

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2011-7191

NATIONAL ORGANIZATION OF VETERANS ADVOCATES, INC.,

Petitioner,

v.

SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Petition For Review Pursuant To 38 U.S.C. § 502

**RESPONDENT'S SECOND MOTION
FOR AN ENLARGEMENT OF TIME**

Pursuant to Rule 26(b) of the Federal Rules of Appellate Procedure and Federal Circuit Rule 26(b), respondent, Eric K. Shinseki, Secretary of Veterans Affairs, respectfully requests a 60-day enlargement of time, to and including May 4, 2012, within which to file our initial brief on appeal. Our brief is currently due March 5, 2012. This is our second request for an enlargement of time for this purpose. On March 5, 2012, counsel for respondent, John J. Todor, contacted counsel for petitioner, Roman Martinez, who stated that petitioner would not oppose our request for a 60-day enlargement of time, but was not in a position to

consent or disagree regarding potential mootness issues until after the repeal of the amendment.

As explained in the attached declaration of John J. Todor, Trial Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, this enlargement of time is necessary because counsel for respondent has been informed that the Secretary of Veterans Affairs has decided to repeal the rule amendment that is the subject of petitioner's challenge, *Rules Governing Hearings Before the Agency of Original Jurisdiction and the Board of Veterans' Appeals: Clarification*, 76 Fed. Reg. 52,527 (Dep't Veterans Affairs Aug. 23, 2011), and revise the rule to its previous language. The Department of Veterans Affairs, however, has not yet published the repeal in the *Federal Register*, as is required by the Administrative Procedure Act for the repeal to become effective. *See* 5 U.S.C. § 552(a)(1)(E). The 60-day enlargement of time should enable the Department of Veterans Affairs to publish the repeal in the *Federal Register*, upon which time petitioner's challenge to the rule will become moot.

We recognize that in its order of February 10, 2012, which granted our first motion for an enlargement of time, the Court stated that no further extensions should be anticipated. Nevertheless, we believe that the grounds for this motion are compelling because the previous motion was for an extension of time to file

our brief on the merits, while this extension is for the purpose of repealing the rule at issue. We have also been informed that the Department of Veterans Affairs (including the Board of Veterans' Appeals) will not apply the provisions of the August 23, 2011 amendment between now and when the repeal of that amendment takes effect.. Accordingly, the requested extension would not create any prejudice to petitioner, and in fact would accomplish the repeal of the rule sought by petitioner.

For the foregoing reasons, the Secretary respectfully requests that the Court grant our motion for an enlargement of time of 60 days, through and including May 4, 2012, to file our responsive brief in this matter.

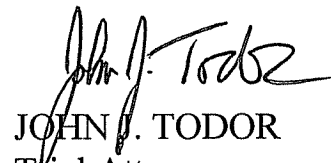
Respectfully submitted,

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March 5, 2012

Attorneys for Respondent

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**DECLARATION OF JOHN J. TODOR
IN SUPPORT OF RESPONDENT'S SECOND
MOTION FOR AN ENLARGEMENT OF TIME**

1. I am a Trial Attorney in the National Courts Section of the Department of Justice, Civil Division, Commercial Litigation Branch, Washington, D.C. I am the principal counsel for respondent, Eric K. Shinseki, Secretary of Veterans Affairs, in this appeal. I offer this declaration in support of the accompanying motion for a 60-day enlargement of time, to and including May 4, 2012, to file our initial brief on appeal, currently due on March 5, 2012.

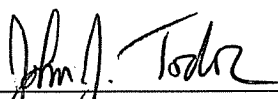
2. On March 5, 2012, I contacted counsel for petitioner, Roman Martinez, who stated that petitioner would not oppose our motion for a 60-day enlargement of time but was not in a position to consent or disagree regarding potential mootness issues until after the repeal of the amendment.

3. This is our second request for an enlargement of time. This enlargement of time is necessary because counsel for respondent has been informed that the Secretary of Veterans Affairs has decided to repeal the rule amendment that is the subject of petitioner's challenge, *Rules Governing Hearings Before the Agency of Original Jurisdiction and the Board of Veterans' Appeals: Clarification*, 76 Fed. Reg. 52,527 (Dep't Veterans Affairs Aug. 23, 2011), and revise the rule to its previous language. The Department of Veterans Affairs, however, has not yet published the repeal in the *Federal Register*, as is required by the Administrative Procedure Act for the repeal to become effective. *See* 5 U.S.C. § 552(a)(1)(E). The 60-day enlargement of time should enable the Department of Veterans Affairs to publish the repeal in the *Federal Register*, upon which time petitioner's challenge to the rule will become moot.

4. We recognize that in its order of February 10, 2012, which granted our first motion for an enlargement of time, the Court stated that no further extensions should be anticipated. Nevertheless, we believe that the grounds for this motion

are compelling because the previous motion was for an extension of time to file our brief on the merits, while this extension is for the purpose of repealing the rule at issue. We have also been informed that the Department of Veterans Affairs (including the Board of Veterans' Appeals) will not apply the provisions of the August 23, 2011 amendment between now and when the repeal of that amendment takes effect. Accordingly, the requested extension would not create any prejudice to petitioner, and in fact would accomplish the repeal of the rule sought by petitioner.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.



JOHN J. TODOR
Trial Attorney
Commercial Litigation Branch
Civil Division
U.S. Department of Justice

March 5, 2012

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of March 2012, I caused to be served by First-Class Mail (postage pre-paid) copies of "RESPONDENT'S MOTION FOR AN ENLARGEMENT OF TIME," along with the accompanying supporting declaration addressed as follows:

Roman Martinez, Esq.
Latham & Watkins LLP
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