

Argued and Submitted
March 7, 2001--Seattle, Washington

Filed September 21, 2001

Before: Harry Pregerson, Sidney R. Thomas and
Ronald M. Gould, Circuit Judges.

Opinion by Judge Thomas

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I

Rosario Gallo-Alvarez ("Gallo") was born in Jalisco, Mexico in 1951. He entered the United States illegally in 1972, and has been in this country more or less continuously since

On July 11, 1998, Gallo's attorney moved to withdraw his previous appeal to the BIA. In that motion, Gallo requested that the BIA enter an order granting him voluntary departure, due to the medical emergency that provoked Gallo's trip to Mexico. Gallo did not make a motion to reopen the proceedings. On September 21, 1998, the BIA acknowledged that the appeal had been withdrawn, and ordered that the record be returned to the immigration court without further action. In its order, the BIA noted that it was without jurisdiction to grant Gallo voluntary departure in view of the withdrawal.

On August 10, 1999, Gallo went to the INS office to renew his work authorization, on the suggestion of Eddy. There the INS served him with a Notice of Intent to Reinstatement Prior Order. Gallo signed the order, and checked a box stating that he wished to be reinstated.

Just prior to appeal to this court, the INS released Gallo from custody. In addition, on August 16, 1999, the INS denied Gallo's application for adjustment of status.

III

The threshold issue before us is whether this court has jurisdiction over either Gallo's direct appeal or his habeas

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ambit of the reinstatement provision. Section 1231(a)(5) provides that:

If the Attorney General finds that an alien has reentered the United States illegally after having been

against Gallo originally stated his date of entry as June 10,

Because genuine issues of material fact remain, we transfer the consolidated cases to the district court pursuant to 28 U.S.C. § 2347(b)(3), which authorizes such a transfer when an agency has not held a hearing before taking the complained-of action, and "when a hearing is not required by law and a genuine issue of material fact is presented." Id.; see also *Reno v. Am.-Arab Anti-Discrimination Comm.* theict adated cases to t he72 .08uab An6 pereheeriis not requi5