



AMERICAN IMMIGRATION LAW FOUNDATION  
LEGAL ACTION CENTER  
LITIGATION CLEARINGHOUSE  
NEWSLETTER

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**SUPREME COURT UPDATE:  
GOVERNMENT FILES PETITION FOR  
CERTIORARI IN THEFT OFFENSE CASES**

On June 22, 2006, the government filed petitions for certiorari in *Penuliar v. Gonzales*, 435 F.3d 961 (9th Cir. 2006), and *Duenas-Alvarez v. Gonzales*, No. 04-74471, 2006 U.S. App. Lexis 9904 (9th Cir. April 18, 2006). *Penuliar* held, inter alia, that a conviction for taking a vehicle under California Vehicle Code § 10851(a) does not categorically qualify as a theft offense under INA § 101(a)(43)(G) and therefore is not an aggravated felony under INA § 237(a)(2)(A)(iii). The court's decision noted that "California's vehicle theft statute is broader than the generic definition of 'theft offense' under INA § 101(a)(43)(G) because it criminalizes activity that is neither 'a taking of property or an exercise of control over the property.'" Like the petitioner in *Penuliar*, Mr. Duenas-Alvarez was convicted of violating California Vehicle Code § 10851(a). In a short, unpublished decision, the Ninth Circuit remanded the petition to the Board in accordance with *Penuliar*.

Although the government petitioned for certiorari in both *Penuliar* and *Duenas-Alvarez*, the government maintains that *Duenas-Alvarez* is more suitable for Supreme Court review due to questions it raises about whether *Penuliar* exhausted his claims. The responses to the certiorari petitions are due on August 23, 2006.

**BIA ON PROCEDURES FOR CASES  
REMANDED BY THE CIRCUIT COURT**

At AILA's Spring Conference, BIA Vice Chairman Juan Osuna addressed BIA procedures for cases that the circuit courts remand to the Board. He reported that remanded cases are assigned to a small group of BIA attorneys in order to promote uniform handling. The BIA relies primarily on the Office of Immigration Litigation (OIL) to inform it of the outcome of petitions for review. Often, OIL fails to provide timely notification. As a result, in some cases, the Board first learns of the remand when a private attorney

inquires about the status of a remanded case. Vice Chair Osuna indicated that conversations are ongoing to address this problem.

In the meantime, attorneys whose clients' cases have been remanded to the BIA may want to notify the BIA of the remand in order to expedite the adjudication of the case. It is helpful to attach a Form EOIR-27 (notice of appearance), particularly if you were not the attorney of record in the prior administrative proceedings. If the attorney thinks that the case warrants additional briefing on remand, the attorney may file a motion for additional briefing along with

**NEW AT THE LAC ...**

AILF's Legal Action Center recently has issued the following three Practice Advisories:

**Reinstatement of Removal** (Updated July 11, 2006). This Practice Advisory discusses reinstatement of removal, challenges to and federal court review of reinstatement orders, and the Supreme Court's recent decision in *Fernandez-Vargas v. Gonzales*.

**I-140 Portability for Employment-Based Adjustment Applicants in Removal Proceedings: Strategies for Challenging Matter of Perez-Vargas** (July 10, 2006). This Practice Advisory discusses INA § 204(j) and the BIA's interpretation of this provision in *Matter of Perez-Vargas*. It also suggests practical and legal strategies that practitioners can employ before the immigration courts, the Board and the circuit courts.

**"Arriving Aliens" and Adjustment of Status: What is the Impact of the Government's Interim Rule of May 12, 2006?** (July 5, 2006). This Practice Advisory discusses the impact of an interim rule repealing two former regulations which barred all "arriving aliens"—including parolees—from adjusting to permanent resident status if they were in removal proceedings and suggests steps that a parolee can take to benefit from the interim rule.

AILF's Practice Advisories are available at [http://www.ailf.org/lac/lac\\_pa\\_index.asp](http://www.ailf.org/lac/lac_pa_index.asp).

the notification of the remand order. Vice Chairman Osuna indicated that the Board will grant these motions.

AILA's Spring Conference was held on March 26, 2006 in Washington, DC. Vice Chair Osuna's made these remarks during the EOIR panel.

## **NINTH AND TENTH CIRCUITS UPHOLD DECISIONS ON 245(i) AFTER REENTRY WITHOUT ADMISSION**

The Ninth and Tenth Circuits have rejected the government's requests to reconsider their precedent decisions holding that INA § 245(i) trumps inadmissibility under INA § 212(a)(9)(C)(i)(I) (reentry after more than one year of unlawful presence). The government petitioned for rehearing in both circuits. On June 19, 2006, the Tenth Circuit denied the petition for rehearing en banc in *Padilla-Caldera v. Gonzales*, 426 F.3d 1294 (10th Cir. 2005), and issued an amended decision with minor changes. The Ninth Circuit denied the petition for panel rehearing in *Acosta v. Gonzales*, 439 F.3d 550 (9th Cir. 2006), on July 6, 2006.

## **ASISTA PROVIDES LITIGATION SUPPORT ON VAWA ISSUES**

ASISTA is a collaboration of nationally-recognized legal experts who work to provide comprehensive and cutting-edge technical assistance on the intersection between immigration and domestic violence law. ASISTA maintains an online clearinghouse of resources, including the VAWA Manual, information about U and T visas, and helpful links for gender-related asylum issues. ASISTA's resources are available at [www.asistaonline.org](http://www.asistaonline.org).

ASISTA may be able to provide amicus support to attorneys litigating VAWA issues. For example, working through the National Network to End Violence Against Immigrant Women, ASISTA

attorneys filed an amicus brief in *Hernandez v. Ashcroft*, 345 F.3d 824 (9th Cir. 2003). This groundbreaking case held that the court had jurisdiction to review the BIA's "extreme cruelty" determination in a VAWA suspension of deportation case.

ASISTA Co-Director Gail Pendleton, [gpendleton@earthlink.net](mailto:gpendleton@earthlink.net), advises attorneys to contact her if they are bringing a client's VAWA case to the federal court. She is able to counsel attorneys on how to create a good record, as well as help fashion appeals to the BIA and federal courts.

## **CLEARINGHOUSE HIGHLIGHT**

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

### **BIA Appeal Deadline is Not Jurisdictional, *Huerta v. Gonzales*, 443 F.3d 753 (10th Cir. 2006).**

The issue before the court was whether "non-compliance with the filing deadlines governing appeal to the BIA constitutes a jurisdictional defect that prevents [the court] from addressing the merits and renders all actions subsequent to the untimely filing a nullity." The court first distinguished between jurisdictional challenges – which may be made at any time – and regulatory requirements that, while mandatory, may be forfeitable. Relying on the 2005 Supreme Court decision *Eberhart v. United States*, 546 U.S. \_\_\_, 127 S. Ct. 403 (2005), the court concluded that the BIA's 30 day filing deadline is a "claim processing rule" that does not go to the BIA's general subject matter jurisdiction to hear the appeal. As such, the court could review a late-filed appeal if ICE did not object to the timeliness of the notice of appeal at the administrative level. The court noted that its decision conflicts with a pre-*Eberhart* Ninth Circuit precedent, *Da Cruz v. INS*, 4 F.3d 721 (9th Cir. 1993).

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

<http://www.aila.org/content/default.aspx?docid=19443>

### **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).**