



AMERICAN IMMIGRATION LAW FOUNDATION  
LEGAL ACTION CENTER  
LITIGATION CLEARINGHOUSE  
NEWSLETTER

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**SUPREME COURT VACATES NINTH CIRCUIT ASYLUM DECISION, *GONZALES V. THOMAS***

In a per curiam decision dated April 17, 2006, the Supreme Court granted the government's petition for certiorari, vacated the Ninth Circuit's decision, and remanded the case for further consideration of the asylum claim. The Solicitor General argued that the Ninth Circuit erred by deciding – without prior resolution by the BIA – that the asylum applicants were members of a “particular social group.” The Supreme Court agreed that the BIA had not expressed an opinion about whether the asylum applicants and their family “present the kind of ‘kinship ties’ that constitute a ‘particular social group.’” Therefore, relying on *INS v. Ventura*, 537 U.S. 12 (2002), the Court found that the Ninth Circuit should have applied “the ordinary remand rule” in this case rather than deciding the asylum case in the first instance.

**Family as a Social Group.** Importantly, the Supreme Court's decision does not address the Ninth Circuit's substantive social group analysis. The Ninth Circuit's vacated opinion held that “family membership may constitute membership in a ‘particular social group’ and thus confer refugee status on a family member who has been persecuted or who has a well founded fear of future persecution on account of that familial relationship.” Other circuits have reached similar conclusions: *Gebremichael v. INS*, 10 F.3d 28 (1st Cir. 1993); *Lopez-Soto v. Ashcroft*, 383 F.3d 228 (4th Cir. 2004); *Iliev v. INS*, 127 F.3d 638 (7th Cir. 1997); *Hamzehi v. INS*, 64 F.3d 1240 (8th Cir. 1995) (implicitly recognizing family as a particular social group). Furthermore, the Ninth Circuit's decision is consistent with the BIA's social group analysis in *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985) (recognizing “kinship ties” as a shared characteristic designating members of a particular social group). Therefore, it is likely the Ninth Circuit will reach the same conclusion when the issue is before it again.

**Ventura and the Remand Rule.** The Supreme Court's decision may or may not portend an expansion of *Ventura*. *Ventura*, like *Thomas*, involved an asylum claim. In *Ventura*, the BIA found that the applicant

failed to establish past persecution. On appeal, the Ninth Circuit reversed the BIA's past persecution determination, and addressed the presumption of future persecution – an issue the BIA had not reached. The circuit court concluded that the record contained no evidence of changed country conditions to rebut the presumption of a well founded fear of future persecution. However, the Supreme Court held that the Ninth Circuit should not have analyzed the changed country conditions in the first instance. The Court said,

The agency can bring its expertise to bear upon the matter; it can evaluate the evidence, it can make an initial determination; and, in doing so, it can, through informed discussion and analysis, help a court later determine whether its decision exceeds the leeway that the law provides.

**New at the LAC ...**

AILF's Legal Action Center has filed amicus curiae briefs in the following cases.

*Ermelinda Poci v. Gonzales*, 7th Cir., Case No. 05-4680: (*Succar* issue) Arguing that 8 CFR § 1245.1(c)(8), the regulation barring "arriving aliens" from adjusting status if in proceedings, violates INA § 245(a).

*Meza-Cota v. Gonzales*, 6th Cir., Case No. 05-4523: (*Succar* issue).

*Morales-Izquierdo v. Gonzales*, 9th Cir., Case No. 03-70674: (Reinstatement) court-ordered brief regarding the court's ability to review an alleged prior deportation order in the course of reviewing a reinstatement order.

The Legal Action Center also issued four updated Practice Advisories:

*How to File a Petition for Review* (updated April 17, 2006)

*Equal Access to Justice Act (EAJA) Fee Application* (updated April 7, 2006)

*Whom to Sue and Serve* (updated April 7, 2006)

*Federal Court Jurisdiction Over Discretionary Decisions After REAL ID: Mandamus, Other Affirmative Suits and Petitions for Review* (updated April 5, 2006)

Available at [http://www.ailf.org/lac/lac\\_pa\\_chrono.shtml](http://www.ailf.org/lac/lac_pa_chrono.shtml)

Therefore, the *Ventura* Court concluded that the Ninth Circuit erred by not remanding the case for consideration of the changed circumstances question.

*Thomas* is unclear as to whether the Ninth Circuit “erred” by applying the law to facts – as it did in *Ventura* – or whether the Ninth Circuit also erred by reaching a *legal* conclusion, i.e., that “a family may constitute a particular social group.” This is an important distinction because it may determine whether the courts are may be limited not only from examining factual issues in the first instance, but also from interpreting the immigration laws without the benefit of the agency’s prior interpretation.

Unfortunately, the Supreme Court’s message is not clear. The Court indicates that the issue decided by the Ninth Circuit involved an application of law to facts:

The agency has not yet considered whether [the applicant’s father-in-law’s] family presents the kind of “kinship ties” that constitute a “particular social group.” The matter requires determining the facts and deciding whether the facts as found fall within a statutory term.

Yet, the “error,” as characterized by the Solicitor General – and “agree[d]” with by the Court – was deciding that “members of a family can and do constitute a ‘particular social group.’” Given the mixed messages and the fact that *Thomas* was a per curiam summary reversal, it remains to be seen how *Thomas* will be interpreted both in this case and in others.

Regardless, *Thomas* also sends the message that the BIA cannot forego its responsibility to provide thorough, individualized review of each case before it. The implementation of BIA streamlining has resulted in a shift of work from the BIA to the courts of appeals. In fact, *Thomas* was an affirmance without opinion (AWO), and therefore, the Ninth Circuit had only the IJ’s decision before it. It therefore, is not surprising that the agency’s analysis was deficient. In future cases before the courts of appeals, petitioners

may find *Thomas* helpful in seeking remands in cases with incomplete analysis.

## **AILF TAKES ACTION REGARDING BEC “45-DAY LETTERS,” CALLS FOR PLAINTIFFS**

AILF’s Legal Action Center (LAC) is preparing a possible lawsuit to challenge the DOL Backlog Elimination Centers’ (BEC) handling of problems arising from the “45-day letters.”

Throughout 2005, DOL shipped 300,000 plus backlogged (pre-PERM) labor certification cases to two BECs. The BECs began sending “45-day letters” to employers/attorneys in each of the backlogged cases. These letters request that the employer/attorney check a box on an enclosed form if they want to proceed with the case. If the employer/attorney fails to respond to the letter within 45 days, BEC closes the case.

There have been serious problems with the BECs management of the 45-day letter process. The two primary problems are: 1) cases have been closed for failure to respond to the 45-day letter even though the attorney and the employer never received the letter; and 2) cases have been closed for failure to comply with the 45-day letter although the employer/attorney did send a timely response to the BEC.

DOL has failed to set up a reasonable and fair process for reopening cases that were closed wrongly. DOL has been asked to fix these problems several times, and, despite commitments to AILA that it would issue a policy by the end of March 2006, DOL has yet to issue a policy. Therefore, AILF is preparing a lawsuit that will ask a court to order DOL to reopen all cases that were wrongly closed and to develop a system to address any future problems.

If you have clients who might wish to be plaintiffs in this action – either because the 45-day letter was never received or because the letter was replied to but the case was closed anyway – please send an email to [beclawsuit@aifl.org](mailto:beclawsuit@aifl.org).

### **AILF Legal Action Center, Litigation Clearinghouse**

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AILF’s Legal Action Center works to advance fundamental fairness in United States immigration law and to protect the constitutional and legal rights of noncitizens. The LAC conducts national impact litigation; writes amicus curiae briefs; produces practice advisories; conducts the Litigation Institute and other legal educational programs; and mentors, coordinates and provides technical support for lawyers litigating due process and fairness issues in family, removal and business immigration cases.

The Clearinghouse is a project of the 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 information about your cases.

**Litigation Clearinghouse Newsletters are posted on AILF’s web page at [www.aifl.org/lac/litclearinghouse.shtml](http://www.aifl.org/lac/litclearinghouse.shtml).**