



AMERICAN IMMIGRATION LAW FOUNDATION  
LEGAL ACTION CENTER  
LITIGATION CLEARINGHOUSE  
NEWSLETTER

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## UPDATE ON NATZ DELAY LITIGATION

### Court Approves Settlement in NY Natz Delay Lawsuit

A district court approved a settlement in a naturalization delay class action brought by applicants residing in Kings, Nassau, Queens, Richmond, and Suffolk counties. The agreement requires USCIS to adjudicate approximately 90% of the naturalization applications of the proposed class members that have been pending, as of June 12, 2008, for more than 120 days after initial interviews. According to defendants, there are 1,426 applicants from the proposed class whose applications meet these criteria. USCIS must complete the adjudication process by August 25, 2008 and must schedule approved applicants for an oath of citizenship within 45 days of approval. If on or before September 2, 2008, USCIS has adjudicated fewer than 90% of the applications, the court will determine if defendants' failure to adjudicate was reasonable, and if not, what relief should be ordered. The case is *Yakubova v. Chertoff*, No. 06-3203 (E.D.N.Y. July 7, 2008).

To read the court order, settlement, and other documents from the case, see AILF's Naturalization Delay Litigation Issue Page at [http://www.ailf.org/lac/natz\\_delay0806.shtml](http://www.ailf.org/lac/natz_delay0806.shtml).

### Court Cites USCIS and FBI "Business Plan" as Evidence Name Check will be Completed

In a pre-interview naturalization delay mandamus action, a district court relied on assurances made by USCIS and the FBI in the National Name Check Program Business Plan ("The Business Plan"). The plaintiff has not yet had a naturalization interview because the name check is not complete. The Business Plan, agreed to and signed by USCIS and the FBI in March 2008, was designed to eliminate USCIS name check requests that had been pending for extended periods of time and speed processing in the future. *Inter alia*, the Business Plan indicated that July 2008 was the target date for processing USCIS name check requests that had been pending for over two years. Defendants cited the Business Plan in their pleadings and stated that because plaintiff's naturalization application will have been

pending for more than two years by July 31, 2008, the FBI "will work to complete Plaintiff's FBI name check no later than July 31, 2008." Based on these assurances, the court found it unnecessary to determine whether USCIS was required to schedule an interview absent a completed FBI name check. The court stayed the case until December 1, 2008. The case is *Cherenkov v. Mukasey*, No. 08-376 (W.D. Wash. filed Mar. 5, 2008).

The Business Plan includes additional information about eliminating name check delays that may be helpful in litigation efforts. See AILF's Naturalization Delay Litigation Issue Page at [http://www.ailf.org/lac/natz\\_delay0806.shtml](http://www.ailf.org/lac/natz_delay0806.shtml) for links to the court order and the Name Check Business Plan.

## COURTS SPLIT ON WHETHER AGGRAVATED IDENTIFY THEFT REQUIRES KNOWLEDGE THAT ID BELONGED TO ANOTHER PERSON

In a development of heightened relevance because of recent immigration raids and prosecutions, several courts of appeals have interpreted the aggravated identity theft statute, 18 U.S.C. § 1028A. Subsection (a)(1) of the statute says "Whoever, during and in relation to any felony violation enumerated in subsection (c), knowingly transfers, possesses or uses, without lawful authority, a means of identification of another person shall, in addition to the punishment Continued on following page

### NEW AT THE LAC ...

*Afanwi v. Mukasey*, 06-1236 (4th Cir. amicus brief filed July 18, 2008). AILF urged the court to rehear this case. In its original decision, the court wrongly concluded that the BIA lacked jurisdiction over petitioner's ineffective assistance of counsel claim and that the Fifth Amendment does not protect noncitizens from ineffective assistance of counsel in immigration proceedings.

*Vorontsova v. Chertoff*, No. 08-1052 (1st Cir. amicus brief filed July 16, 2008). AILF's brief supported the district court's finding that there was subject matter jurisdiction over a mandamus action. The case involves a delayed adjustment of status application.

## Aggravated Identity Theft Continued

for such felony, be sentenced to a term of imprisonment of 2 years.” The courts are divided about whether the knowledge requirement extends to the “of another person” element of the offense. In other words, does the government have to prove that a defendant knew that the means of identification he or she transferred, possessed or used belonged to another actual person or is it enough for the defendant to know that he or she used a false document? Section 1028A has come under closer scrutiny over the past few months following the ICE raid in Postville, Iowa, where hundreds of workers were charged with aggravated identify theft. Currently, six circuits have issued precedent decisions addressing the knowledge requirement. At least two other courts currently are considering the issue. Also, there are at least two pending petitions for certiorari asking the Supreme Court to consider the issue, *see United States v. Mendoza-Gonzalez* (cited below) and *United States v. Flores-Figueroa*, No. 07-2871 (8th Cir. April 23, 2008) *petition for cert. filed* (U.S. July 22, 2008) (08-108).

### Decisions Requiring Knowledge

*United States v. Godin*, \_\_ F.3d \_\_, 2008 U.S. App. LEXIS 15301 (1st Cir. July 18, 2008); *United States v. Miranda-Lopez*, \_\_ F.3d \_\_, 2008 U.S. App. LEXIS 15200 (9th Cir. July 17, 2008); *United States v. Villanueva-Sotelo*, 515 F.3d 1234 (D.C. Cir. 2008)

### Decisions Not Requiring Knowledge

*United States v. Mendoza-Gonzalez*, 520 F.3d 912 (8th Cir. 2008), *petition for cert. filed* (U.S. July 15, 2008) (08-5316); *United States v. Hurtado*, 508 F.3d 603 (11th Cir. 2007); *United States v. Montejo*, 442 F.3d 213 (4th Cir. 2006)

### Pending Circuit Court Cases

*United States v. Chavez-Quintana*, 07-3323 (10th Cir. filed Nov. 6, 2007) (argument scheduled for Sept. 23, 2008); *United States v. Tureseo*, 07-2933 (2d Cir. filed July 9, 2007) (argued June 23, 2008)

## CONTACT AILF ABOUT DADA CASES

AILF is continuing to examine the implications of the Supreme Court’s decision in *Dada v. Mukasey*, 128 S. Ct. 2307 (2008). In *Dada*, the Supreme Court protected the right to file a motion to reopen by

holding that voluntary departure recipients are permitted to unilaterally withdraw their voluntary departure request before the expiration of the voluntary departure period. AILF has been active on these issues and filed an amicus brief in the Supreme Court. Please contact AILF at [clearinghouse@ailf.org](mailto:clearinghouse@ailf.org) if your client’s case may be affected by *Dada*. We are monitoring how the agencies and the courts are interpreting the case and what arguments the government is making. For more information about *Dada*, see “*Dada v. Mukasey* Q&A: Preliminary Analysis and Approaches to Consider” at [http://www.ailf.org/lac/lac\\_pa\\_topics.shtml](http://www.ailf.org/lac/lac_pa_topics.shtml).

## COURT DECLARES NEW YORK LICENSING LAW UNCONSTITUTIONAL; STATE FILES NOTICE OF APPEAL

A district court struck down a New York state law that restricted veterinarian licenses to U.S. citizens and LPRs. The plaintiff, a Canadian citizen, had been granted a temporary visa under NAFTA specifically to practice veterinary medicine. Under the state law, plaintiff does not qualify for a permanent veterinarian license, but the state granted him a waiver of the citizenship/LPR requirement so that he was able to work under a limited license until July 2008.

The court granted plaintiff’s motion for summary judgment. It held that nonimmigrants are a suspect class for purposes of the Equal Protection Clause and that the NY law fails to pass strict scrutiny. However, even under the less stringent rational basis test, the law still violates the Equal Protection Clause. The court also concluded that the law conflicts with NAFTA and therefore is invalid under the Supremacy Clause. On July 24, 2008, the state filed a notice of appeal to the Second Circuit. In addition, the state asked the court to stay its decision pending resolution of the appeal and to authorize the plaintiff to continue working under a limited license.

The case is *Kirk v. New York State Dep’t of Education*, No. 08-6016 (W.D.N.Y. 2008). See the court’s decision in this case and read about other challenges to state and local laws regulating immigrants and immigration at AILF’s Challenges to State and Local Law Enforcements Efforts Litigation Issue Page at [http://www.ailf.org/lac/clearinghouse\\_120706.shtml](http://www.ailf.org/lac/clearinghouse_120706.shtml).

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

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