



AMERICAN IMMIGRATION LAW FOUNDATION
LEGAL ACTION CENTER
LITIGATION CLEARINGHOUSE
NEWSLETTER

Vol. 4, No. 3

February 24, 2009

CSC CERTIFIED TWO CSPA CASES TO BIA

The California Service Center (CSC) certified two visa petition cases raising issues under the Child Status Protection Act (CSPA) to the BIA and asked the BIA to issue a precedent decision. These cases involve USCIS' failure to implement § 3 of the CSPA, codified at 8 U.S.C. § 1153(h)(3). This provision states that where certain beneficiaries of visa petitions, including derivative beneficiaries, are unable to retain the status of "child" under the CSPA formula, they nevertheless are entitled to automatic conversion of the petition to the appropriate category and retention of the priority date from the original petition.

In both of the certified cases, the CSC concluded that 8 U.S.C. § 1153(h)(3) allowed only the derivative beneficiary of a second preference family-based visa petition to retain the priority date from such petition after aging out. In one of the cases, *Matter of Wang*, the aged-out person sought to retain the priority date of a fourth preference visa petition in which he had been named as a derivative beneficiary. In the other case, *Matter of Patel*, the aged-out person was the derivative beneficiary of an employment-based visa petition.

In addition, there are two suits filed in the U.S. District Court for the Central District of California challenging USCIS' interpretation of 8 U.S.C. § 1153(h)(3). Those cases currently are on hold for the BIA to consider the issue first. To read more about CSPA litigation, see <http://shusterman.com/cspa.html>.

MATTER OF R-A- DEVELOPMENTS; HAVE YOU RECEIVED A BIA BRIEFING ORDER IN A DOMESTIC VIOLENCE ASYLUM CASE?

In September 2008, former Attorney General Mukasey lifted the stay in *Matter of R-A*; 24 I&N Dec. 629 (A.G. 2008). *Matter of R-A* is an asylum case involving a woman who suffered domestic violence in her home country. In 1999, the BIA denied the asylum claim, but subsequently, former Attorney General Reno vacated that decision. The case had been stayed pending issuance of regulations

that were proposed in 2000.

Prior to the September order lifting the stay, the BIA had placed other domestic violence asylum cases on hold, pending the issuance of regulations and a decision in *Matter of R-A*. Since the September 2008 order, at least a few asylum seekers with pending cases have received BIA orders to submit supplemental briefs. The Center for Gender and Refugee Studies (CGRS) – which has been litigating *Matter of R-A* and assisting lawyers representing other domestic violence victims – is trying to assess how broadly this is happening. If you have a domestic violence asylum case pending at the BIA and have received an order for supplemental briefing in light of Mukasey's remand of *Matter of R-A*, please contact CGRS at frydmanl@uchastings.edu. For more information about *Matter of R-A* and other gender-related asylum claims, see CGRS' website at <http://cgrs.uchastings.edu/>.

NEW AT THE LAC ...

"Arriving Alien" and Adjustment of Status Litigation Issue Page. AILF has updated its "Arriving Alien" and Adjustment of Status Litigation Issue Page. This page provides information about developments relating to the ability of an "arriving alien" in removal proceeding to adjust status. It includes summaries of circuit court decisions and links to AILF's Practice Advisories on this issue. http://www.ailf.org/lac/clearinghouse_102306.shtml

AILF is seeking to find out about cases challenging *Matter of Perez-Vargas*. In *Matter of Perez-Vargas*, 23 I&N Dec. 829 (BIA 2005), the BIA held that an immigration judge lacks jurisdiction to determine whether an adjustment applicant satisfies the portability provisions found in INA § 204(j). AILF has filed amicus briefs in cases challenging this decision, and was successful in the Fourth Circuit case *Perez-Vargas v. Gonzales*, 478 F.3d 191 (4th Cir. 2007). Please email AILF at clearinghouse@ailf.org if you are litigating a case in the circuit court. For more information about this issue, see AILF's IJ's Jurisdiction to Apply INA § 204(j) Litigation Issue Page at http://www.ailf.org/lac/ina204_0806.shtml.

NEW LITIGATION RESOURCES

Challenging Immigration Consulting Fraud.

The ABA's Commission on Immigration, in collaboration with Bryan Cave LLP, launched a new project, Fight Notario Fraud. The project provides information about how to challenge immigration consulting fraud; collects litigation-related resources, including pleadings and decisions in recent cases; and promotes collaboration on pro-bono work regarding immigration fraud. www.fightnotariofraud.org.

Representing Unaccompanied Minors.

Immigrant advocates have issued a practice advisory addressing the provisions in the Trafficking Victims Protection Reauthorization Act of 2008 that affect unaccompanied minors. The TVPRA, enacted on December 23, 2008, made changes to relief for unaccompanied immigrant children, including those seeking relief from removal, SIJ status and asylum. <http://www.aila.org/content/default.aspx?docid=28052>.

COURT ORDERS USCIS TO EXPLAIN DELAY IN "MATERIAL SUPPORT" ADJUSTMENT CASE

A district court denied USCIS' motion to dismiss a challenge to delayed adjudication of an adjustment application. The application is on hold in compliance with a USCIS memo instructing adjudicators to hold applications where the applicant is inadmissible for having provided material support to a Tier III terrorist organization under INA § 212(a)(3)(B)(vi)(III). According to USCIS, the government is undertaking a review to determine which Tier III terrorist organization may be exempted from terrorism-related inadmissibility.

The court declined to decide whether the delay is reasonable, but ordered USCIS to present the following evidence to explain the delay: how the review of Tier III terrorist organizations is occurring; the number of groups for which a review is completed each month; how many groups have been exempted and not exempted so far; and how long the typical review has taken. The court also required USCIS to file the list of Tier III terrorist organizations. The case is *Ahmed v. Scharfen*, No. 08-1680, 2009 U.S. Dist. LEXIS 591 (N.D. Cal. 2009).

NOTICE TO *DURAN-GONZALES* CLASS MEMBERS

Duran Gonzales is a Ninth Circuit-wide class action involving individuals who have been removed from the U.S. and who now are seeking to adjust status (under INA § 245(i)) along with an I-212 waiver application. On February 6, 2009, the temporary restraining order expired and the district court denied a preliminary injunction. As a result, USCIS is now allowed to deny class members' I-212 applications and give effect to already denied applications, which may result in individuals being put in removal proceedings or being subject to reinstatement of removal. Read class counsel's notice to class members regarding the current status of the class action and steps class members can take in their individual cases, see <http://www.ailf.org/lac/chdocs/Duran-classnotice.pdf>.

FUGITIVE DISENTITLEMENT DOCTRINE NOT APPLICABLE WHERE PETITIONER'S WHEREABOUTS KNOWN DURING PFR

The fugitive disentitlement doctrine did not justify dismissing a petition for review, even though the petitioner had failed to report for removal, the Ninth Circuit recently held. *Sun v. Mukasey*, 2009 U.S. App. LEXIS 2277 (9th Cir. Feb. 9, 2009). The fugitive disentitlement doctrine developed in the criminal law context to limit a person's ability to appeal as long as he or she remained a "fugitive." The courts generally have approved of the doctrine's application in the immigration context.

In *Sun*, the petitioner did not report for removal, as ordered by the government, several years prior to filing a petition for review. Nonetheless, the petitioner's failure to report did not necessarily make the doctrine applicable. According to the court, "the critical question" is "whether the appellant is a fugitive at the time the appeal is pending." Because the petitioner's whereabouts were known to her counsel, DHS, and the court while the petition for review was pending, the court concluded that it would be inappropriate to dismiss the case.

For more information about the fugitive disentitlement doctrine and its application in the petition for review and FOIA contexts, see AILF's practice advisory at http://www.ailf.org/lac/pa/lac_pa_fugdis.pdf.

AILF Legal Action Center, Litigation Clearinghouse

www.ailf.org/lac clearinghouse@ailf.org

Beth Werlin, Litigation Clearinghouse Attorney Emily Creighton, Staff Attorney

Maria Lokshin, Law Clerk

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.

AILF is grateful for the generous support of LexisNexis.