



AMERICAN IMMIGRATION LAW FOUNDATION  
LEGAL ACTION CENTER  
LITIGATION CLEARINGHOUSE  
NEWSLETTER

Vol. 3, No. 5

May 7, 2008

### LAWSUIT SEEKS REGULATIONS TO ADDRESS DETENTION STANDARDS

On April 30, 2008, two non-profit organizations and two individual plaintiffs filed suit demanding that DHS respond to a petition for rulemaking submitted on January 25, 2007. The petition requested that DHS promulgate comprehensive, binding regulations governing detention standards for detained immigrants. Plaintiffs allege that defendants' failure to respond to the petition violates § 706(1) of the APA requiring a reasoned and timely response to the petition. The complaint also alleges that the constructive denial of the petition is arbitrary, capricious, and an abuse of discretion under § 706(2) of the APA. Plaintiffs seek declaratory relief and an order requiring initiation of a rulemaking procedure and enactment of regulations. In the alternative, plaintiffs seek an order directing defendants to respond to the petition. The case is *Families for Freedom v. Chertoff*, No. 08-40567 (S.D.N.Y. filed April 30, 2008), and the complaint is available at [http://www.ailf.org/lac/clearinghouse\\_otherissues.shtml](http://www.ailf.org/lac/clearinghouse_otherissues.shtml).

### LAWYERS IN RELIGIOUS WORKERS SUIT SEEK TO IDENTIFY POTENTIAL CLASS MEMBERS

Religious workers with pending visa petitions (I-360s) filed a class action to challenge USCIS' policy of requiring religious workers to have an approved petition before they can file an adjustment of status application (I-485). Because religious workers cannot file concurrently, often their non-immigrant status expires before the I-360 is approved, and they are forced to leave the United States. On May 1, 2008, the district court granted preliminary relief for several of the named plaintiffs, finding that they had "raised serious questions regarding their eligibility for adjustment of status and that they have a fair chance of success on the merits of their declaratory and/or injunctive relief claim." The court declined to grant class certification at this time because the named plaintiffs, since filing the suit, have become eligible to apply for adjustment of status. Lawyers are planning to amend the complaint with additional plaintiffs.

Read more about the case and obtain the plaintiff intake questionnaire at <http://www.ghp-law.net/Cases.html>.

### COURT CERTIFIES CLASS IN NATZ DELAY SUIT

On April 25, 2008, the District Court for the Western District of Washington issued an order granting a motion for class certification in a lawsuit challenging delays in the adjudication of naturalization applications. The class includes all LPRs residing in the Western District of Washington who have submitted naturalization applications, but whose applications have not been adjudicated by USCIS within 120 days of the date of their initial examination due to the pendency of a "name check." This is the first court to certify a class in a one of several pending class actions challenging delayed naturalization adjudications.

In its order, the court first addressed standing, finding that plaintiffs' inability to vote, inability to serve on juries and difficulty traveling as a result of delayed action on their applications are harms sufficient to confer standing. With respect to class certification, the court held that the plaintiffs met the commonality and typicality requirements and that the named plaintiffs are adequate class representatives.

*Continued on following page*

#### NEW AT THE LAC ...

**APA Jurisdictional Issues**, *Ngassem v. Chertoff*, No. 05-0584 (2d Cir. amicus brief filed Apr. 16, 2008). The LAC filed this brief aiming to correct common jurisdictional errors that district courts make in immigration-related APA cases. The issue is whether the district court erred in dismissing, for lack of jurisdiction, plaintiff's APA challenge to USCIS' denial of her asylee relative petitions.

**Updated Practice Advisory**, *Reinstatement of Removal* (Updated April 23, 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.

## THE NATIONAL IMMIGRANT JUSTICE CENTER'S LITIGATION UPDATE SUMMARIZES IMMIGRATION CASES

The National Immigrant Justice Center's Litigation Update is an online, daily digest of immigration-related federal court decisions from around the United States. The cases are organized by circuit, and readers are able to post comments. The digest is available at

<http://www.immigrantjustice.org/litigationupdate>. NIJC's website has additional resources for litigating immigration cases, including pro bono training manuals on Special Immigrant Juvenile status and asylum claims based on sexual orientation, transgender identity and/or HIV-positive status. See <http://www.immigrantjustice.org/attorneys.html>.

NIJC, a partner of Heartland Human Care Services, is a non-profit organization that provides direct legal services to low-income immigrants, refugees and asylum seekers. It also advocates for these populations through policy reform, impact litigation, and public education.

### IMMIGRATION COURT PRACTICE MANUAL

The Immigration Court Practice Manual, which provides guidance on immigration court practice and is intended to establish uniform procedures nationwide, goes into effect on July 1, 2008. On April 23, 2008, EOIR issued an Operating Policies and Procedures Memorandum (OPPM) that addresses the application of the manual's filing deadlines to non-detained cases pending on July 1, 2008. Both the manual and the OPPM are available at EOIR's website, <http://www.usdoj.gov/eoir/>.

AILA is preparing comments to the manual and is seeking input from AILA membership until May 8, 2008. See <http://www.aila.org/content/default.aspx?docid=25285>. AILA also is offering an audio seminar providing an overview of the manual on Thursday, June 5, see <http://www.aila.org/content/default.aspx?docid=25156>. In addition, the Office of the Chief Immigration Judge will discuss the manual at AILA's Annual Conference, EOIR Open Forum on Friday, June 27, 2008.

### Natz Delay Suit Continued

The court rejected the government's argument that class treatment would create antagonism among class members by disrupting the order in which applications are adjudicated. The court reasoned, "an injunction would likely instruct USCIS to complete the name checks and adjudicate all naturalization applications by the same date certain."

For more information about this case and other pending naturalization delay class actions, see AILF's Natz Delay Litigation Issue Page at [http://www.aifl.org/lac/natz\\_delay0806.shtml](http://www.aifl.org/lac/natz_delay0806.shtml).

### COURTS LIMIT APPLICABILITY OF THE CATEGORICAL APPROACH

Over the past several weeks, two courts of appeals have limited the applicability of the categorical approach to determine whether a conviction renders a person removable. These courts have allowed immigration judges to consider evidence not in the record of conviction to determine certain aspects of removability. The decisions depart from numerous other circuit decisions, though they follow on the heels of two BIA precedent decision from 2007 that similarly allow immigration judges to look outside the record in limited circumstances. Anticipate more litigation on these issues over the next year.

*Arguelles-Olivares v. Mukasey*, No. 05-60914, \_\_ F.3d \_\_ 2008 U.S. App. LEXIS 8721 (5th Cir. Apr. 22, 2008) (looked outside record to determine amount of loss to fraud victim, INA § 101(a)(43)(M)(i)). See also dissent by Judge Dennis.

*Ali v. Mukasey*, No. 07-1970, \_\_ F.3d \_\_, 2008 U.S. App. LEXIS 7160 (7th Cir. Apr. 4, 2008) (looked outside record to determine if CIMT)

*Matter of Babaisakov*, 24 I&N Dec. 306 (BIA 2007) (looked outside record to determine amount of loss to fraud victim, INA § 101(a)(43)(M)(i))

*Matter of Gertsenshteyn*, 24 I&N Dec. 111 (BIA 2007) (looked outside record to determine if transportation for the purpose of prostitution is "committed for commercial advantage," INA § 101(a)(43)(K)(ii))

#### AILF Legal Action Center, Litigation Clearinghouse

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

Beth Werlin, Litigation Clearinghouse Attorney

Emily Creighton, Staff Attorney

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).

AILF is grateful for the generous support of LexisNexis.