



AMERICAN IMMIGRATION LAW FOUNDATION  
LEGAL ACTION CENTER  
LITIGATION CLEARINGHOUSE  
NEWSLETTER

Vol. 1, No. 10

May 5, 2006

IMMIGRATION JUDGE'S JURISDICTION TO APPLY INA § 204(J);  
*MATTER OF PEREZ VARGAS* ON APPEAL AT THE FOURTH CIRCUIT

In *Matter of Perez Vargas*, 23 I&N Dec. 829 (BIA Oct. 2005), the BIA held that immigration judges, when adjudicating adjustment of status applications, lack jurisdiction to determine whether an approved I-140 remains valid under INA § 204(j). Section 204(j) provides that, for purposes of an adjustment application that has been pending for more than 180 days, an approved I-140 visa petition remains valid even if the adjustment applicant changes jobs, so long as the new job is in the same or similar occupational classification.

The respondent in *Matter of Perez Vargas* was the beneficiary of an approved I-140 visa petition, but he no longer was employed by the petitioning employer at the time of the immigration court hearing. The IJ denied his adjustment application based on his changed employment status, concluding that he lacked jurisdiction to consider whether the previously approved I-140 visa petition continued to be valid for purposes of his adjustment application. The BIA upheld the adjustment denial, reasoning that the authority to apply INA § 204(j) is within the sole jurisdiction of DHS. The BIA reasoned that “[b]ecause the DHS has the primary authority to grant visa petitions, we find that jurisdiction also lies with the DHS to determine whether the validity of an alien’s approved employment-based visa is preserved under section 204(j) of the Act after the alien’s change in jobs or employers.”

The BIA's decision improperly ties the “same or similar” occupation classification inquiry to the I-140 visa petition approval. In fact, under INA §204(j), there is a presumption that the approval remains valid and thus the “same or similar” occupation classification inquiry is relevant only to assessing eligibility for adjustment of status. The BIA failed to address (1) the law providing that once an adjustment applicant is in removal proceedings, an IJ has sole jurisdiction over the adjustment application and (2) the fact that CIS will decline to rule on whether §

204(j) applies to an adjustment application when a person is in removal proceedings.

Perez Vargas is challenging the BIA’s decision in a petition for review filed with the Fourth Circuit Court of Appeals. The case is *Perez Vargas v. Gonzales*, No. 05-2313 (4th Cir. filed Nov. 28, 2005). The petitioner is represented by O’Toole, Rothwell, Nassau & Steinbach. Briefing is scheduled to be completed this spring, and AILF plans to submit an amicus brief on behalf of Petitioner Perez Vargas.

If you have a client barred from adjusting in removal proceedings because of *Matter of Perez Vargas*, consider the following options.

If the case is before the immigration court or the BIA:

- request the hearing be continued or the appeal held in abeyance pending the outcome in *Perez Gonzales*.

*Continued on next page.*

**AILF is Identifying Plaintiffs**

**FOIA Delays:** Has your client's case or petition been affected by long FOIA-response delays? If you or your client might be interested in participating in a potential lawsuit challenging FOIA delays, please email AILF at [foia@ailf.org](mailto:foia@ailf.org) and we will send you more information.

**BEC “45 Day Letters”:** AILF is preparing a possible lawsuit to challenge the DOL Backlog Elimination Centers’ (BEC) handling of problems arising from the “45-day letters.” Please contact us at [beclawsuit@ailf.org](mailto:beclawsuit@ailf.org) if you have 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; or 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.

- preserve the issue for federal court review by arguing that *Matter of Perez Vargas* is wrong and that the IJ has jurisdiction over all questions related to the adjudication of the adjustment application, including whether an I-140 visa petition remains valid under § 204(j). Note: even Fourth Circuit respondents may preserve this issue as there is no way to know what the Fourth Circuit will do.

If the case currently is before the court of appeals:

- ask the court to hold the case in abeyance pending a decision in *Perez Vargas*. Although the Fourth Circuit may be most inclined to do so, petitioners outside of the Fourth Circuit can argue that if the Fourth Circuit vacates or reverses *Matter of Perez Vargas*, the BIA's decision should no longer be precedent.

**\*The Clearinghouse would like to hear about cases challenging *Matter of Perez Vargas*.** Please contact us at [clearinghouse@ailf.org](mailto:clearinghouse@ailf.org). We are especially interested in hearing about: (1) pre-*Matter of Perez Vargas* decisions where the IJ may have granted adjustment of status pursuant to INA §204(j); or (2) written refusals by CIS to assess the “same or similar” occupation classification for a person in proceedings.

## CLEARINGHOUSE HIGHLIGHT

*In each edition of this newsletter, the Clearinghouse will highlight one case in order to showcase novel arguments, creative lawyering, and issues of first impression.*

### District Court Reverses Denial of Consent to Pursue SIJ Status

In *Zheng v. Pogash*, 416 F. Supp. 2d 550 (S.D. Tex. 2006), the district court reversed DHS' denial of plaintiff's request for consent to pursue special immigrant juvenile (SIJ) status in state court (“specific consent”). The court found jurisdiction over the claim and held that DHS' denial of “specific consent” constituted an abuse of discretion. The firm Fulbright & Jaworski, LLP represented plaintiff Zheng. The government has filed a notice of appeal of

the district court's decision. However, unless and until the Fifth Circuit reverses this decision, the district court decision is persuasive precedent and supports cases brought by other would-be SIJ applicants.

Jurisdiction. The district court's jurisdictional holding is the first published decision to address the post-REAL ID Act version of INA § 242(a)(2)(B)(ii)'s applicability to immigration issues that fall outside of title II of the INA. Section 242(a)(2)(B)(ii) limits review over discretionary decisions “under this title,” (i.e., title II of the INA). Because the authority for specific consent to pursue SIJ status is found in INA § 101(a)(27)(J), which is in title I of the INA, the court held that section 242(a)(2)(B)(ii) is not applicable.

[For further discussion about INA § 242(a)(2)(B) post REAL ID Act, see AILF's Practice Advisory, *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\\_index.asp](http://www.ailf.org/lac/lac_pa_index.asp).]

The court also held that Zheng's claim is reviewable under the APA. Although the court lacks jurisdiction to review agency decisions where the underlying statute is “drawn in such broad terms that in a given case there is no law to apply,” here, the court found that there was sufficient law to apply. Specifically, it cited an internal agency memorandum that set forth standards for when to grant specific consent. Other courts have reached this same conclusion: *M.B. v. Quarantillo*, 301 F.3d 109 (3d Cir. 2002); *A.A.-M v. Gonzales*, No. 05-2012, 2005 U.S. Dist. LEXIS 40482 (W.D. Wash. 2005) (unpublished).

Merits. The court found that the denial of specific consent was arbitrary and capricious. The court examined the government's decision under the standards set forth in the internal memorandum. The court concluded that the defendant failed to consider the relevant factors set forth in the memorandum and that there was substantial evidence to establish that Zheng had satisfied the agency's own standards.

#### AILF Legal Action Center, Litigation Clearinghouse

[www.ailf.org/lac](http://www.ailf.org/lac)  
[clearinghouse@ailf.org](mailto:clearinghouse@ailf.org)

Beth Werlin  
 Litigation Clearinghouse Attorney

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