



AMERICAN IMMIGRATION LAW FOUNDATION  
LEGAL ACTION CENTER  
LITIGATION CLEARINGHOUSE  
NEWSLETTER

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## CONTACT AILF ABOUT “ARRIVING ALIEN” AND EWI PAROLEE ADJUSTMENT

### “Arriving Aliens”

AILF’s LAC would like to hear how USCIS is handling the adjustment applications of “arriving aliens” in removal proceedings who are now eligible to apply for adjustment with USCIS under the interim rule, 71 Fed. Reg. 27585 (May 12, 2006).

In particular, we are interested in the following:

- Has a CIS office refused to accept an adjustment application from an “arriving alien” because that person is in proceedings?
- Has CIS adjudicated any of these applications yet? If so, what was the result?
- Have any clients been removed before CIS adjudicated a pending adjustment application?

The interim rule, effective on May 12, 2006, deleted the absolute bar on an “arriving alien’s” ability to adjust status if he or she is in removal proceedings. Prior to the issuance of the interim rule, several courts of appeals had struck down the former regulation barring adjustment, finding that it violated the statute. For more information about the rule and the litigation that prompted it, see AILF’s Practice Advisory, “*Arriving Aliens*” and *Adjustment of Status: What is the Impact of the Government’s Interim Rule of May 12, 2006?* (Updated October 3, 2006) available at [http://www.ailf.org/lac/lac\\_pa\\_chrono.shtml](http://www.ailf.org/lac/lac_pa_chrono.shtml).

### EWI Parolees

In two Second Circuit petitions for review, individuals are challenging the government’s refusal to consider their release on conditional parole under INA § 236(a)(2)(B) as “parole” for purposes of adjustment of status. In both cases, the individuals were present in the U.S. without inspection. Following apprehension by ICE they were placed in proceedings and paroled from custody under INA § 236(a)(2)(B). AILF filed an

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### NEW AT THE LAC ...

AILF filed Amicus Briefs in the following cases:

- *Valdez-Sanchez v. Gonzales*, No. 05-9506 (10th Cir. amicus brief filed Oct. 19, 2006): In this reinstatement case, AILF distinguished *Fernandez-Vargas v. Gonzales*, 126 S.Ct. 2422 (2006), on the ground that petitioner was a conditional resident before the reinstatement statute went into effect.
- *Myong Jung Kim v. Gonzales*, No 06-1943 (4th Cir. amicus brief filed Oct. 17, 2006): On appeal to the court of appeals, AILF argued that the district court erroneously dismissed the case under INA § 242(a)(2)(B)(i) because USCIS denied adjustment on statutory eligibility grounds.
- *Francisco-Lorenzo v. Gonzales*, No. 06-0768 (2d Cir.) and *Espino Del Angel v. Gonzales*, No. 06-2832 (2d Cir.) (Amicus briefs filed Sept. 27, 2006): These cases raise the issue of whether parole under INA § 236(a)(2)(B) constitutes “parole” for purposes of adjustment of status.

Update in *Duran v. DHS*, 06-1411 (W.D. Wash), *Perez-Gonzalez* I-212 Litigation:

- On October 27, 2006, plaintiffs filed replies to Defendants’ Opposition to Plaintiffs’ Motion for Class Certification and Defendants’ Opposition to Plaintiffs’ Motion for Preliminary Injunction. The court will hold a hearing on the preliminary injunction and class certification on November 6, 2006. For more information about *Duran*, see [http://www.ailf.org/lac/lac\\_lit\\_92806.shtml](http://www.ailf.org/lac/lac_lit_92806.shtml).

AILF updated the following Practice Advisories. See [http://www.ailf.org/lac/lac\\_pa\\_index.shtml](http://www.ailf.org/lac/lac_pa_index.shtml).

*“Arriving Aliens” and Adjustment of Status: What is the Impact of the Government’s Interim Rule of May 12, 2006?* (Updated October 3, 2006).

*Applying for Adjustment of Status After Reentering the United States Without Being Admitted: I-212s, 245(i) and VAWA 2005* (Updated October 19, 2006).

*How to File a Petition for Review* (Updated October 25, 2006).

## **EWI Parolees Continued**

amicus brief arguing that this “parole” rendered them eligible to apply for adjustment of status under INA 245(a) and the Cuban Adjustment Act because an individual who has been “inspected and admitted or paroled” is eligible to adjust. Moreover, AILF argued release on bond under INA § 236(a)(2)(A) necessarily constitutes a parole qualifying a person for adjustment of status. AILF is interested in hearing from attorneys whose clients’ cases raise this issue.

**Contact Information:** Please email us at [clearinghouse@ailf.org](mailto:clearinghouse@ailf.org) with information these issues.

## **COURT REVIEW OF CONTINUANCE DENIALS**

Several courts of appeals have addressed whether they have jurisdiction to review an IJ’s denial of a continuance. The courts are divided about whether the decision is reviewable or barred as a matter of discretion.

**Courts Finding Jurisdiction:** *Abu-Khaliel v. Gonzales*, 436 F.3d 627 (6th Cir. 2006); *Subhan v. Ashcroft*, 383 F.3d 591 (7th Cir. 2004); *Zafar v. Attorney General*, 461 F.3d 1357 (11th Cir. 2006)

**Courts Finding No Jurisdiction:** *Onyinkwa v. Ashcroft*, 376 F.3d 797 (8th Cir. 2004); *Yerkovich v. Ashcroft*, 381 F. 3d 990 (10th Cir. 2004)

**Additional Resource:** AILF Practice Advisory, *Federal Court Jurisdiction Over Discretionary Decisions After REAL ID: Mandamus, Other Affirmative Suits and Petitions for Review* (April 5, 2006) available at [http://www.ailf.org/lac/lac\\_pa\\_chrono.shtml](http://www.ailf.org/lac/lac_pa_chrono.shtml).

In cases where the courts have found jurisdiction to review the denial of a continuance, the results have varied. The Eleventh Circuit said that an IJ erred by not granting a continuance to a person with an approved labor certification who had filed his visa petition and adjustment application with DHS and a visa number was immediately available. See *Merchant v. Attorney General*, 461 F.3d 1375 (11th

Cir. 2006). Alternatively, where the labor certification was not approved and the applicant had not yet filed the visa petition, the Eleventh Circuit found that the IJ did not err by denying the continuance. See *Zafar v. Attorney General*, 461 F.3d 1357 (11th Cir. 2006). In contrast, the Seventh Circuit found that an unapproved labor certification alone does not provide a sufficient basis for denying a continuance. See *Subhan v. Ashcroft*, 383 F.3d 591 (7th Cir. 2004).

## **CLEARINGHOUSE HIGHLIGHT**

*In each edition of this newsletter, the Clearinghouse highlights cases that showcase novel arguments, creative lawyering, and issues of first impression.*

### **Eleventh Circuit Finds IJ Has Jurisdiction Over In Absentia Motion to Reopen Filed From Outside of the U.S.**

*Contreras-Rodriguez v. U.S. Attorney General*. 462 F.3d 1314 (11th Cir. 2006).

Petitioner was ordered removed in absentia and removed from the United States. He filed a motion to reopen to rescind the in absentia order based on lack of notice. The IJ denied the motion, concluding that the immigration court lacked jurisdiction because petitioner was outside of the United States. The BIA affirmed the dismissal.

The Eleventh Circuit found that petitioner’s motion was governed by 8 C.F.R. § 1003.23(b)(4)(ii), which says that a motion to reopen in absentia proceedings may be made at any time if the person shows that he or she did not receive notice. This regulation does not bar reopening when the person has been removed from the United States. The court noted that *Patel v. United States AG*, 334 F.3d 1259 (11th Cir. 2003), is in apposite. In *Patel* the court dismissed a petition for review of the BIA’s dismissal of a motion to reopen because the person was outside of the United States. *Patel*, however, did not involve a motion to reopen to rescind an in absentia order.

### **AILF Legal Action Center, Litigation Clearinghouse**

[www.ailf.org/lac](http://www.ailf.org/lac)  
[clearinghouse@ailf.org](mailto:clearinghouse@ailf.org)

Beth Werlin  
*Litigation Clearinghouse Attorney*

AILF’s Legal Action Center works to advance fundamental fairness in United States immigration law and to protect the constitutional and legal rights of noncitizens. The LAC conducts national impact litigation; writes amicus curiae briefs; produces practice advisories; conducts the Litigation Institute and other legal educational programs; and mentors, coordinates and provides technical support for lawyers litigating due process and fairness issues in family, removal and business immigration cases.

The Clearinghouse is a project of the 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 information about your cases.

**Litigation Clearinghouse Newsletters are posted on AILF’s web page at [www.ailf.org/lac/litclearinghouse.shtml](http://www.ailf.org/lac/litclearinghouse.shtml).**