civil action
3 challenging the denial of his I-485 application to adjust
4 his immigration status.

5 For the reasons stated below, we find that, in the
6 absence of evidence of a waiver, Galluzzo's due process
7 rights were violated by his failure to receive a hearing.
8 We REMAND to allow the Department of Homeland Security to
9 determine whether Galluzzo was substantially prejudiced by
10 this violation. As to the district court's judgment, we
11 AFFIRM.

12 **Background**

13 On April 12, 1995, Galluzzo entered the United States
14 from Italy. Galluzzo concedes that he entered the United
15 States on a ninety-day tourist visa issued through the VWP,
16 which permits qualified visitors from certain countries to
17 enter the United States without applying for a standard
18 visa. See 8 U.S.C. § 1187(a). There is little evidence in
19 the record, however, related to Galluzzo's entry; the record
20 contains only a copy of Galluzzo's Italian passport and a
21 copy of the front page of Galluzzo's Form I-94W Departure
22 Record, filled out with his name and entry date in Italian.

1 Although the Government submits that Form I-94W contains a
2 waiver provision stating that a VWP entrant waives his right
3 to a hearing to contest removal, the Government did not
4 submit a Form I-94W waiver into the record. Nor, more
5 importantly, has the Government produced a signed waiver
6 executed by Galluzzo waiving his right to contest removal.

7 Galluzzo stayed well beyond the permitted ninety days.
8 Approximately three years after his entry, Galluzzo began
9 attempting to adjust his immigration status. On January 13,
10 1998, Galluzzo's employer filed an Application for
11 Employment Certification on Galluzzo's behalf. Once the
12 Department of Labor approved that application, Galluzzo's
13 employer then filed a Form I-140 Immigrant Petition for
14 Alien Worker on Galluzzo's behalf; the former Immigration
15 and Naturalization Services approved that petition on
16 November 21, 2001. On January 10, 2002, Galluzzo then filed
17 a Form I-485 Application to Register Permanent Resident or
18 Adjust Status.

19 On November 25, 2008, Galluzzo attended what he
20 believed to be a second interview related to his I-485
21 Application. Upon arrival, however, Galluzzo learned that
22 his I-485 Application had been denied on May 24, 2007. The

1 denial decision informed Galluzzo that U.S. Citizenship and
2 Immigration Services ("USCIS") found him ineligible for an
3 adjustment of status. The decision explained that an
4 alien's willful misrepresentation renders him ineligible for
5 a visa and concluded, "It is clear that as a result of your
6 blatant disregard for the terms of the VWP you have
7 willfully misrepresented yourself in conjunction with your
8 entry into the United States."

9 After he received the decision, Galluzzo alleges that
10 he was isolated from his attorney and asked to sign certain
11 forms. Upon his refusal, Galluzzo was reunited with his
12 attorney and allegedly interrogated by an FBI agent about
13 the Italian mafia; Galluzzo indicated that he did not know
14 any reputed members of the mafia. The FBI agent then
15 allegedly told him, "I don't think there is anything I can
16 do here."

17 Galluzzo was taken into ICE custody and served for the
18 first time with the October 1, 2008 Order of Removal. The
19 removal order states that Galluzzo is removable because (1)
20 he overstayed his ninety-day visa authorized under the VWP;
21 (2) his I-485 application was denied; and (3) as a VWP
22 entrant, he waived his right to contest removal except to

1 apply for asylum. Appellant remained in ICE detention from
2 November 25, 2008 until February 26, 2009 when he was
3 released under an Order of Supervision.

4 On December 11, 2008, Galluzzo filed a petition with
5 our Court for review of his removal order. Galluzzo does
6 not contend that he is eligible for asylum. Instead,
7 Galluzzo challenges his removal order on the ground that he
8 is eligible to adjust his immigration status.

9 On January 14, 2009, Galluzzo filed a civil action
10 challenging the denial of his I-485 application in the
11 Southern District of New York. On March 28, 2009, the
12 district court dismissed Galluzzo's civil action, finding
13 that Galluzzo's petition before our Court and his civil suit
14 raised similar claims challenging removal. Applying the
15 "first to file" rule, the district court refrained from
16 exercising its jurisdiction.

17 Galluzzo timely filed an appeal of the dismissal of his
18 civil action, and that action was consolidated with his
19 petition for review of his order of removal.

20 **Discussion**

21 **A. Petition for Review**

22 As an initial matter, contrary to the Government's

1 suggestion, in the absence of a waiver, Galluzzo has a
2 constitutional right to a pre-removal hearing. Although an
3 alien's constitutional rights are narrowly circumscribed
4 prior to entry, "once an alien gains admission to our
5 country and begins to develop the ties that go with
6 permanent residence his constitutional status changes
7 accordingly." *Landon v. Plasencia*, 459 U.S. 21, 32 (1982)
8 (citation omitted); see also *Plyler v. Doe*, 457 U.S. 202,
9 210 (1982) ("Aliens, even aliens whose presence in this
10 country is unlawful, have long been recognized as 'persons'
11 guaranteed due process of law by the Fifth and Fourteenth
12 Amendments."). Our sister circuits that have considered
13 this issue have likewise concluded that aliens similarly
14 situated to Galluzzo have a constitutional right, in the
15 absence of a waiver, to a hearing. See *Bayo v. Napolitano*,
16 593 F.3d 495, 502-03 (7th Cir. 2010) (en banc); *Nose v. U.S.*
17 *Att'y Gen.*, 993 F.2d 75, 78-79 (5th Cir. 1993); *Mokarram v.*
18 *U.S. Att'y Gen.*, 316 F. App'x 949, 952-53 (11th Cir. 2009)
19 (unpublished).

20 Given that Galluzzo had a constitutional right to a
21 hearing absent waiver and that the Government has submitted
22 no explicit evidence of waiver, we must determine whether

1 Galluzzo's status as a VWP entrant alone is *de facto* proof
2 that he waived his right to contest removal. The statute
3 authorizing the VWP stipulates that "[a]n alien may not be
4 provided a waiver under the [VWP] program unless the alien
5 has waived any right . . . to contest, other than on the
6 basis of an application for asylum, any action for removal
7 of the alien." 8 U.S.C. § 1187(b)(2). Based on this
8 statutory language, the Government argues that Galluzzo
9 could not have entered the country absent waiver of his
10 right to a hearing and therefore urges us to presume that
11 Galluzzo must have waived his right to contest removal.

12 We decline to adopt this presumption. In fact, we
13 "indulge every reasonable presumption *against* waiver of
14 fundamental constitutional rights." *Johnson v. Zerbst*, 304
15 U.S. 458, 464 (1938) (internal quotation marks omitted)
16 (emphasis added). The record is silent as to whether the
17 Form I-94W Departure Record Galluzzo filled out upon his
18 entry actually advised Galluzzo that he would waive his
19 right to a hearing to contest removal by entering the
20 country through the VWP. More significantly, the record is
21 likewise silent as to whether Galluzzo signed or otherwise
22 agreed to waive his rights to contest removal. We will not

1 presume away an evidentiary problem of the Government's own
2 making. We agree with the Eleventh Circuit that "[i]t would
3 be unreasonable for this Court to conclude that waiver
4 occurred in the absence of anything more than the entry-
5 ergo-waiver logic offered by Respondent." *Mokarram*, 316 F.
6 App'x at 953. Absent proof of a waiver, Galluzzo suffered a
7 violation of his right to due process when he was denied the
8 opportunity for a hearing prior to the issuance of the
9 removal order.

10 Galluzzo is not thereby entitled to relief, however,
11 unless he can show prejudice as a result of his failure to
12 receive a hearing. "Parties claiming denial of due process
13 in immigration cases must, in order to prevail, allege some
14 cognizable prejudice fairly attributable to the challenged
15 process." *Garcia-Villeda v. Mukasey*, 531 F.3d 141, 149 (2d
16 Cir. 2008). We cannot determine whether Galluzzo suffered
17 prejudice without delving into the merits of Galluzzo's
18 underlying claims, including his contention that he is
19 eligible to adjust his immigration status. Rather than make
20 that determination in the first instance, we remand to allow
21 the Department of Homeland Security to make a determination

1 as to prejudice. See *I.N.S. v. Ventura*, 537 U.S. 12, 16
2 (2002) (discussing a determination of asylum eligibility and
3 holding that "the proper course, except in rare
4 circumstances, is to remand to the agency for additional
5 investigation or explanation").

6 **B. Appeal from the District Court**

7 For the reasons stated by the district court, the
8 "first to file" rule applied to Galluzzo's claims. See
9 *First City Nat'l Bank & Trust Co. v. Simmons*, 878 F.2d 76,
10 79 (2d Cir. 1989) (explaining that "[w]here there are two
11 competing lawsuits, the first should have priority, absent
12 the showing of balance of convenience or special
13 circumstances giving priority to the second" (citations
14 omitted) (internal ellipses omitted)). Accordingly, the
15 district court properly acted within its discretion when it
16 declined to exercise jurisdiction over Galluzzo's civil
17 action.

18 **Conclusion**

19 For the above stated reasons, we REMAND Galluzzo's
20 petition to the Department of Homeland Security for further
21 proceedings consistent with this order. The district

1 court's March 28, 2009 order dismissing Appellant's civil
2 action is hereby AFFIRMED.