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COURT GRANTS SUMMARY JUDGMENT FOR PLAINTIFFS IN RELIGIOUS WORKER SUIT

A district court granted summary judgment for the plaintiffs in a class action challenging the requirement that religious workers have an approved visa petition before they can file an adjustment of status application. The regulation at issue in the case, 8 C.F.R. § 245.2(a)(2)(i)(B), permits some noncitizens to file concurrently, while requiring others to await approval of the visa petition. The court concluded that the regulation is an unreasonable and impermissible construction of the governing statute, and the government “may not, therefore, reject or refuse to accept plaintiffs’ applications for adjustment of status based on the regulation barring religious workers from concurrent filing.” The case is *Ruiz-Diaz v. USA*, No. 07-1881 (W.D. Wash. Summ. J. granted Mar. 23, 2009). See http://www.aifl.org/lac/clearinghouse_otherissues.shtml#ruiz for more information.

COURTS DIVIDED OVER JURISDICTION TO REVIEW IJ’S DENIAL OF CONTINUANCE; SOME DENIALS OVERTURNED

All of the circuit courts have considered whether they have jurisdiction to review an IJ’s denial of a continuance. The courts are divided about whether INA § 242(a)(2)(B)(ii), the discretionary decision bar to judicial review, precludes review.

Cases Finding Jurisdiction: *Alsamhour v. Gonzales*, 484 F.3d 117 (1st Cir. 2007); *Sanusi v. Gonzales*, 445 F.3d 193 (2d Cir. 2006); *Khan v. Att’y Gen.*, 448 F.3d 226 (3d Cir. 2006); *Lendo v. Gonzales*, 493 F.3d 439 (4th Cir. 2007); *Ahmed v. Gonzales*, 447 F.3d 433 (5th Cir. 2006); *Abu-Khaliel v. Gonzales*, 436 F.3d 627 (6th Cir. 2006); *Subhan v. Ashcroft*, 383 F.3d 591 (7th Cir. 2004); *Sandoval-Luna v. Mukasey*, 526 F.3d 1243 (9th Cir. 2008); *Zafar v. Att’y Gen.*, 461 F.3d 1357 (11th Cir. 2006)

Cases Finding No Jurisdiction: *Malik v. Mukasey*, 546 F.3d 890 (7th Cir. 2008); *Onyinkwa v. Ashcroft*, 376 F.3d 797 (8th Cir. 2004); *Yerkovich v. Ashcroft*, 381 F.

3d 990 (10th Cir. 2004).

The Seventh Circuit is the only court to reach different results on the jurisdiction question depending on the circumstances of the continuance denial. The court generally has said that it lacks jurisdiction over continuance denials, but it will review the denial where it results in the denial of a benefit. See *Subhan v. Ashcroft*, 383 F.3d 591 (7th Cir. 2004). For example, in *Ceta v. Mukasey*, 535 F.3d 639 (7th Cir. 2008), the court found jurisdiction to review the denial of the continuance because it nullified petitioner’s “statutory opportunity to adjust status.” In contrast, the Seventh Circuit refused to exercise jurisdiction over a denial of a continuance in *Continued on following page*

NEW AT THE LAC ...

Litigation Clearinghouse Website Updates. AILF has updated its **Brand X in Immigration Cases** and **Natz Delay Litigation** Litigation Issue Pages. The **Brand X in Immigration Cases** webpage provides an overview of the Supreme Court’s decision in *Brand X*, holding that in some circumstances, an agency interpretation of a statute trumps a prior circuit court precedent. The page identifies circuit court immigration decisions that have applied *Brand X* and immigration agency decisions that have addressed *Brand X*. The **Natz Delay Litigation** webpage focuses on litigation brought under INA § 336(b). The page covers class action and multi-party suits, jurisdiction over naturalization delay suits, court issued remedies, and attorneys fees.

Appeal Filed in *Duran Gonzales* Class Action.

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)) with an I-212 waiver. On Feb. 27, 2009, the district court entered judgment in favor of the defendants. Plaintiffs have appealed to the Ninth Circuit to pursue the argument that the Ninth Circuit’s decision in *Duran Gonzales v. DHS*, 508 F.3d 1227 (9th Cir. 2007), should not apply retroactively to class members who relied on *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004). Read more about this suit at http://www.aifl.org/lac/lac_lit_92806.shtml.

Continuances continued

Malik v. Mukasey, 546 F.3d 890 (7th Cir. 2008), where the court found that the person's past conduct made him ineligible for adjustment of status.

Where the courts have found jurisdiction to review the denial of a continuance, they have reached differing results regarding the merits of the IJ or BIA's decisions.

Cases Overturning Continuance Denial

Rajah v. Mukasey, 544 F.3d 449 (2d Cir. 2008) (labor cert. pending); *Hashmi v. U.S. Att'y Gen.*, 531 F.3d 256 (3d Cir. 2008) (I-130 pending); *Masih v. Mukasey*, 536 F.3d 370 (5th Cir. 2008) (labor cert. and I-140 approved and visa priority date current when I-485 filed); *Badwan v. Gonzales*, 494 F.3d 566 (6th Cir. 2007) (IJ failed to explain denial of continuance for petitioner to supplement adjustment application) *Ahmed v. Mukasey*, 519 F.3d 579 (6th Cir. 2008) (I-130 pending); *Subhan v. Ashcroft*, 383 F.3d 591 (7th Cir. 2004) (labor cert. pending); *Vasquez v. Mukasey*, No. 05-70618, 2008 U.S. App. LEXIS 16360 (9th Cir. July 30, 2008) (sought continuance to file an expedited FOIA request); *Merchant v. Attorney General*, 461 F.3d 1375 (11th Cir. 2006) (approved labor cert., I-140 pending)

Cases Upholding Continuance Denial

Alsamhour v. Gonzales, 484 F.3d 117 (1st Cir. 2007) (sought continuance to file asylum application after disregarding deadline); *Pedrerros v. Keisler*, 503 F.3d 162 (2d Cir. 2007) (I-130 denial on appeal); *Khan v. U.S. Att'y Gen.*, 448 F.3d 226 (3d Cir. 2006) (labor cert. pending) *Lendo v. Gonzales*, 493 F.3d 439 (4th Cir. 2007) (labor cert. pending); *Ukpabi v. Mukasey*, 525 F.3d 403 (6th Cir. 2008) (Notice of Intent to Deny issued); *Abu-Khaliel v. Gonzales*, 436 F.3d 627 (6th Cir. 2006) (I-130 pending); *Ali v. Gonzales*, 502 F.3d 659 (7th Cir. 2007) (son's application for naturalization, upon which an I-130 would be based, had been denied); *Sandoval-Luna v. Mukasey*, 526 F.3d 1243 (9th Cir. 2008) (labor cert. pending); *Zafar v. Attorney General*, 461 F.3d 1357 (11th Cir. 2006) (labor cert. pending).

The Second Circuit has requested guidance from the BIA on the issue of continuances. In *Rajah v. Mukasey*, 544 F.3d 449 (2d Cir. 2008), the court stated that it could not adequately assess whether the agency abused its discretion in denying a continuance

due to the "absence of standards that reflect the various situations of those seeking continuances."

FIFTH CIRCUIT RULES FAVORABLY IN FTCA CASE ADDRESSING "DISCRETIONARY FUNCTION" EXCEPTION

The Fifth Circuit reversed a district court's dismissal of a Federal Tort Claim Act (FTCA) suit for damages brought by a minor U.S. citizen who was wrongfully deported and her mother. *See Castro v. United States*, No. 07-40416, 2009 U.S. App. LEXIS 3659 (5th Cir. Feb. 20, 2009). The plaintiffs claim that border patrol agents violated their Fourth and Fifth Amendment rights. The plaintiffs allege claims of negligence, intentional infliction of emotional distress, false imprisonment, abuse of process, and assault. The district court dismissed the case under the FTCA's "discretionary function" exception, which says that the government is not liable for any claim arising from the exercise of discretion in the performance of a government function or duty. On appeal, the Fifth Circuit held that the discretionary function exception does not apply where the government agents exceeded the scope of their authority. Because the plaintiffs sufficiently alleged that the border patrol agents exceeded their authority in arresting, detaining and removing a U.S. citizen, the case should be allowed to proceed.

EIGHTH CIRCUIT RESOURCE: ILCM'S APPELLATE LITIGATION PROJECT

The Immigrant Law Center of Minnesota has launched the Appellate Litigation Project to improve both access to the Eighth Circuit Court of Appeals and coordination of immigration litigation within the circuit. The project's primary goals are (1) providing representation to indigent or detained immigrants, (2) training and mentoring lawyers, and (3) improving circuit-wide coordination and quality of immigration litigation by tracking cases and disseminating information about important issues and legal developments. The litigation project presently is working on a number of cases of potentially significant impact, including a petition for review from the BIA's precedent gang-asylum decision, *Matter of S-E-G*, 24 I&N Dec. 579 (BIA 2008). For more information, go to ILCM's website at www.immigrantlawcentermn.org.

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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.aifl.org/lac/litclearinghouse.shtml.

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