



AMERICAN IMMIGRATION LAW FOUNDATION
LEGAL ACTION CENTER
LITIGATION CLEARINGHOUSE
NEWSLETTER

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LAWYERS CHALLENGE DHS' DENIAL OF ACCESS TO COUNSEL AT IMMIGRATION INTERVIEW

A lawyers organization and an individual arrested by ICE filed suit challenging DHS' denial of access to counsel at an immigration interview. ICE arrested over 100 individuals at a factory raid in Van Nuys, California. Many of the individuals were released and scheduled for follow up interviews, but ICE barred their lawyers from being present at the interviews. After plaintiffs filed the complaint and a motion for a TRO, DHS agreed not conduct immigration interviews until the court can consider a motion for a preliminary injunction. The case is *National Lawyers Guild et al. v. Chertoff et al.*, No. 08-01000 (C.D. Cal. filed Feb. 14, 2008) and more information is available at AILF's Litigation Issue Page, "Litigation Related to ICE Raids" at www.aifl.org/lac/lit_issue_pages.shtml.

PLAINTIFFS FILE FOR REHEARING EN BANC IN DURAN GONZALES, 245(i)/I-212 LITIGATION

On February 27, 2008, plaintiffs-appellees filed a petition for rehearing en banc in *Duran Gonzales v. DHS*, 508 F.3d 1227 (9th Cir. 2007). *Duran Gonzales* is a circuit-wide class action challenging DHS' refusal to follow *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004). In *Duran Gonzales*, the Ninth Circuit overturned *Perez-Gonzalez*, deferring to the BIA's holding that individuals who have previously been removed or deported are not eligible to apply for adjustment of status (under INA § 245(i)) along with an accompanying I-212 waiver application.

The plaintiffs' counsel, including AILF's Legal Action Center, prepared a Q&A to address issues that have arisen following the Ninth Circuit's adverse decision, including the effective date of the decision, qualifications for class membership, and strategies for class members and others affected by the decision. Counsel also remind practitioners that INA § 212(a)(9)(C)(i)(II) applies only to individuals who were ordered removed and then reentered unlawfully any time on or after April 1, 1997. Thus, these individuals are not barred from adjusting under INA § 245(i),

though they may be subject to reinstatement of removal. The Q&A and more information about the lawsuit are available at

http://www.aifl.org/lac/lac_lit_92806.shtml.

COURT TO CONSIDER SETTLEMENT IN CLASS ACTION TO RESTORE SSI BENEFITS

On February 29, 2008, a district court will consider a proposed settlement in a class action brought by refugees and asylees seeking to restore their SSI (Supplemental Security Income) benefits. Their benefits were terminated because processing delays prevented them from becoming U.S. citizens within seven years, the span of time during which LPRs may receive SSI benefits. The proposed settlement would affect all noncitizens who are receiving or have received Supplemental Security Income ("SSI") and are or may be subject to termination or suspension of SSI prior to a final decision on their current or future naturalization application and oath. *Inter alia*, the proposed settlement provides procedures for expedited processing for class members. The case is *Kaplan v.*

Continued on following page

NEW AT THE LAC ...

CSPA Case, *Sandoval-Garcia v. U.S. Attorney General*, No. 07-14747 (11th Cir.). The LAC filed a brief in a case addressing the effective date of the Child Status Protection Act. The LAC argued that INS' decision on the petitioner's adjustment application is not the "the final determination" because the petitioner renewed his application before the IJ; alternatively, the LAC argued that the CSPA applied because his adjustment application was pending before DOJ after the effective date of the Act.

Comments to Proposed Rule on Voluntary Departure. The LAC submitted comments to EOIR's proposed rule on voluntary departure. The proposed rule provides that the filing of a motion to reopen or reconsider or a petition for review automatically terminates the grant of voluntary departure. Read the comments at www.aifl.org/lac/EOIRvoldep_comments.pdf.

DAMAGES SUIT ALLEGES SEXUAL AND PHYSICAL ABUSE OF MINORS IN DETENTION

Nine plaintiffs recently brought suit against the U.S. government, DHS officials, a private detention facility (Away from Home, Inc.), and detention facility employees. Plaintiffs allege sexual, physical and emotional abuse during a period of detention at the Away From Home facility. At the time that the events occurred, the plaintiffs all were younger than eighteen. Plaintiffs allege several *Bivens* claims based on the abuse and violations of the *Flores* settlement agreement, a 1997 settlement regarding treatment of unaccompanied minors. In addition, plaintiffs' complaint includes claims of negligence, intentional infliction of emotional distress, and assault and battery. Plaintiffs seek injunctive relief and damages.

The case is *Walding v. USA*, No. 08-00124 (W.D. Tex. filed Feb. 15, 2008). More information about this suit, including the complaint, is available on AILF's Litigation Issue Page, "Other Impact Litigation" at www.aifl.org/lac/lit_issue_pages.shtml.

PROPERTY OWNERS SUE DHS OVER BORDER FENCE CONSTRUCTION

Two Texas property owners brought suit against DHS for failure to comply with federal laws regarding the construction of a border fence between the U.S. and Mexico. DHS has demanded that the plaintiffs execute a waiver of their property rights for six months. Both plaintiffs have refused to sign the waiver, and the government has sued the lead plaintiff. Plaintiffs allege that IIRIRA prohibits DHS from using an expedited condemnation proceeding, that DHS is failing to comply with standard condemnation proceedings, and that DHS has violated federal law by failing to consult with property owners and other stakeholders to minimize the impact of the fence. The plaintiffs have sought class certification and a preliminary injunction. The case is *Tamez et al. v. Chertoff et al.*, No. 08-00055 (S.D. Tex. filed Feb. 6, 2008). More information about this suit, including the pleadings, is available on AILF's Litigation Issue Page, "Other Impact Litigation" at www.aifl.org/lac/lit_issue_pages.shtml.

SSI Benefits Settlement Continued

Chertoff, 06-5304 (E.D. Pa.) To read a summary and the proposed settlement, see www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=1e4496b6414c7110VgnVCM1000004718190aRCRD.

CLEARINGHOUSE HIGHLIGHT

Third Circuit Rejects *Matter of Velarde's* Requirement that DHS Not Oppose the Motion, *Melnitsensko v. Mukasey*, Nos. 06-3189, 07-0110, 2008 U.S. App. LEXIS 2549 (2d Cir. Feb. 6, 2008).

The Second Circuit recently found that the BIA abused its discretion when it relied on *Matter of Velarde*, 23 I&N Dec. 253 (BIA 2002), to deny a motion to reopen. The court rejected the BIA's conclusion that petitioner's motion "must be denied" because DHS objected to the motion. *Matter of Velarde* set forth five factors that must be present for to grant a motion to reopen to adjust based on a marriage entered into after proceedings commenced where the visa petition still is pending. The court noted that the petitioner failed to satisfy the fifth factor, namely, that DHS not oppose a motion to reopen. The court held that while DHS' opposition may be considered in adjudicating the motion, the BIA may not deny the motion based solely on this objection.

NINTH CIRCUIT TO REHEAR *MATTER OF BLAKE* CASE *ABEBE*

The Ninth Circuit ordered that *Abebe v. Gonzales*, 493 F.3d 1092 (9th Cir. 2007) be reheard en banc. In its order, the court said, "[t]he three-judge panel opinion shall not be cited as precedent by or to any court of the Ninth Circuit." The court calendared the case for March 25, 2008.

In *Abebe*, a panel of the Ninth Circuit upheld the BIA's decision *Matter of Blake*, 23 I&N Dec. 722 (BIA 2005) (finding a person convicted of sexual abuse of a minor is ineligible a 212(c) waiver). The BIA had reasoned that the aggravated felony ground of removal had no statutory counterpart in the 212(a) grounds of inadmissibility.

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The Clearinghouse is a project of AILF's Legal Action Center. The Litigation Clearinghouse serves as a national point of contact for lawyers conducting or contemplating immigration litigation. The LAC encourages immigration attorneys to contact the Clearinghouse to share case information.

Litigation Clearinghouse Newsletters are posted on AILF's web page at www.aifl.org/lac/litclearinghouse.shtml.

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