



AMERICAN IMMIGRATION LAW FOUNDATION  
LEGAL ACTION CENTER  
LITIGATION CLEARINGHOUSE  
NEWSLETTER

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## FIRST AND TENTH CIRCUITS DISAGREE IN ATTORNEYS FEES RULINGS

Two courts of appeals recently reached different conclusions regarding a plaintiff's eligibility for attorneys fees under the Equal Access to Justice Act (EAJA) after a successful naturalization delay lawsuit brought under INA § 336(b). In both cases, the district court granted a joint remand to USCIS to adjudicate the naturalization application and later granted an EAJA award to the plaintiff. The Tenth Circuit upheld the district court decision granting fees and a divided First Circuit en banc panel reversed the district court's fee grant.

EAJA authorizes payment by the government of attorney's fees and costs for successful federal court litigation against the government. In order to prevail, a plaintiff must show that 1) he/she was the prevailing party and 2) the government's pre-litigation or litigation position was not substantially justified. To demonstrate prevailing party status, there must be a court-ordered judgment on the merits *or* the functional equivalent of a court-ordered consent decree.

The Tenth Circuit, in *Al-Maleki v. Holder*, No. 07-4260, 2009 U.S. App. LEXIS 5899 (10th Cir. Mar. 18, 2009), held that the plaintiff met both EAJA requirements. First, in finding that the plaintiff was a prevailing party, the court held that USCIS only completed the naturalization process after it was ordered to do so by the court. Further, the order remanding the case to USCIS with instructions to administer the oath of citizenship constituted a judgment on the merits and imposed a judicially enforceable obligation on USCIS. Second, the court held that the government's pre-litigation position was not reasonable because, contrary to the government's statements that it was unable to expedite the plaintiff's name check request due to backlogs at the FBI, USCIS in fact had the ability to direct the FBI to expedite his name check. The court also found that the government was not substantially justified when it sought a complete dismissal of the § 336(b) action and permission from the district court to adjudicate

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## NEW AT THE LAC ...

New AILF Practice Advisory, *Electronic Filing and Access to Electronic Federal Court Documents* (April 13, 2009). This Practice Advisory explains the federal rules authorizing electronic filing; describes how to file documents using the Electronic Case Files (CM/ECF) System; and outlines how to access electronic documents through Public Access to Court Electronic Records (PACER). The advisory also addresses limitations to electronic access of documents in federal immigration cases. All AILF Practice Advisories are available at [http://www.ailf.org/lac/lac\\_pa\\_topics.shtml](http://www.ailf.org/lac/lac_pa_topics.shtml).

## UPDATE ON INEFFECTIVE ASSISTANCE OF COUNSEL LITIGATION

Since the former Attorney General issued *Matter of Compean*, 24 I&N Dec. 710 (AG 2009), in January, immigration judges and the BIA have been applying the new substantive standards for "deficient performance" of counsel claims. Motions to reconsider *Matter of Compean*, filed by the respondents in the case on February 3, 2009, remain pending. Although at least a dozen circuit court decisions have cited to *Matter of Compean*, no court yet has reached the merits of the AG's decision.

Interestingly, the Seventh Circuit recently reaffirmed that "ineffective assistance can rise to the level of a due process violation." See *Malik v. Holder*, No. 08-2846, 2009 U.S. App. LEXIS 5240 (7th Cir. Mar. 13, 2009). *Matter of Compean* mischaracterizes the Seventh Circuit as previously having rejected outright that there is a constitutional right to effective assistance of counsel. In addition, the petitioner in *Afanwi v. Mukasey*, a case relied upon by the AG in *Matter of Compean*, filed a petition for certiorari at the Supreme Court. See 526 F.3d 788 (4th Cir. 2008) *petition for cert. filed*, 08-906 (Jan. 16, 2009).

For more information about *Matter of Compean* and other related litigation developments, see AILF's Ineffective Assistance of Counsel Litigation Issue Page at <http://www.ailf.org/lac/lac-ineffective.shtml>.

## ORANTES INJUNCTION UPHOLD

On April 6, 2009, the Ninth Circuit affirmed the district court's decision to uphold a nationwide injunction to protect Salvadoran asylum seekers. The injunction requires the government to implement certain detention standards and to advise Salvadorans of their right to apply for asylum, be represented by counsel, and have a hearing. The government had requested that the court dissolve the 1988 injunction. In upholding the injunction, the district court found that evidence showed violations of the "injunction dealing with detainees' access to legal materials, telephone use and attorney visits." Read more about the decision and the history of the case at <http://www.nilc.org/immlawpolicy/arrestdet/ad091.htm>.

## EAJA Cases continued

the plaintiff's application without any time constraints or judicial oversight, as such relief would nullify the 120-day statutory provision.

In *Aronov v. Napolitano*, No. 07-1588, 2009 U.S. App. LEXIS 7751 (1st Cir. Apr. 13, 2009), the First Circuit reached opposite conclusions on both EAJA requirements. First, the majority found that the district court remand order did not confer prevailing party status upon the plaintiff because it was not a judgment on the merits or the functional equivalent of a court-ordered consent decree. According to the majority, it was not a consent decree because, inter alia, it was "merely an allowance of a motion to remand," and did not specifically mandate action by USCIS or include any enforcement provisions. Second, the majority held that the government's litigation position – that the investigation of a naturalization applicant required an FBI name check and that § 336(b) did not impose an absolute 120-day time line – was substantially justified.

The dissent disagreed with the majority on both grounds. The dissent reasoned that the order satisfied the requirements for entering a consent decree because it, inter alia, successfully incorporated, by reference, the joint motion of the parties remanding to USCIS specifically to grant plaintiff's application. Further, the dissent determined that the government's position was not substantially justified because it did not offer a particularized justification for not complying with the 120-day statutory

adjudication timeframe. Generalized policy arguments related to the importance of the name check for security purposes and the FBI processing backlogs were not sufficient. More information about § 336(b) EAJA actions is available at [http://www.aifl.org/lac/natz\\_delay0806.shtml](http://www.aifl.org/lac/natz_delay0806.shtml).

## COURTS, BIA ADDRESS CALCULATING ONE-YEAR FOR ASYLUM FILING DEADLINE

The INA requires asylum applicants to apply for asylum within one year of their arrival in the United States. INA § 208(a)(2)(B). In several decisions over the past year, the courts and the BIA have addressed what constitutes timely filing.

In *Minasyan v. Mukasey*, 553 F.3d 1224 (9th Cir. 2008), the court clarified that the statute requires the applicant to file within one year *after* the date of arrival in the United States, meaning that the date of arrival does not count toward the one year. Therefore, because the applicant's arrival was on April 9, 2001, the deadline was April 9, 2002, as opposed to April 8, 2002, as the BIA had held.

In *Jorgji v. Mukasey*, 514 F.3d 53 (1st Cir. 2008), the First Circuit considered what happens when the filing deadline falls on a weekend. The regulations provide that when the filing deadline falls on a weekend or holiday, the filing period shall run until the end of the day following the weekend or holiday. Because the regulations allow filing to be accomplished by mail, the applicant need only show that he or she mailed the application on that following day.

The BIA addressed the regulation providing that the one year period shall be calculated from the applicant's "last arrival" in the United States. *See Matter of F-P-R*, 24 I&N Dec. 681 (BIA 2008). The Board held that the term "last arrival" means the applicant's "most recent coming or crossing into the United States after having traveled from somewhere outside the country." The Board disagreed with a Second Circuit case, *Joaquin-Porras v. Gonzales*, 435 F.3d 172 (2d Cir. 2006), which held that "last arrival" does not include an applicant's "return to the United States after a brief trip abroad pursuant to a parole."

In related news, the Trafficking Victims Protection Reauthorization Act of 2008, § 235(d)(7)(A), exempts unaccompanied children from the filing deadline.

### AILF Legal Action Center, Litigation Clearinghouse

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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](http://www.aifl.org/lac/litclearinghouse.shtml).

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