



AMERICAN IMMIGRATION LAW FOUNDATION
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LITIGATION CLEARINGHOUSE
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COURT ORDERS DHS TO RESPOND TO DETENTION STANDARDS PETITION

A district court ordered DHS to respond to a petition for rulemaking filed by two non-profit organizations and two former detainees. Plaintiffs brought the suit after DHS failed to respond to their request for comprehensive, binding regulations governing detention standards for detained immigrants. Plaintiffs alleged that DHS' failure to respond to the petition violated the Administrative Procedure Act (APA), which requires a reasoned and timely response to the petition, and that the constructive denial of the petition was arbitrary, capricious, and an abuse of discretion under the APA.

The court held that plaintiffs properly stated a claim that DHS violated the APA by failing to grant or deny plaintiffs' rulemaking request. Further, the court found that DHS' almost two-and-one-half year delay in responding to the petition was unreasonable. Because it held that DHS had not yet responded to plaintiffs' petition within the meaning of the APA, the court dismissed plaintiffs' constructive denial claim as moot. The court ordered the agency to decide plaintiffs' petition within 30 days and closed the case.

The case is *Families for Freedom v. Chertoff*, No. 08-4056, 2009 U.S. Dist. LEXIS 56092 (S.D.N.Y. June 25, 2009). The complaint and court order are available at http://www.aifl.org/lac/clearinghouse_treatment.shtml

BIA AND NINTH CIRCUIT RULE ON CONTINUANCES IN REMOVAL PROCEEDINGS WHEN VISA PETITIONS ARE PENDING

The BIA and the Ninth Circuit recently identified factors immigration judges should consider when ruling on motions to continue to allow USCIS to complete adjudication of a visa petition. In *Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009), the BIA reiterated the presumption stated in *Matter of Garcia*, 16 I&N Dec. 653 (BIA1979), that a continuance generally should be granted where there is a prima facie approvable family-sponsored visa petition and adjustment of status application. Additionally, the BIA identified factors for immigration judges to

consider, including DHS' response to the request; whether the visa petition is prima facie approvable; whether the respondent is eligible for adjustment of status and merits this discretionary relief; and the reason for the continuance, including the party most responsible for the delay.

Stressing that the "focus of the inquiry is the apparent ultimate likelihood of success on the adjustment application," the BIA also specifically identified the types of evidence relevant to the continuance motion. Further, the BIA urged DHS to consider administrative closure where there is a pending prima facie approvable visa petition. It also stated that unsupported opposition to a continuance should not carry much weight. Finally, the BIA cautioned immigration judges that case completion goals are not a proper factor to consider.

In an employment-based case, the Ninth Circuit held that the immigration judge abused his discretion in denying a second continuance to allow the AAO time to rule on the immigrant's appeal of his I-140 visa
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NEW AT THE LAC ...

AILF Submits Brief in CSPA Case. AILF submitted an amicus brief in *Costello v. Chertoff*, No. 08-688 (C.D. Cal. amicus brief submitted July 1, 2009), arguing that the BIA's recent decision interpreting section 3 of the Child Status Protection Act, *Matter of Wang*, 25 I&N Dec. 28 (BIA 2009), was decided wrongly and is not entitled to deference. Read more about *Costello* and *Matter of Wang* in the June 22, 2009 AILF Litigation Clearinghouse Newsletter at http://www.aifl.org/lac/litclearinghouse/litclr_newsletter_090622.pdf.

New AILF Practice Advisory. *Voluntary Departure: Automatic Termination and the Harsh Consequences of Failing to Depart* (July 6, 2009). This Practice Advisory addresses when the voluntary departure period runs and the events that cause automatic termination of a voluntary departure order. The advisory also discusses the serious consequences that result from failing to depart, when these consequences apply, and importantly, when they do not apply.

CONTINUANCES CONTINUED

petition. *Ahmed v. Holder*, No. 06-71631, 2009 U.S.App. LEXIS 13555 (9th Cir. June 24, 2009). The court found that a determination of “good cause” for a continuance requires consideration of the nature of the evidence excluded without the continuance; the reasonableness of the immigrant’s conduct; the inconvenience to the immigration court; and the number of continuances already granted. The court also explained that there is a regulatory right to appeal the denial of an I-140 and that the denial of the continuance “effectively pretermitted” this appeal. Finally, while noting *Matter of Garcia*, the court stated that the immigrant need not show prima facie eligibility for adjustment of status in order to demonstrate “good cause” for a continuance.

Related Resource: For information about federal court jurisdiction to review IJ continuance decisions, see the March 22, 2009 AILF Litigation Clearinghouse Newsletter at http://www.aifl.org/lac/litclearinghouse/litclr_newsletter_090325.pdf.

COURT TO EXAMINE THE RETROACTIVE APPLICATION OF LAW WHEN CIRCUIT PRECEDENT IS TRUMPED BY AGENCY RULE UNDER *BRAND X*

Whether a new rule should apply retroactively to individuals who relied on a prior circuit precedent that was trumped under the Supreme Court’s decision in *Brand X*, currently is before the Ninth Circuit in the *Duran Gonzales* class action. The plaintiffs in *Duran Gonzales* applied for adjustment of status in reliance on the Ninth Circuit’s prior precedent, *Perez-Gonzalez*, 379 F.3d 783 (9th Cir. 2004). Subsequently, the Ninth Circuit, relying on *Brand X*, said it was bound to defer to and adopt a BIA interpretation of the statute and regulations – an interpretation which would mean that plaintiffs are not eligible to adjust. Plaintiffs filed their brief to the Ninth Circuit arguing that the new rule should not apply retroactively to class members who relied on the prior circuit precedent. Read the brief and more about the *Duran Gonzales* litigation at http://www.aifl.org/lac/lac_lit_92806.shtml. Also, read more about *Brand X* and its application in immigration cases at AILF’s *Brand X* Litigation Issue Page, at http://www.aifl.org/lac/lit_issue_pages.shtml.

CLASS ACTION CHALLENGES PRE-FINAL ORDER PROLONGED DETENTION

Two LPRs filed a class action charging that the government is unlawfully detaining them for prolonged periods of time without providing them a custody hearing. The proposed class includes LPR Pennsylvania residents who 1) are or will be detained for prolonged periods of 6 months or more under the pre-final order detention statute, 8 U.S.C. § 1226; 2) have not had a custody hearing to determine whether their prolonged detention is justified; 3) are not detained pursuant to one of the detention statutes authorizing prolonged detention on national security grounds; and 4) are not detained pursuant to 8 U.S.C. § 1225 (governing pre-final order detention of non-citizens who have not been admitted to the U.S.).

Petitioners argue, inter alia, that 1) the INA does not authorize their prolonged detention without a custody hearing, and 2) if it does, prolonged detention without adequate review violates the Due Process Clause. Petitioners seek a hearing to determine whether their prolonged detention is justified.

Petitioners have filed a motion for class certification and are seeking a preliminary injunction. The court scheduled a hearing on petitioners’ motion for a preliminary injunction and the governments’ response to the habeas petition for August 4, 2009. The case is *Alli v. Decker*, No. 09-00698 (M.D. Pa. amended petition filed May 27, 2009). Read the complaint at <http://www.aclu.org/immigrants/detention/396891gl20090527.html>.

LITIGATION RESOURCES: ADVISORIES ON THE SUPREME COURT’S *NIJHAWAN* DECISION AND THE CATEGORICAL APPROACH

“The Impact of *Nijhawan v. Holder* on Application of the Categorical Approach to Aggravated Felony Determinations” (June 24, 2009) by the Immigrant Defense Project and the National Immigration Project of the National Lawyer Guild. [http://www.nationalimmigrationproject.org/Nijhawan_practiceadvisory%20\(NIP_NLG_IDP\).pdf](http://www.nationalimmigrationproject.org/Nijhawan_practiceadvisory%20(NIP_NLG_IDP).pdf)

“Preliminary Advisory on *Nijhawan v. Holder*” by the Immigrant Legal Resource Center http://www.ilrc.org/immigration_law/pdf/Practice%20Advisory%20Nijhawan%20ILRC.pdf

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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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