



AMERICAN IMMIGRATION LAW FOUNDATION
LEGAL ACTION CENTER
LITIGATION CLEARINGHOUSE
NEWSLETTER

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UPDATE ON NATZ DELAY CLASS ACTIONS

Naturalization applicants have filed several class actions challenging DHS' failure to issue decisions within 120 days from the naturalization interviews. The following cases are pending. The courts have not yet certified any of the proposed classes.

Roshandel v. Chertoff, No. 2:07-cv-01739 (W.D. Wash. filed Oct. 29, 2007). The proposed class consists of LPRs residing in the Western District of Washington whose naturalization applications have not been decided within 120 days of the date of their initial interview due to the pendency of a name check.

Ahmadi v. Chertoff, No. 07-3455 (N.D. Cal filed July 2, 2007). The proposed class consists of "[a]ll persons who have submitted or will submit applications for naturalization to CIS, and who have met all statutory requirements for naturalization, and whose applications for naturalization are not adjudicated within 120 days of the date of their naturalization examinations." In September 2007, the court granted in part and denied in part a motion to dismiss. Plaintiffs filed an amended complaint on November 15, 2007. A motion for class certification is pending.

Yakubova v. Chertoff, 06 Civ. 3203 (E.D.N.Y. filed June 28, 2006). The plaintiffs are naturalization applicants residing in Kings, Nassau, Queens, Richmond and Suffolk counties in New York State. On November 1, 2006, the court denied defendants' motion to dismiss and ruled that plaintiffs' motion for class certification was premature. Discovery is scheduled to be completed by May 15, 2008, and a settlement conference will be held on May 30, 2008.

Alsamman v. Gonzales, No. 06-2518 (N.D. Ill. filed May 4, 2006). The proposed class consists of Muslim male naturalization applicants. In September 2007, the court found jurisdiction over the case under 8 U.S.C. § 1447(b) and remanded it to USCIS to adjudicate the naturalization applications. Plaintiffs filed an amended complaint on November 13, 2007.

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NEW AT THE LAC ...

Supreme Court Brief in Voluntary Departure Case. AILF's Legal Action Center filed an amicus curiae brief on behalf of AILF, AILA and the Catholic Charities Community Services, Archdiocese of New York in the Supreme Court case *Dada v. Keisler*. This case addresses the interplay between voluntary departure and motions to reopen removal proceedings. The Court is considering whether the filing of a motion to reopen removal proceedings automatically tolls the running of the voluntary departure period. The Court will hear oral arguments on January 7, 2007. Read more about the case and AILF's amicus brief at http://www.ailf.org/lac/supremecourt_112806.shtml.

Mandamus Jurisdiction. AILF's LAC is continuing to litigate whether the federal district courts have jurisdiction to compel USCIS to perform its non-discretionary duty to adjudicate applications that have been unreasonably delayed. AILF filed an amicus brief in *Rogatch v. Chertoff*, No. 07-1791 (1st Cir. filed May 21, 2007) on November 15, 2007.

Litigation Practice Update Podcast. AILA's third podcast, Litigation Practice Update, features AILF attorneys Beth Werlin and Emily Creighton who provide an overview of the immigration cases pending at the Supreme Court and an update about mandamus litigation in adjustment of status cases. Podcasts (audio downloads) are free to AILA members. See <http://commpartners.client.ninesystems.com/AILA/podcasts/>.

Motions to Reopen After Departure. AILF's LAC continues to challenge the regulation barring motions to reopen filed after a person has departed or been deported. Petitioner and AILF recently defeated the government's petition for rehearing en banc in *William v. Gonzales*, 499 F.3d 329 (4th Cir. 2007). *William* is the first case to find the departure bar regulation invalid. AILF is litigating this issue in the Second and Tenth Circuit Courts.

Natz Delay Continued

At least two other class actions have been closed. In *Aziz v. Gonzales*, 06-4791 (C.D. Cal.), the plaintiffs withdrew their class action allegations and USCIS agreed to adjudicate the named plaintiffs' naturalization applications within 10 or 30 days. In *Zhang v. Gonzales*, No. 07-0503 (N.D. Cal.), several plaintiffs voluntarily moved for dismissal and refiled their case as *Ahmadi v. Chertoff*, No. 07-3455 (see description above).

Individual plaintiffs continue to file petitions under 8 U.S.C. § 1447(b) seeking a judicial remedy for a naturalization application that has been pending for more than 120 days after the interview. Many courts are remanding applications to the agency rather than adjudicating them. Read more about naturalization delay litigation on AILF's *Natz Delay Litigation* Issue Page at http://www.aifl.org/lac/lit_issue_pages.shtml.

COURTS REJECT *MATTER OF PEREZ-VARGAS*, JURISDICTION TO CONSIDER PORTABILITY

In *Matter of Perez Vargas*, 23 I&N Dec. 829 (BIA Oct. 2005), the BIA held that immigration judges, when adjudicating adjustment of status applications, lack jurisdiction to determine whether an approved I-140 remains valid under INA § 204(j) (porting provision). To date three courts have considered whether immigration judges have jurisdiction to determine the validity of the I-140, and all three courts have rejected the BIA's holding. The cases are *Perez-Vargas v. Gonzales*, 478 F.3d 191 (4th Cir. 2007), *Matovski v. Gonzales*, 492 F.3d 722 (6th Cir. 2007), and *Sung v. Keisler*, No. 06-60539, 2007 U.S. App. LEXIS 24646 (5th Cir. Oct. 22, 2007).

AILF recently amended its Practice Advisory, *I-140 Portability for Employment-Based Adjustment Applicants in Removal Proceedings: Strategies for Challenging Matter of Perez-Vargas* (November 7, 2007). This Practice Advisory discusses INA § 204(j), challenges to the BIA precedent decision *Matter of Perez-Vargas*, and the three court of appeals decisions rejecting *Matter of Perez-Vargas*. This Practice Advisory and descriptions of the BIA and court of

appeals decisions are posted on AILF's Litigation Issue Page, *IJ's Jurisdiction to Apply INA § 204(j)* at http://www.aifl.org/lac/lit_issue_pages.shtml.

IDENTIFYING PLAINTIFFS: RELIGIOUS WORKERS WITH PENDING I-360S

Preparation is underway for a class action on behalf of religious workers whose special immigrant visa petitions (I-360) are pending and their authorized period of stay on an R visa is running out. Because DHS precludes religious workers from filing the adjustment application (I-485) until the I-360 is approved, they must leave the U.S. The suit would seek to allow religious workers to file the I-360 and I-485 concurrently, thus allowing the applicant to remain in the U.S. while DHS investigates and adjudicates the petition.

Lawyers for the religious workers are seeking to identify 1) additional named plaintiffs, and 2) religious organizations and/or lawyers who can attest to the problems stemming from the current process. Please contact Bob Pauw at rpauw@ghp-law.net.

CLEARINGHOUSE HIGHLIGHT

The Clearinghouse highlights cases that showcase novel arguments, creative lawyering, and issues of first impression.

Establishing that Cancellation Applicant Is Not Convicted of an Aggravated Felony. In *Sandoval-Lua v. Gonzales*, 499 F.3d 1121 (9th Cir. 2007), the Ninth Circuit held that an applicant for cancellation of removal has the burden of establishing that that he or she was not convicted of an aggravated felony. Under the modified categorical approach, the applicant satisfies this burden by submitting a record of conviction that is inconclusive (i.e., record shows convicted under a divisible statute and not necessarily an aggravated felony). For additional discussion about overcoming the aggravated felony bar to cancellation of removal, see the National Immigration Project's Practice Advisory *The Burden of Proof to Overcome the Aggravated Felony Bar to Cancellation of Removal* at http://www.nationalimmigrationproject.org/CrimPage/Practice_Adv._Burden_Proof_Ag_Fel_3.07.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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