



AMERICAN IMMIGRATION LAW FOUNDATION
LEGAL ACTION CENTER
LITIGATION CLEARINGHOUSE
NEWSLETTER

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**AILF'S CHALLENGES TO REGULATIONS
BARRING "ARRIVING ALIENS" FROM
APPLYING FOR ADJUSTMENT OF STATUS**

Pursuant to 8 C.F.R. §§ 245.1(c)(8) and 1245.1(c)(8), "arriving aliens" in removal proceedings are barred from applying for adjustment of status. Three courts of appeals have struck down this regulation as being in violation of the adjustment of status statute, INA § 245(a). These cases are: *Succar v. Ashcroft*, 394 F.3d 8 (1st Cir. 2005); *Zheng v. Gonzales*, 422 F.3d 98 (3d Cir. 2005) (reh'g pending); *Bona v. Gonzales*, 425 F.3d 663 (9th Cir. 2005). Only one circuit court has upheld the regulations: *Mouelle v. Gonzales*, 416 F.3d 923 (8th Cir. 2005) (rehearing denied). AILF's Legal Action Center (LAC) has appeared as amicus curiae in each of these published cases.

Pending Cases *

2nd Circuit – *Li v. Gonzales*, Nos. 03-41059, 04-0902 (AILF amicus brief pending); *Sanchez-Montoya v. Gonzales*, No. 04-1071 (AILF amicus brief pending); *Singh v. Gonzales*, No. 04-0136 (AILF amicus brief pending). **3rd Circuit** – *Zheng v. Gonzales*, 422 F.3d 98 (reh'g pending). **4th Circuit** – *Ore-Jimenez v. Gonzales*, No. 05-1761. **5th Circuit** – *Salman v. Gonzales*, No. 05-60895; *Anteoyo v. Gonzales*, No. 04-61045 (AILF amicus brief filed); *Momin v. Gonzales*, No. 05-60119; *Trejo-Romero v. Gonzales*, No. 05-60464. **6th Circuit** – *Meza-Cota v. Gonzales*, No. 05-4523. **7th Circuit** – *Metaj v. Gonzales*, No. 05-4040; *Imam v. Gonzales*, No. 05-3787. **9th Circuit** – *Jiang v. Gonzales*, 425 F.3d 649 (9th Cir. 2005) (pet. for reh. pending) (AILF amicus brief filed). **11th Circuit** – *Delphin v. Gonzales*, No. 05-14941 (AILF amicus brief pending); *Rincon v. Gonzales*, No. 05-16318; *Sampedro v. Gonzales*, No. 05-13390 (AILF amicus brief filed); *Garcia v. Gonzales*, No. 05-12059; *Scheerer v. Gonzales*, Nos. 05-11303, 04-16231.

*Attorneys reported these cases to AILF and thus this may not be an exhaustive list of all pending cases. Please contact the Clearinghouse at clearinghouse@ailf.org if you have a pending petition for review challenging §§ 245.1(c)(8) and 1245.1(c)(8).

Resource

AILF Practice Advisory, *Adjustment of Status for "Arriving Aliens" In Removal Proceedings: Strategy Decisions to Challenge 8 C.F.R. § 245.1(c)(8)*, by Mary Kenney (Oct. 18, 2005) available at (http://www.ailf.org/lac/lac_pa_101805.pdf).

**SUPREME COURT UPDATE:
COURT ASKED TO REVIEW WHETHER
DRUG POSSESSION CONVICTIONS
ARE AGGRAVATED FELONIES**

The Supreme Court has been asked to resolve a circuit split over whether drug possession convictions that qualify as state felonies, but would not qualify as felonies under federal law, can constitute an aggravated felonies under INA §§ 237(a)(2)(A)(iii) and 101(a)(43)(B) (illicit trafficking of a controlled substance).

The following circuits, employing various rationales, have held that state felony convictions (not involving an element of trafficking) are not aggravated felonies unless they qualify as felonies under federal law: **2nd Circuit** – *Aguirre v. INS*, 79 F.3d 315 (2d Cir. 2003); **3rd Circuit** – *Gerbier v. Holmes*, 280 F.3d 297 (3d Cir. 2003); **6th Circuit** – *United States v. Palacios-Suarez*, 418 F.3d 692 (6th Cir. 2005) (sentencing guidelines); **9th Circuit** – *Oliviera v. INS*, 382 F.3d 1045 (9th Cir. 2004).

The **5th** and **8th Circuits** have reached the opposite conclusion in *Lopez v. Gonzales*, 417 F.3d 934 (8th Cir. 2005); *Salazar-Regino v. Trominski*, 415 F.3d 436 (5th Cir. 2005); and *United States v. Sanchez-Villalobos*, 412 F.3d 572 (5th Cir. 2005) (sentencing guidelines). Petitioner Sanchez-Villalobos filed a petition for a writ of certiorari on October 11 and Petitioner Lopez filed a writ of certiorari on October 31. Petitioner Salazar-Regino also plans to file a petition for a writ of certiorari.

This issue is pending in the **7th Circuit**, *Yanez-Garcia v. Gonzales*, 05-2732 (filed June 14, 2005). See also *Yanez-Garcia v. Ashcroft*, 388 F.3d 280 (7th Cir. 2004).

JURISDICTION AFTER REAL ID ACT: ASYLUM ONE YEAR BAR DECISIONS

Section 106 of the REAL ID Act added a new section (a)(2)(D) to INA § 242. This section opens up review of all constitutional claims or questions of law notwithstanding any other restrictions on review contained in the INA (except for certain provisions contained in INA § 242). AILF believes, therefore, that new section 242(a)(2)(D) should loosen the general bar to review over decisions pertaining to the one year filing deadline for asylum applications (INA § 208(a)(3)). Nonetheless, the published cases to date addressing this issue have denied review after finding that the issues raised were neither legal nor constitutional.

Vasile v. Gonzales, 417 F.3d 766 (7th Cir. 2005) – The court held that whether the petitioner had demonstrated extraordinary circumstances to excuse the one year filing deadline was a discretionary decision barred by INA § 242(a)(2)(B)(ii). The Seventh Circuit’s analysis conflicts with *Nakamoto v. Ashcroft*, 363 F.3d 874 (9th Cir. 2004).

Botero v. Attorney General, 427 F.3d 954 (11th Cir. 2005) – Without explanation, the court held that one year deadline decisions present neither legal nor constitutional questions. The court noted its agreement with the Seventh Circuit’s conclusion in *Vasile*.

Ramadan v. Gonzales, 427 F.3d 1218 (9th Cir. 2005) – The court held that the existence of changed circumstances (which would excuse the one year filing deadline) is a “predominantly factual determination which will invariably turn on the facts of a given case.” On December 9, 2005, the court granted an extension of time for filing a petition for rehearing in *Ramadan*; a petition for rehearing is planned.

Despite these adverse decisions, attorneys with cases in these and other circuits may continue to raise legal and constitutional challenges regarding the one year

filing deadline decision. *Ramadan*, *Botero*, and *Vasile* arguably leave open the possibility that some one year deadline determinations will present legal questions. For example, in an unpublished Ninth Circuit decision issued after *Ramadan*, the court found that “the BIA applied the wrong statutory period in its analysis of [whether the petitioner established changed circumstances].” *Hay v. Gonzales*, No. 04-70743, 2005 U.S. App. LEXIS 26026 (9th Cir. 2005) (unpublished). Accordingly, the court remanded the case to the BIA. In addition, on December 9, 2005, the Ninth Circuit held oral arguments in *Sardari v. Chertoff*, No. 05-15108. The petitioner argued that *Ramadan* was inapplicable because his case involves legal issues and that *Ramadan* was decided wrongly.

CLEARINGHOUSE HIGHLIGHT

In each edition of this newsletter, the Clearinghouse will highlight one case in order to showcase novel arguments, creative lawyering, and issues of first impression.

***Sagaydak v. Gonzales*, 405 F.3d 1035 (9th Cir. 2005)**

In this pre-REAL ID Act case, the Ninth Circuit held that it had jurisdiction to review the BIA’s failure to determine whether extraordinary circumstances excused the late filing of an asylum application. Although INA § 208(a)(3) generally barred review of decisions relating to the one year filing deadline, the court found this provision inapplicable because the IJ and BIA had failed to make a determination about whether the petitioner demonstrated an exception to the filing deadline. Noting that “IJs and the BIA are not free to ignore arguments raised by the petitioner,” the court remanded the case to the BIA.

For a complete description of the case, see AILA’s case summaries at www.aila.org/content/default.aspx?docid=16705.

*AILA prepares digests of all Supreme Court and significant appeals court decisions and posts them on Infonet. The digests are sorted by court and are searchable.

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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.