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COURTS CERTIFY TWO CLASS ACTIONS

TPS Registrants Sue for Refunds of Fees

Nationals of El Salvador, Honduras, and Nicaragua who applied to register for TPS sued the government for charging them more than the required amount in fees. Under INA § 244(c)(1)(B), "the amount of any fee shall not exceed \$50," but TPS registrants must pay an \$80 biometrics fee for each re-registration. The plaintiffs seek refunds of fees higher than \$50 and an order enjoining DHS from imposing fees higher than \$50. On July 9, 2009, the court granted plaintiffs' motion for class certification. The class is defined as "[a]ll nationals of El Salvador, Honduras, and Nicaragua who have applied to register or re-register for Temporary Protected Status ("TPS") at any time from August 16, 2001 to the present." The case is *Bautista-Perez v. Mukasey*, No. 07-4192 (N.D. Cal. filed Aug. 16, 2007).

Visa Beneficiaries Challenge Government Interpretation of CSPA

Plaintiffs filed a class action to challenge USCIS' failure to implement § 3 of the Child Status Protection Act (CSPA), codified at INA § 203(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 visa category and retention of the priority date from the original petition. In *Matter of Wang*, 25 I&N Dec. 28 (BIA 2009), the BIA said §203(h)(3) applies only to visa petitions filed by an LPR parent for a child as either a direct or derivative beneficiary.

On July 16, 2009, the court issued an order certifying a class as defined as "[a]ll aliens who became lawful permanent residents as primary beneficiaries of third- and fourth-preference visa petitions listing their children as derivative beneficiaries, and who subsequently filed second-preference petitions on behalf of their aged-out unmarried sons and daughters, for whom Defendants have not granted automatic conversion or the retention or priority dates pursuant to § 203(h)(3)."

Read the court orders in both of these class actions

and learn more about these cases and other multi-party immigration actions at

http://www.aifl.org/lac/clearinghouse_otherissues.shtml.

BIA TO HEAR ARGUMENT ON IJ'S JURISDICTION TO APPLY INA § 204(j) AND *MATTER OF PEREZ VARGAS*

The BIA scheduled oral argument for October 1, 2009, in a case challenging *Matter of Perez Vargas*, 23 I&N Dec. 829 (BIA 2006). In *Matter of Perez Vargas*, the BIA held that IJs lack jurisdiction to determine whether an approved I-140 remains valid under INA § 204(j) (portability provision). Section 204(j) provides that, for purposes of an adjustment application that has been pending for more than 180 days, an approved I-140 visa petition remains valid even if the applicant changes jobs, so long as the new job is in the same or similar occupational classification.

The BIA directed the parties to address (1) whether the Board should overrule *Matter of Perez Vargas*; (2) regardless of whether IJ's have jurisdiction, under what circumstances should IJs grant continuances to allow DHS an opportunity to resolve whether the I-140 remains valid, and (3) alternatively (for DHS), is DHS amenable to administrative closure of such cases in lieu of a continuance?

AILF has been challenging *Matter of Perez Vargas* in federal court and has issued a Practice Advisory discussing these arguments. Read more about the issue and find links to the BIA's scheduling order and AILF's Practice Advisory on AILF's § 204(j) Litigation Issue Page, http://www.aifl.org/lac/ina204_0806.shtml.

NEW AT THE LAC ...

Updated AILF Practice Advisory. *Mandamus Jurisdiction over Delayed Applications: Responding to the Government's Motion to Dismiss* (July 23, 2009). This Practice Advisory outlines arguments to make in response to the government's motion to dismiss a mandamus or Administrative Procedure Act action brought to remedy the delayed adjudication of an immigration application. All AILF Practice Advisories are available at http://www.aifl.org/lac/lac_pa_topics.shtml.

COURT REJECTS APPLICABILITY OF CONSULAR NONREVIEWABILITY DOCTRINE; REVIEWS “MATERIAL SUPPORT” PROVISION

The Second Circuit held that the doctrine of consular nonreviewability did not bar the district court from considering a lawsuit challenging the denial of a visa petition for an Islamic scholar. The consular officer denied the visa based on a finding that the applicant was inadmissible under the “material support” of terrorism ground, INA § 212(a)(3)(B)(iv)(VI). The case is *Am. Acad. of Religion v. Napolitano*, No. 08-0826, 2009 U.S. App. LEXIS 15786 (2d Cir. July 17, 2009).

The court relied on *Kleindienst v. Mandel*, 408 U.S. 753 (1972), in which the Supreme Court recognized a First Amendment right to “hear, speak and debate with” a visa applicant. Here, plaintiffs, three U.S. organizations, properly alleged First Amendment claims. The government attempted to distinguish *Mandel* because it addressed the Attorney General’s discretionary decision not to waive a ground of inadmissibility, rather than the consular officer’s threshold decision that the noncitizen was inadmissible. The latter decision, the government contended, is totally immune from review. However, the court found this alleged distinction unavailing.

Applying *Mandel*, the court held that the visa denial was not “facially legitimate and bona fide.” Specifically, the court found that INA § 212(a)(3)(B)(iv)(VI)(dd) provides a visa applicant an “opportunity to demonstrate by clear and convincing evidence that he did not know, and reasonably should not have known, that the recipient of his contributions was a terrorist organization.” It was unclear whether the applicant was afforded this opportunity.

The court also considered, but rejected, the plaintiffs’ argument that the material support provision, enacted by the REAL ID Act, should not apply retroactively to conduct that pre-dated the Act. The court left unanswered whether the retroactive application of this provision to LPRs would violate due process. In addition, the court held that under *Mandel*, a court is permitted to consider only whether that the alleged conduct fits within the statutory provisions relied upon in denying the visa; the court could not conduct further inquiry into the evidence that supported the consular officer’s decision.

The ACLU, which is co-counsel in this case, also is

challenging First Amendment violations in another case. Read more about both cases and find links to court materials and press releases at <http://www.aclu.org/safefree/exclusion/index.html>.

COURT COMPELS DOL TO ADJUDICATE PERM APPLICATION

The District Court for the Northern District of Georgia granted a plaintiff’s request for a TRO ordering DOL to make a decision on his Application for Permanent Employment Certification (Form ETA-9089) within one day of the court’s order. Plaintiff had filed a mandamus action seeking to have the ETA-9089 adjudicated before his son’s 21st birthday. Because plaintiff’s 20-year old son had to file his visa petition (I-140) prior to his 21st birthday to qualify as a derivative beneficiary, plaintiff requested that the court issue a TRO ordering immediate action on the ETA-9089.

The government argued that the court lacked jurisdiction to compel agency action on the ETA-9089. The court disagreed, reasoning that the APA imposes a non-discretionary duty upon the government to adjudicate immigration-related applications, and that this provision applied to DOL. It concluded that the government’s 10-month delay in processing the ETA-9089 was unreasonable because the government provided no explanation for the delay, and DOL’s rule implementing PERM anticipated that electronically-filed applications would be decided within 45 to 60 days. The case is *Kumykov v. Carlson*, No. 09-01217 (N.D. Ga. TRO granted Jun. 4, 2009).

In addition to this case, there are other examples outside the adjustment of status context where the courts have found jurisdiction to remedy immigration delays: *Patel v. Reno*, 134 F.3d 929 (9th Cir. 1998) (I-130 petition at consulate); *Omoruyi v. Chertoff*, No. 08-0106, 2008 U.S. Dist. LEXIS 34690 (S.D. Tex. Apr. 28, 2008) (I-130 petition); *Harriott v. Ashcroft*, 277 F. Supp. 2d 538 (E.D. Pa. 2003) (application for derivative citizenship); *Pierre v. McElroy*, 200 F. Supp. 2d 251 (S.D.N.Y. 2001) (SIJ petition); *Johnson v. Reno*, 92 F. Supp. 2d 993 (N.D. Ca. 2000) (ordering INS and other federal defendants to produce the information and testimony requested by plaintiff for use in defense of criminal charges). Read more about recent mandamus litigation and find links to AILF’s mandamus Practice Advisories at http://www.ailf.org/lac/clearinghouse_mandamus.shtml.

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