



AMERICAN IMMIGRATION LAW FOUNDATION
LEGAL ACTION CENTER
LITIGATION CLEARINGHOUSE
NEWSLETTER

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SUPREME COURT TO ADDRESS PERSECUTOR BAR TO ASYLUM

On March 17, 2008, the Supreme Court granted certiorari to decide whether a person who was compelled, against his will, to assist or take part in persecution is barred from asylum under the persecutor bar at INA § 208(b)(2)(A)(i). The case involves an Eritrean citizen who worked as an armed prison guard. He objected to and occasionally disobeyed orders to inflict punishment on the prisoners. Nonetheless, the BIA found that he assisted in the persecution of others and therefore is statutorily ineligible for asylum and withholding of removal. The Fifth Circuit affirmed the BIA's decision. In its per curiam order, the Fifth Circuit noted that whether Petitioner was compelled to assist authorities or whether he shares the authorities' intentions is irrelevant.

It is expected that the Court will hear this case in the term beginning October 6, 2008. The case is *Negusie v. Gonzales*, 231 Fed. Appx. 325, No. 06-60193 (5th Cir. May 15, 2007) (per curiam), *cert. granted sub nom. Negusie v. Mukasey*, No. 07-499, 2008 U.S. LEXIS 2444 (U.S. Mar. 17, 2008).

COURTS AWARD ATTORNEYS' FEES IN NATZ DELAY CASES

Several courts have awarded attorneys' fees in cases challenging delays in the adjudication of naturalization applications. In addition, some courts have found that immigration attorneys require specialized immigration law skills to litigate these cases and have awarded fees at an enhanced rate. In post-interview cases brought under INA § 336(b), courts have found that a plaintiff is the prevailing party if USCIS completes adjudication of the application after the court remands the matter to USCIS.

See, for example, *Alghamdi v. Ridge*, No. 05-344, 2006 U.S. Dist. LEXIS 68498 (N.D. Fla. Sept. 25, 2006); *Aronov v. Chertoff*, No. 06-11526, 2007 U.S. Dist. LEXIS 40455 (D. Mass. Jan. 30, 2007); *Berishev v.*

Chertoff, 486 F. Supp. 2d 202 (D. Mass. 2007); *Donado v. Swacina*, No. 07-20190 (S.D. Fla. Sept. 17, 2007); *Ghanim v. Mukasey*, No. 07-594 (W.D. Wash. Feb. 17, 2008) (enhanced fees); *Osman v. Mukasey*, No. 07-588, 2008 U.S. Dist. LEXIS 20278 (W.D. Wash. Mar. 3, 2008) (enhanced fees).

Courts also have granted fees in mandamus/APA cases brought to address delays in adjudicating
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NEW AT THE LAC ...

Save the Date – Litigation and Detention Meetings at AILA Annual Conference. AILF is sponsoring a litigation meeting at AILA's Annual Conference on Thursday, June 26, from 1-3 pm. In addition, AILF and the Detention Watch Network are co-sponsoring a detention meeting on Saturday, June 28, from 12:35-2 pm. The 2008 AILA Annual Conference is being held in Vancouver, British Columbia, Canada on June 25-28. See <http://www.aila.org/content/default.aspx?docid=16973>.

New AILF Practice Advisory. *Terminating Removal Proceedings to Pursue Naturalization before DHS: Strategies for Challenging Matter of Acosta Hidalgo* (March 18, 2008). This Practice Advisory sets out arguments to challenge *Matter of Acosta Hidalgo*, a recent BIA decision holding that IJs and BIA lack jurisdiction to determine prima facie eligibility for naturalization in order to terminate removal proceedings.

Updated AILF Practice Advisory. *Reinstatement of Removal* (Updated March 14, 2008). This Practice Advisory addresses where to obtain federal court review of reinstatement orders and what arguments are available to challenge the legality of reinstatement orders in federal court, including challenges to the underlying removal order.

Motions to Reopen After Departure. AILF's LAC is challenging the regulatory bar to motions to reopen filed after a person is removed or departed the United States. AILF filed an amicus brief in *Ovalles v. Mukasey*, No. 07-60836 (5th Cir.) on March 13, 2008. AILF successfully challenged the bar in *William v. Gonzales*, 499 F.3d 329 (4th Cir. 2007).

CIRCUIT COURTS TO CONSIDER WHETHER STATE AND LOCAL LAWS ARE PREEMPTED BY FEDERAL LAW

The courts of appeals will be weighing in on the legality of anti-immigrant state and local laws. The Third Circuit is considering the government's appeal in the City of Hazleton, Pennsylvania case. The district court had found that the local ordinance targeting both businesses and landlords was preempted by federal law. The government filed its opening brief and the response is scheduled to be filed in April. The Ninth Circuit also is considering preemption issues in cases challenging the Arizona state law that prohibits employers from knowingly or intentionally employing an unauthorized immigrant. The district court had found that the law was not preempted by federal law and was otherwise lawful. The Ninth Circuit has set an expedited schedule, and the parties are scheduled to complete briefing this spring. In addition, the plaintiffs filed a notice of appeal to the Eighth Circuit in a case challenging a Valley Park, Missouri ordinance requiring employers to investigate and determine the immigration status of its employees and punishing employers suspected of hiring undocumented workers. The district court found that this ordinance was not preempted by federal law.

To read about these cases and other challenges to state and local laws, see AILF's Litigation Issue Page, Challenges to State and Local Law Enforcement Efforts at http://www.ailf.org/lac/lit_issue_pages.shtml.

Attorneys' Fees Continued

naturalization applications when the interview has not taken place, as well as in cases challenging other delayed adjudications, specifically adjustment delays. In these cases, courts have found that a plaintiff is a prevailing party under EAJA if he or she has an enforceable court order requiring the agency to complete the application. See, for example, *Aboushaban v. Mueller*, No. 06-1280 (N.D. Cal. Mar. 23, 2007) (adjustment application); *Lazli v. United States Citizenship & Immigration Servs.*, 05-1680, 2007 U.S. Dist. LEXIS 54444 (D. Or. July 25, 2007) (pre-interview natz, enhanced fees); *Haidari v. Frazier*, No. 06-3215 (D. Minn. May 10, 2007) (adjustment application, enhanced fees); *Sun*

v. Gonzales, 07-0180 (E.D. Wash. Feb. 28, 2008) (adjustment application)

To read more about the court's reasoning in these cases, see AILF's Naturalization Delay Litigation Issue Page at http://www.ailf.org/lac/lit_issue_pages.shtml. Also, for more information about EAJA, see AILF Practice Advisory, *Requesting Attorneys Fees Under the Equal Access to Justice Act* (April 7, 2006) available at http://www.ailf.org/lac/lac_pa_topics.shtml.

CLEARINGHOUSE HIGHLIGHT

Third Circuit Joins Ninth Circuit In Finding that Affidavit May Overcome Presumption of Mailing BIA Decision. *Jahjaga v. Attorney General*, 512 F.3d 80 (3d Cir. 2008)

The two petitioners in this case claimed that they had not received the BIA's decisions and accordingly filed motions to reissue. The BIA denied the motions, stating that the decisions were mailed to the address provided by the respondents. On review, the Third Circuit reversed and remanded. The court noted that regulations require the BIA to serve noncitizens with final decisions and that service is accomplished by mailing them. The court held that a petitioner "claiming non-receipt of a BIA decision, and who presents the BIA with an affidavit to that effect, may well have provided enough evidence to rebut the presumption of mailing which attaches to the presence of a [BIA] transmittal cover letter in the administrative record." The court remanded the case to the BIA to consider the weight to be given to the claims made by petitioners.

In reaching this conclusion, the court agreed with the Ninth Circuit's recent decision in *Singh v. Gonzales*, 494 F.3d 1170 (9th Cir. 2007). In contrast, the Second Circuit in *Ping Chen v. United States AG*, 502 F.3d 73 (2d Cir. 2007), found that the BIA's transmittal cover letter addressed to the petitioner was substantial evidence of mailing which the petitioner's affidavit did not contradict. Nonetheless, the Second Circuit found that the affidavit "is relevant" to the question of proper service and left open the possibility that in other cases an affidavit, especially if supported by additional evidence may establish that the BIA did not mail the decision.

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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.ailf.org/lac/litclearinghouse.shtml.

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