



AMERICAN IMMIGRATION LAW FOUNDATION
LEGAL ACTION CENTER
LITIGATION CLEARINGHOUSE
NEWSLETTER

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**POST-*LOPEZ* IS A SECOND OR
SUBSEQUENT DRUG POSSESSION
CONVICTION AN AGGRAVATED FELONY?**

The Supreme Court's decision in *Lopez v. Gonzales*, holding that drug possession convictions that qualify as state felonies, but would not qualify as felonies under federal law, are not "aggravated felonies" as defined under INA § 101(a)(43)(B) ("drug trafficking crimes"), left open questions about whether second or subsequent drug possession offenses may be aggravated felonies. In removal cases nationwide, the government is arguing that any state drug offense where facts outside the record of conviction indicate that the person has a prior drug offense should be treated as the equivalent of a conviction for a federal recidivist felony and thus constitute an aggravated felony under INA § 101(a)(43)(B). The New York State Defenders Association Immigrant Defense Project (IDP) has developed arguments to counter the government's position and filed a supplemental amicus letter brief in *Martinez v. Ridge*, No. 05-3189 (2d Cir.), laying out these arguments. See http://www.ailf.org/lac/clearinghouse_122106_martinezvridge.pdf.

IDP would like to hear from attorneys who are briefing this issue. Please contact Manny Vargas (MVargas@nysda.org) or Alina Das (ADas@nysda.org). For more information about *Lopez* resources, see the Litigation Clearinghouse's Issue Page, http://www.ailf.org/lac/clearinghouse_122106_lopezvgonzalesshtml.

**ACLU CHALLENGES DETENTION
CONDITIONS**

On January 24, 2007, the ACLU moved for leave to file an amended complaint and filed a motion for class certification in a case challenging the detention conditions at the San Diego Correction Facility (SDCF). According to the complaint, SDCF is so overcrowded – more than 50% over design capacity –

that immigration detainees are sleeping on plastic slabs by the toilets and on bunk beds in the recreation area.

SDCF is one of the largest for-profit immigration detention facilities in the United States. It houses about 1000 detainees. The amended complaint names both ICE and SDCF's owner, Correction Corporation of America, Inc., as defendants. (*Continued*)

NEW AT THE LAC ...

Litigation Clearinghouse Issue Pages Now Online! AILF's Litigation Clearinghouse has created several issue-specific web pages that focus on topics currently being litigated in the federal courts. See http://www.ailf.org/lac/lac_lit_index.shtml. The pages include recent Litigation Clearinghouse Newsletter articles, court updates, and relevant resources such as practice advisories and pleadings, where available.

Service of BIA Decisions. AILF's Legal Action Center filed an amicus brief on behalf of AILF, Northwest Immigrant Rights Project, and The Lawyers' Committee for Civil Rights of the San Francisco Bay Area in a petition for rehearing en banc in *Singh v. Gonzales*, 469 F.3d 863 (9th Cir. 2006) (rhg. pet. filed 1/12/07). The panel held that the BIA does not have to reissue a decision even if the noncitizen says he or she did not receive the decision; the BIA need only show that it properly mailed the decision by regular mail. The decision places the burden on the parties to check (via the toll free hotline) to find out if the BIA has issued a decision. Amici argued that the BIA's requirement to serve its decision must incorporate both dispatch and delivery.

New AILF Practice Advisory: *Return to the United States after Prevailing on a Petition for Review (January 17, 2007)*. This Practice Advisory contains practical and legal suggestions for attorneys representing clients who have prevailed on a petition for review or other legal action and who are outside of the United States. See http://www.ailf.org/lac/lac_pa_index.shtml.

The case is *Kiniti v. Meyers*, 3:05-CV-01013 and is pending in the Southern District of California. U.S. District Court Judge Dana M. Sabraw scheduled hearings for February 23, 2007 and April 13, 2007 to hear arguments on the motion to amend the complaint and the motion for class certification respectively. The plaintiffs are represented by attorneys from the ACLU National Prison Project and Immigrants' Rights Project, the ACLU of San Diego and Imperial Counties and the law firm of Cooley Godward Kronish LLP. The proposed complaint is available at <http://www.aclu.org/prison/conditions/281281gl20070124.html>.

AILF WANTS TO KNOW!

Do you have a Ninth Circuit reinstatement case that was held in abeyance pending a decision in *Morales-Izquierdo*?

The Ninth Circuit recently issued an en banc decision in *Morales-Izquierdo v. Gonzales*, No. 03-70674, (9th Cir. Feb. 6, 2007). The court rejected the panel's prior decision, 388 F.3d 1299 (9th Cir. 2005), and upheld DHS' procedures for issuing reinstatement of removal orders. Many Ninth Circuit cases were held in abeyance pending the en banc decision. If you represent someone whose case has been held in abeyance, please email us at clearinghouse@ailf.org to let us know about developments following the court's decision. Please indicate in the email whether briefing has commenced or has been completed in the case.

Is INA § 242(a)(2)(D) being implicated in district court?

Section 242(a)(2)(D), added to the INA by the REAL ID Act, says that, with exceptions, nothing in the INA "which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or question of law raised upon a petition for review filed with an appropriate court of appeals...." Thus, this section restored court of appeals

jurisdiction over legal and constitutional questions in cases, such as those involving criminal grounds of removability, that previously were barred from review. It says nothing about the district courts. Nonetheless, you may face an argument that this section may affect the district court's jurisdiction in non-removal immigration cases. If INA § 242(a)(2)(D) is an issue in your client's district court case, please email us at clearinghouse@ailf.org.

CLEARINGHOUSE HIGHLIGHT

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

Fourth Circuit Holds that Hiding Is Not Reasonable Internal Relocation. *Essouhou v. Gonzales*, 471 F.3d 518 (4th Cir. 2006). The Fourth Circuit vacated the BIA's decision that an asylum applicant could reasonably relocate. An asylum applicant who demonstrates that he or she was the victim of past persecution is presumed to have a well-founded fear of future persecution. The government may rebut this presumption by demonstrating that country conditions have changed sufficiently to eliminate the well-founded fear or that the applicant could avoid persecution by relocating within the country of persecution. In this case, the BIA found that the petitioner had suffered past persecution, but concluded that the government had rebutted the presumption of future persecution because the petitioner had lived "undisturbed for 20-plus months," establishing that she was able to relocate internally.

The court of appeals held that the BIA's finding of internal relocation was not supported by substantial evidence. The court noted that the record "reveals a four-year period in which [the petitioner] was in hiding, constantly fearing for her life." The court went on to conclude that periods in which the applicant was not specifically targeted by the persecutors resulted from her efforts to hide and not from a reasonable relocation. Thus, the court granted the petition for review, vacated the Board's decision and remanded the case to the Board.

AILF Legal Action Center, Litigation Clearinghouse

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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 case information.

Litigation Clearinghouse Newsletters are posted on AILF's web page at www.ailf.org/lac/litclearinghouse.shtml.