



AMERICAN IMMIGRATION LAW FOUNDATION
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SUPREME COURT GRANTS CERTIORARI IN IMMIGRATION CASES

The Supreme Court opened the October 2007 term by granting certiorari in four cases involving immigration law. Each case is described below. AILF's Supreme Court Update webpage will provide information about these cases throughout the term. See http://www.ailf.org/lac/lac_lit_index.shtml. Note that new Supreme Court rules went into effect on October 1, 2007. For more information about the rules, see the August 28, 2007 AILF Litigation Clearinghouse Newsletter at http://www.ailf.org/lac/lac_lit_index.shtml.

Voluntary Departure and Motions to Reopen: *Dada v. Keisler*, No. 06-1181, 2007 U.S. LEXIS 9061 (cert. granted Sept. 25, 2007). The court granted certiorari on the following question: "Whether the filing of a motion to reopen removal proceedings automatically tolls the period within which an alien must depart the United States under an order granting voluntary departure." The circuit courts are split on this issue. **Favorable decisions:** *Kanivets v. Gonzales*, 424 F.3d 330 (3d Cir. 2005); *Sidikhouya v. Gonzales*, 407 F.3d 950 (8th Cir. 2005); *Azarte v. Ashcroft*, 394 F.3d 1278 (9th Cir. 2005); *Ugokwe v. U.S. Attorney General*, 453 F.3d 1325 (11th Cir. 2006). **Adverse decisions:** *Chedad v. Gonzales*, 497 F.3d 57 (1st Cir. 2007) (pet. for rehearing to be filed); *Dekoladenu v. Gonzales*, 459 F.3d 500 (4th Cir. 2006); *Banda-Ortiz v. Gonzales*, 445 F.3d 387 (5th Cir. 2006). The Court's decision in *Dada* likely will resolve this split. Briefing is scheduled to be completed by the end of 2007.

Particularly Serious Crime: *Ali v. Achim*, 06-1346, 2007 U.S. LEXIS 9077 (cert. granted Sept. 25, 2007). The Court granted certiorari to determine whether the Seventh Circuit erred when it 1) concluded that an offense does not need to be an aggravated felony to qualify as a "particularly serious crime," and 2) narrowly construed its jurisdiction over the BIA's particularly serious crime determinations. In a published decision, *Ali v. Achim*, 468 F.3d 462 (7th Cir. 2007). *Continued on following page*

COURT HALTS ENFORCEMENT OF SOCIAL SECURITY NO-MATCH RULE

On October 10, 2007, a district court granted a preliminary injunction enjoining the government from enforcing the new Social Security No-Match rule. The court held that relief was appropriate because plaintiffs raised serious questions about whether 1) the rule is arbitrary and capricious; 2) DHS exceed its authority; and 3) DHS violated the Regulatory Flexibility Act by not conducting a final flexibility analysis. The court ordered the parties to *Continued on following page*

NEW AT THE LAC ...

New AILF Practice Advisory: *Mandamus Jurisdiction over Delayed Applications: Responding to the Government's Motion to Dismiss* (Sept. 25, 2007). This advisory outlines arguments in response to a motion to dismiss a mandamus case brought to remedy the delayed adjudication of an immigration benefit application such as an adjustment of status application. All of AILF's Practice Advisories are available at http://www.ailf.org/lac/lac_pa_index.shtml. In addition to issuing this advisory, AILF's LAC has filed amicus briefs in the Eleventh and Third Circuits in cases where the district court has dismissed a mandamus action for lack of jurisdiction. Please contact the LAC at clearinghouse@ailf.org if your client is appealing a dismissed mandamus petition.

Litigation Issue Pages: The Litigation Clearinghouse has expanded its Litigation Issue Pages to include an "Other Impact Litigation" Issue Page. This page summarizes and discusses class action and other multi-party lawsuits that deal with current issues affecting the immigrant community and that do not fall into categories covered by other Litigation Issue Pages. Cases highlighted on the page include the Social Security No-Match Rule litigation, EAD litigation, and detention conditions litigation. See the Litigation Issue pages at http://www.ailf.org/lac/lac_lit_index.shtml.

SCT Cases Continued

Cir. 2006), the Seventh Circuit upheld the BIA's finding that the petitioner was ineligible for asylum and withholding of removal because he had committed a "particularly serious crime." Briefing is scheduled to be completed in February 2008.

Aggravated Felony: *United States v. Rodriguez*, 06-1646, 2007 U.S. LEXIS 9084 (cert. granted Sept. 25, 2007). The Court will examine whether a state drug-trafficking offense, for which state law authorizes a ten-year sentence because the defendant was a recidivist, qualifies as a predicate offense under the Armed Career Criminal Act, 18 U.S.C. § 924(e). Although this is not an immigration case, the Court's decision could affect the Ninth Circuit's aggravated felony analysis in *U.S. v. Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002) (en banc). In *Corona-Sanchez*, the court found that a petty theft conviction could not qualify as an aggravated felony because the maximum possible sentence for a violation without statutory recidivist enhancements was six months. Briefing is scheduled to be completed by the end of 2007.

Remand Rule: *Keisler v. Gao*, 06-1264, 2007 U.S. LEXIS 10267 (cert. granted Oct. 1, 2007). The Supreme Court granted certiorari, vacated the judgment, and remanded the case to the Second Circuit for further consideration in light of *Gonzales v. Thomas*, 547 U.S. 183, 126 S. Ct. 1613, 164 L. Ed. 2d 358 (2006). In *Gonzales v. Thomas*, the Court held that the Ninth Circuit erred by deciding, without prior resolution by the BIA, that the asylum applicants and their family would constitute a "particular social group" and should have applied the "ordinary remand rule" rather than deciding the asylum case in the first instance. The underlying court of appeals decision in *Gao* (*Gao v. Gonzales*, 440 F.3d 62 (2d Cir. 2006)), involves an asylum claim based on membership in a "particular social group."

No-Match Letter Litigation Continued

confer and submit a proposed order by October 12, 2007. The case is *American Federation of Labor and Congress of Industrial Organizations et al. v. Chertoff et al.*, No. 07-4472 (N.D. Cal. filed Aug. 29, 2007). More information about the suit is available at the AILF Other Impact Litigation Issue Page, http://www.ailf.org/lac/clearinghouse_otherissues.shtml.

BIA FINDS FGM IS NOT "CONTINUING PERSECUTION"

The BIA held in *Matter of A-T-*, 24 I&N Dec. 296 (BIA Sept. 27, 2007) that a woman who had been forced to undergo female genital mutilation (FGM) was not eligible for asylum. In doing so, the Board rejected the application of the "continuing persecution" theory to this case. The Board acknowledged that in *Matter of Y-T-L-*, 23 I&N Dec. 601 (BIA 2003), it found that involuntary sterilization constituted "continuing persecution" and qualified a person for asylum. Here, however, the Board said that FGM is distinguishable from forced sterilization because Congress singled out forced sterilization as a basis for asylum in INA § 101(a)(42). The BIA also rejected the applicant's remaining claims based on fear of an arranged marriage and fear of a future child being subjected to FGM. A-T- is planning to seek further review of this case. Look for updates in upcoming Litigation Clearinghouse Newsletters.

LAWSUIT TO FORCE ADJUDICATION OF EAD APPLICATION

An applicant for adjustment of status filed a class action challenging USCIS's policy of withholding interim EADs when an RFE is issued in relation to the underlying application for relief. The complaint alleges that, until recently, 8 C.F.R. § 103.2(b)(10)(ii), which states that "interim benefits . . . will not be granted" when an application is held in suspension because of missing evidence, applied only to the application that triggered the RFE. The complaint alleges that USCIS now is applying this regulation to withhold interim EADs when an RFE is issued in relation to an application other than the EAD, such as the underlying adjustment application. According to the complaint, this new policy violates 8 C.F.R. § 274a.13(d), which places a non-discretionary duty on defendants to adjudicate EAD applications within 90 days or issue an interim EAD. Plaintiff seeks to enjoin defendants from applying 8 C.F.R. § 103.2(b)(10)(ii) to applications other than the specific application that triggered the RFE. The case is *Carreon-Moctezuma v. Cejka*, No. 07-00145 (S.D. Tex. filed Sept. 18, 2007).

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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.

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