



AMERICAN IMMIGRATION LAW FOUNDATION  
LEGAL ACTION CENTER  
LITIGATION CLEARINGHOUSE  
NEWSLETTER

Vol. 1, No. 17

September 27, 2006

**“MATERIAL SUPPORT” LITIGATION;  
CONTACT *HUMAN RIGHTS FIRST***

Hundreds of asylum cases are being impacted by the government’s application of the “material support” provision of the terrorist activity ground of inadmissibility. Many of these cases are being held by the asylum office or are working their way through the immigration courts and the BIA. Section 212(a)(3)(B) of the INA defines “terrorist activity” as an act that provides “material support” to a terrorist organization, a terrorist activity or a person who plans to or has committed a terrorist activity. Under INA § 208, individuals who fall within the definition of providing “material support” are ineligible for asylum. *Human Rights First*, a New York and Washington, DC-based organization that is coordinating the work on this issue, reports that many of the cases affected by the “material support” provision involve refugees who provided money to “terrorist organizations” under duress and refugees who supported pro-democracy groups that fought repressive regimes.

The BIA issued a precedent decision in a “material support” case in June 2006. *See Matter of S-K*, 23 I&N Dec. 936 (BIA 2006). The Board held, *inter alia*, that immigration judges should not take into account either an individual’s intent in making a donation to the terrorist organization or the intended use of the donation when assessing whether the individual provided “material support.” The Board ruled that a group can be considered a terrorist organization simply because it has used armed force against the military forces of the country’s government (in this case the Burmese military junta). *Matter of S-K* currently is pending at the Fifth Circuit Court of Appeals. Numerous immigration and human rights organizations plan to file amicus briefs in support of the petitioner. In addition, the BIA heard oral arguments on a second “material support” case on August 24, 2006. That case raises the issue of whether duress is a defense to a “material support” charge under the INA.

Human Rights First has been assisting attorneys representing asylum applicants who are affected by the material support provision. It also is gathering examples of asylum seekers affected by this bar to help policy makers understand that genuine refugees

**NEW AT THE LAC ...**

**New AILF Practice Advisory:** *2006 Update on the Child Status Protection Act: New Administrative Interpretation* (September 6, 2006) available at [http://www.ailf.org/lac/lac\\_pa\\_index.shtml](http://www.ailf.org/lac/lac_pa_index.shtml). This Practice Advisory discusses recent developments in the interpretation and implementation of the Child Status Protection Act by USCIS and the BIA. There are no regulations yet implementing the Act. The agencies have continued to interpret the Act through policy memoranda and unpublished BIA decisions.

**Amicus Brief in Natz Delays Actions.** The LAC recently filed amicus letter briefs in support of motions to reconsider in several naturalization delays cases in the district court for the Southern District of Texas, Houston. In all four cases, the district court sua sponte dismissed the lawsuits for alleged lack of subject matter jurisdiction prior to service of the complaints on defendant. The cases were brought under 8 U.S.C. § 1447(b), which allows a district court to assume jurisdiction over a naturalization application delayed for more than 120 days after the “date on which the examination is conducted.” The court based its dismissals on the fact that the 120-day period had not been triggered because the FBI checks had not been completed. In its letter briefs, AILF argued that sua sponte dismissal was inappropriate under Fifth Circuit law because the conclusion that it lacked jurisdiction was also a decision on the merits of the plaintiff’s cause of action. Plaintiff was thus entitled to an opportunity to brief the issue prior to the court ruling. Days after the motions were filed, the court summarily denied two of the motions. The Clearinghouse will continue to report on updates in these cases. Let us know if a court similarly dismisses your client’s petition. Email us at [clearinghouse@ailf.org](mailto:clearinghouse@ailf.org).

should not improperly be denied asylum under these overly broad definitions. Please contact Anwen Hughes ([hughesa@humanrightsfirst.org](mailto:hughesa@humanrightsfirst.org)) or Alexandra Wisotsky ([wisotskya@humanrightsfirst.org](mailto:wisotskya@humanrightsfirst.org)) if you are representing an asylum seeker or a refugee or asylee affected by this bar.

## SUPREME COURT UPDATE

### Oral Arguments in Drug Possession Case

The Supreme Court will hear oral arguments on October 3, 2006 in two cases that may decide whether drug possession convictions that qualify as state felonies, but would not qualify as felonies under federal law, nonetheless constitute aggravated felonies as defined under INA § 101(a)(43)(B). As reported in the April 5, 2006 Litigation Clearinghouse Newsletter, the Supreme Court granted certiorari in *Lopez v. Gonzales*, No. 05-547, and *Toledo-Flores v. U.S.*, No. 05-7664. *Lopez*, an Eighth Circuit case, arose in the removal context. *Toledo-Flores*, a Fifth Circuit case, arose in the drug sentencing context. Several amicus curiae briefs on behalf of immigration law and human rights organizations, including AILA, were submitted in these cases.

### Certiorari Granted in Theft Offense Cases

The Supreme Court granted certiorari to address “[w]hether a ‘theft offense,’ which is an ‘aggravated felony’ under the Immigration and Nationality Act, 8 U.S.C. 1101(a)(43)(G), includes aiding and abetting.” The case is *Gonzales v. Duenas-Alvarez*, 05-1629. As reported in the July 14, 2006 Litigation Clearinghouse Newsletter, the government filed a certiorari petition in the Ninth Circuit case *Duenas-Alvarez v. Gonzales*, No. 04-74471, 2006 U.S. App. Lexis 9904 (9th Cir. April 18, 2006). In *Duenas-Alvarez*, the Ninth Circuit had relied on *Penuliar v. Gonzales*, 435 F.3d 961 (9th Cir. 2006), which held 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 Supreme Court is expediting this case. The government’s brief is due on October 10, 2006; Mr. Duenas-Alvarez’s brief is due on November 20, 2006; and the reply brief is due on November 27, 2006. The Court has scheduled oral argument for December 5, 2006.

## CLEARINGHOUSE HIGHLIGHT

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

### 8th Circuit holds DHS to motion to reopen standards, vacates termination of asylum.

***Hailemichael v. Gonzales*, 454 F.3d 878 (8th Cir. 2006).** After the IJ granted petitioner’s asylum application, DHS moved to reopen proceedings and terminate the grant of asylum based on “new evidence,” which DHS alleged undermined petitioner’s asylum claim. DHS obtained its new evidence through an investigation it began after the IJ had granted asylum. The IJ granted DHS’s motion to reopen and terminated proceedings. On petition for review, the government argued that 8 C.F.R. § 1003.23, which exempts DHS from the time and numerical limitations for motions to reopen, also exempts DHS from the motion standards in 8 C.F.R. § 1003.23(b)(3) that require new evidence to be material and previously unavailable and incapable of discovery. The court rejected the government’s argument and remanded the case for the IJ to consider whether DHS’s new evidence satisfies the requirements of section 1003.23(b)(3).

Further, the court found that the IJ had improperly terminated asylum because DHS had not shown “by a preponderance of the evidence” that there “is a showing of fraud in the ... application such that he or she was not eligible for asylum at the time it was granted.” 8 C.F.R. § 208.24(a). The court criticized the IJ for terminating petitioner’s asylum grant solely on the basis of documents that tended to contradict some of petitioner’s testimony. This evidence did not establish fraud, which takes into account the petitioner’s knowledge and intent.

### AILF Legal Action Center, Litigation Clearinghouse

[www.aifl.org/lac](http://www.aifl.org/lac)  
[clearinghouse@aifl.org](mailto:clearinghouse@aifl.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.aifl.org/lac/litclearinghouse.shtml](http://www.aifl.org/lac/litclearinghouse.shtml).**