



AMERICAN IMMIGRATION LAW FOUNDATION
LEGAL ACTION CENTER
LITIGATION CLEARINGHOUSE
NEWSLETTER

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**AILF'S BEC "45 DAY LETTERS"
LITIGATION: DOL PROPOSES POLICY TO
REOPEN CASES**

As reported in previous newsletters, AILF has been preparing a possible lawsuit to challenge the DOL Backlog Elimination Centers' (BEC) handling of problems arising from the "45-day letters." On May 4, 2006, AILF sent a demand letter to DOL, threatening litigation. DOL has responded that it has changed its previous position and is willing to develop a procedure for reopening cases.

AILF's demand letter identified two primary problems regarding the 45 day letters: 1) cases that 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 that have been closed for failure to comply with the 45-day letter although the employer /attorney did send a timely response to the BEC. The demand letter, inter alia, asked DOL to notify individuals regarding case closures for failure to respond the 45 day letters and reopen all cases that were closed as the result of an alleged non-response to the 45 day letter.

DOL now is willing to adopt a reopening process with respect to both problem groups. AILF and AILA have entered into negotiations with DOL to clarify the scope and process regarding the reopening of these cases. AILF does not plan to file the lawsuit immediately, but will keep the litigation as a ready option should negotiations fail. AILF will post updates on AILF's webpage and Infonet.

**SUPREME COURT DISMISSES AND
REMANDS RICO CASE**

In a per curiam opinion, the Supreme Court dismissed the writ of certiorari in a RICO (Racketeer Influenced and Corrupt Organizations) Act case involving the hiring of undocumented workers. See *Mohawk Industries v. Williams*, No. 05-465, 547 U.S. ___ (June 5, 2006). The Court held that certiorari was improvidently granted and remanded the case to

Eleventh Circuit for reconsideration in light of another RICO case the Supreme Court decided on the same day. The other RICO case does not involve undocumented workers. The slip opinion is available on the Supreme Court's webpage at <http://www.supremecourtus.gov/opinions/05pdf/05-465.pdf>.

The Court had granted certiorari on the following narrow issue: Whether a defendant corporation and its agents can constitute an "enterprise" under the RICO Act, 18 U.S.C. §§1961-1969, in light of the settled rule that a RICO defendant must "conduct" or "participate in" the affairs of some larger enterprise and not just its own affairs. For more information about this case, see the January 25, 2006 issue of AILF's Litigation Clearinghouse Newsletter <http://www.ailf.org/lac/litclearinghouse.shtml> and the case summary on Infonet, <http://www.aila.org/content/default.aspx?docid=18341>.

NEW AT THE LAC ...

Practice Advisory on I-212s, 245(i) and VAWA 2005: AILF and ASISTA have issued a Practice Advisory addressing inadmissibility for individuals who reenter the U.S. without admission. It provides strategies for those individuals with defensive adjustment of status applications under 245(i) or VAWA; suggests arguments for challenging the BIA's decision *Matter of Torres-Garcia*; and explains how VAWA 2005 can help. The Advisory is available at http://www.ailf.org/lac/lac_pa_index.asp.

Amicus Brief Filed in Voluntary Departure Case: AILF filed an amicus curiae brief in *Chedad v. Gonzales*, 1st Cir., Case No. 05-2782. The brief argued that *Matter of Shaar* no longer applies after IIRIRA and that the voluntary departure period should be tolled while a motion to reopen is pending. For more information about this issue, please see AILF's Practice Advisory, *Staying The Voluntary Departure Period When Filing A Motion To Reopen* (Dec. 16, 2005) available at http://www.ailf.org/lac/lac_pa_index.asp.

“ARRIVING ALIEN” ADJUSTMENT REGULATIONS, COMMENTS DUE JUNE 12

An interim rule issued by EOIR and USCIS deletes the absolute bar on an "arriving alien's" ability to adjust status if he or she is in removal proceedings. The interim rule, published on May 12, 2006, is effective immediately. The interim rule amends the regulations so that USCIS will have jurisdiction over adjustment applications notwithstanding the removal proceedings. The rule is available at <http://www.ailf.org/content/fileviewer.aspx?docid=19609&linkid=146548>.

This amendment is a direct result of the litigation challenging the bar on adjustment that AILF has coordinated nationally. Four courts of appeals had struck down the former regulation, finding that it violated the statute; two courts had upheld it. For more information about AILF's litigation on "arriving alien" adjustments, please see AILF website at http://www.ailf.org/lac/lac_arrivingalien.shtml.

While this interim rule represents an important victory for immigrants categorized as "arriving aliens," it is not the final rule. DHS and the Attorney General indicate that they are considering unnecessary and harmful limits on the exercise of discretion when adjudicating these adjustment applications. **Please comment on CIS and EOIR's interim regulations!** Model comments, prepared by AILF and Boston AILA members, can be used to prepare your own comments. They are available at <http://www.aila.org/content/default.aspx?docid=19609>. Comments are due on June 12, 2006 and can be filed electronically.

UPDATE: GOVERNMENT WITHDRAWS APPEAL IN SIJ CASE *ZHENG*

The May 5, 2006 issue of the Litigation Clearinghouse Newsletter highlighted *Zheng v. Pogash*, 416 F. Supp. 2d 550 (S.D. Tex. 2006), a case in which the district

court reversed DHS' denial of the plaintiff's request for consent to pursue special immigrant juvenile (SIJ) status in state court ("specific consent"). See http://www.ailf.org/lac/litclearinghouse/litclr_newsletter_050506.pdf. As reported, the government had filed a notice of appeal. On May 30, 2006, the government filed a motion to dismiss the appeal pursuant to FRAP 42 (Voluntary Dismissal). The court granted the motion on May 31, 2006. Therefore, the district court's decision is final.

CLEARINGHOUSE HIGHLIGHT

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

IJ Must Give Asylum Applicant Opportunity to Address Inconsistencies in Testimony, *Xue v. Board of Immigration Appeals*, 439 F.3d 111 (2d Cir. 2006). The IJ issued an oral decision finding the Petitioner not credible and denying his asylum claim. The adverse credibility determination was based on three perceived inconsistencies in the Petitioner's testimony. The BIA summarily affirmed the decision. On appeal, the court held that "an IJ may not rest an adverse credibility finding on non-dramatic putative contradictions or incongruities in a alien's narrative without first giving the applicant a chance to reconcile the testimony." Importantly, the court distinguished this case from *Majid v. Gonzales*, 430 F.3d 77 (2d Cir. 2005), where the court did not require the IJ to solicit an explanation regarding the inconsistencies. In that case, the inconsistency was conspicuous and central to the asylum claim. In contrast, in *Xue*, because none of the incongruities in the Petitioner's testimony was glaring and each had a plausible explanation, the court granted the petition for review and remanded the case to the agency to afford the Petitioner an opportunity to explain his testimony.

AILA prepares digests of all Supreme Court and significant appeals court decisions and posts them on Infonet. The digests are sorted by court and are searchable.

<http://www.aila.org/content/default.aspx?docid=19115>

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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.ailf.org/lac/litclearinghouse.shtml.