

# Memorandum



BIA 06-05

Subject DHS motions to hold in abeyance pending US Supreme Court decision - <i>Gonzales v. Duenas-Alvarez</i>	Date October 5, 2006
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To  
Board Legal Staff

From  
Juan P. Osuna, Acting Chairman *JPO*

On September 26, 2006, the Supreme Court granted the government's petition for *writ of certiorari* challenging the Ninth Circuit Court of Appeals determination that the California offense for unlawful driving or taking a vehicle does not meet the generic definition of a "theft offense" under section 101(a)(43)(G) of the Immigration and Nationality Act. 8 U.S.C. § 1101(a)(43)(G), because it includes accessory or accomplice liability, and therefore criminalizes acts that neither involve "a taking of property or an exercise of control over property." *Duenas-Alvarez v. Gonzales*, 176 Fed.Appx. 820 (9<sup>th</sup> Cir. Apr 18, 2006) (unpublished, No. 04-74471), *certiorari granted by, Gonzales v. Duenas-Alvarez*, \_\_\_ S.Ct. \_\_\_, 2006 WL 1733804, 75 USLW 3001, 75 USLW 3023 (U.S. Sep 26, 2006) (No. 05-1629). Regarding the *writ of certiorari* filed in *Penuliar v. Gonzales*, 435 F.3d 961 (9<sup>th</sup> Cir. 2006), *petition for certiorari filed*, 75 USLW 3001 (Jun 22, 2006) (No. 05-1630), which involves the same issue as raised by *Duenas-Alvarez*, the Board has been advised that the Solicitor General asked the Supreme Court to hold their decision until deciding *Duenas-Alvarez*. Oral argument in *Duenas-Alvarez* has been scheduled for December 5, 2006.

As a result of the Supreme Court's action, it is anticipated that, in *Duenas-Alvarez* or *Penuliar*-related matters, the Board will continue to receive motions from the Department of Homeland Security ("DHS") requesting that proceedings before us be held in abeyance pending the court's ruling. If you are assigned a case arising out of the Ninth Circuit which contains such a request from DHS, please bring the matter immediately to the attention of your Team Leader or SPA.