The LAC Docket

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OUR WORK

ENFORCEMENT

LAC Wins Release of H-1B Fraud Documents
AILA v. DHS, No. 10-01224 (D.D.C. *summary judgment granted in part* March 30, 2012)

In May 2012, USCIS released in full the remaining contested documents in a Freedom of Information Act (FOIA) lawsuit brought by the LAC and Steptoe & Johnson LLP on behalf of AILA. Filed in July 2010, the case sought the public release of records concerning USCIS fraud investigations in the H-1B program. For the past several years, USCIS's H-1B visa review and processing procedures have caused confusion and concern among U.S. businesses that depend on temporary foreign workers with specialized knowledge to operate successfully.

In its initial response to the suit, USCIS released only a few heavily redacted documents. Later, in response to AILA's motion for summary judgment, USCIS released additional records, but continued to withhold unredacted versions of critical documents. Finally, in response to the district court's grant of partial summary judgment to AILA in March 2012, which found USCIS's explanations for withholding the records insufficient, USCIS released in unredacted form the remaining contested documents: 1) an October 31, 2008 USCIS memorandum on H-1B Anti-Fraud Initiatives, 2) an H-1B Petition Fraud Referral Sheet , and 3) a Compliance Review Report.
These documents provide valuable insight into the criteria that USCIS applies to assess fraud. Notably, H-1B petitioners with a gross income of less than $10 million, with 25 or fewer employees, or that were established within the last 10 years are presumed to be more susceptible to fraud. Where two or more of these factors exist, the internal USCIS memorandum directs adjudicators to review them "with an awareness of the heightened possibility for fraud and/or technical violations" and refer them for "further scrutiny."

LAC Files Suit Against DHS for Failure to Disclose Records on "Voluntary" Returns
AIC v. DHS and CBP, No. 1:12-cv-00932 **(***D.D.C. filed* June 8, 2010)

In June 2012, the LAC, in collaboration with Hughes Socol Piers Resnick & Dym, filed suit against DHS and CBP for unlawfully withholding records concerning voluntary returns of noncitizens from the United States to their countries of origin. Voluntary return, also known as "administrative voluntary departure," is a procedure whereby CBP officers permit noncitizens to voluntarily depart the United States at their own expense rather than undergo formal removal

proceedings. Noncitizens may be granted voluntary return to their countries of origin after conceding unlawful presence in the United States and knowingly and voluntarily waiving the right to contest removal.

Based on reports from immigration advocates, CBP officers do not always provide noncitizens with information regarding the consequences of accepting voluntary return and in some cases even compel them to "agree" to "voluntarily" depart. Consequently, individuals who accept voluntary departure may be forced to relinquish claims for legal status in the U.S. or become barred from lawfully reentering the United States for up to ten years.

The LAC filed a detailed FOIA request regarding these practices in June 2011. CBP produced four pages of records with the promise of more to come. After waiting almost a year for additional documents, the LAC filed suit under the FOIA.

On Behalf of Northern Border Groups, LAC Files FOIA Requests regarding Border Patrol Involvement in Translation and 911 Dispatch Activities

In May 2012 an alliance of immigration advocacy groups represented by the LAC filed FOIA requests with CBP and DHS seeking information regarding CBP policies on providing translation assistance to other law enforcement agencies and on participating in 911 dispatch activities. The alliance is seeking documents explaining the relevant legal authority, applicable procedural guidance, training materials, statistical data, and complaints filed with the government as a result of CBP's practices.

Over the past year, advocates in states along the northern border of the United States have reported that Border Patrol agents frequently "assist" other law enforcement agencies by serving as Spanish-English interpreters and participating in 911 dispatch activities. Capitalizing on their access to noncitizens, Border Patrol agents often use these opportunities to question individuals about their immigration status and, in many cases, initiate removal proceedings.

There is little public information about the scope and purpose of CBP's collaboration with other law enforcement agencies. Through their FOIA requests, the alliance —which includes the American Immigration Council, the Michigan Organizing Project/Alliance for Immigrants & Reform Michigan, Migrant Justice, the New York Immigration Coalition, the Northwest Immigrant Rights Project, and OneAmerica—hopes to promote greater transparency regarding these practices.

ACCESS TO COUNSEL

LAC Highlights DHS Restrictions on Access to Counsel

AIC v. DHS and USCIS, No. 1:11-cv-01971 (D.D.C. *filed* Nov. 8, 2011)
AIC v. DHS and CBP, No. 1:11-cv-01972 (D.D.C. *filed* Nov. 8, 2011)
AIC v. DHS and ICE, No. 1:12-cv-00856 (D.D.C. *filed* May 31, 2012)

In May 2012, the LAC and Penn State Law's Center for Immigrants' Rights released the report, *Behind Closed Doors: An Overview of DHS Restrictions on Access to Counsel*. The report describes restrictions on access to legal representation before DHS, provides an overview of the law regarding access to counsel, and offers recommendations designed to combat DHS's harmful practices. It also addresses recent changes to USCIS guidance that are intended to expand access to legal representation.

The report includes anecdotes from immigration attorneys across the country indicating that CBP, ICE and USCIS often interfere with noncitizens' access to counsel in benefits interviews, interrogations, and other types of administrative proceedings outside of immigration court. Depending on the context, immigration officers completely bar attorney participation, impose unwarranted restrictions on access to legal counsel, or strongly discourage noncitizens from seeking legal representation at their own expense. In conjunction with the release of the report, the LAC held a recorded teleconference highlighting the key issues.

The LAC, in collaboration with Dorsey & Whitney, is also involved in ongoing FOIA litigation seeking to compel the release of DHS records relating to noncitizens' access to counsel in interactions with the immigration agencies. See summaries of these lawsuits here.

LAC Challenges BIA Decision Denying *Miranda*-Like Warnings to Immigrants Under Arrest
Miranda-Fuentes v. Holder, No. 11-72641 (9th Cir. *amicus brief filed* April 20, 2012)

In April 2012, the LAC filed an *amicus* brief with the Ninth Circuit Court of Appeals challenging a BIA decision ruling that immigrants need not be advised before being interrogated of the reason for their arrest, their right to legal representation, and that anything they say may be used against them in a subsequent proceeding. The LAC argued that the BIA misinterpreted the text and purpose of 8 C.F.R. § 287.3(c). The brief was joined by the American Immigration Lawyers Association, the Lawyers' Committee for Civil Rights of the San Francisco Bay Area, the National Immigration Law Center, the National Immigration Project of the National Lawyers Guild, and the Northwest Immigrant Rights Project. The BIA ruling under challenge is *Matter of E-R-M-F- & A-S-M-*, 25 I&N Dec. 580 (BIA 2011).

ACCESS TO COURTS

LAC Continues to Challenge the "Departure Bar"; Argues in the Fifth Circuit
Lari v. Holder, No. 11-60706 (5th Cir. *argued* June 5, 2012)

The LAC, in collaboration with the National Immigration Project of the National Lawyers Guild, continues to challenge the "departure bar" in federal courts of appeals, contesting the validity of regulations preventing immigrants from seeking reopening or reconsideration of their removal cases after they have been deported. Following several victories, LAC Deputy Director Beth Werlin urged the Fifth Circuit Court of Appeals to join the eight circuits that have struck down the regulation. The oral argument was held on June 5, 2012.

SYSTEMIC REFORMS

LAC Amends the Complaint in Asylum Clock Litigation, Adding Two New Claims
A.B.T. et al. v. U.S. Citizenship and Immigration Services, No. 11-02108 (W.D. Wash. *filed* December 15, 2011)

The LAC filed an amended complaint on June 4, 2012 in *A.B.T. v. USCIS*, the nationwide class action challenging USCIS and EOIR policies related to the "asylum clock." The asylum clock is the system these agencies use to track the 180-day period that an asylum applicant must wait, after filing the asylum application, before he or she may apply for work authorization. The challenged policies unlawfully delay – and in some cases, entirely prevent – eligibility for employment authorization.

The amended complaint adds two new claims. First, it challenges the policy of allowing the asylum clock to start or restart only at a hearing before an immigration judge. Under the regulations, the asylum clock can be stopped, thus tolling the 180-day waiting period, when there is "applicant-caused" delay. The policy does not allow the asylum clock to restart when this applicant delay is resolved. Instead, by dictating that the clock will only restart at the next hearing, the policy results in the clock being stopped for prolonged periods that reflect the congested immigration court dockets rather than any applicant delay. In some locales, hearings are being set three years out, which means that asylum applicants are without the ability to work for this extended period.

The second new claim addresses agency policies that prohibit the asylum clock from restarting when, after an asylum applicant fails to appear for an interview with USCIS, the asylum office refers the case to immigration court for a removal hearing. In these cases, the agency policies allow the asylum clock to be restarted only by USCIS and only after the removal case has been terminated by an immigration judge and the asylum application remanded to USCIS. The asylum applicant has no control over the decision to terminate proceedings and thus no independent ability to "cure" his or her failure to appear at the asylum interview in order to restart the asylum clock. Because termination and remand occur in very few cases, the vast majority of asylum applicants in this situation are prohibited from receiving EADs for the entire period that their asylum applications are pending before the immigration court.

Ninth Circuit Agrees to *En Banc* Rehearing in CSPA Class Action
Costelo v. Napolitano, No. 09-56846 (9th Cir. *rehearing en banc* granted April 20, 2012)
Cuellar de Osorio, No. 09-56786

On June 18, 2012, the Ninth Circuit, sitting *en banc*, will hear oral argument on the meaning of INA § 203(h)(3), the provision of the Child Status Protection Act (CSPA) that provides alternate benefits to "aged-out" beneficiaries of immigrant visa petitions.

The issue in the two cases before the Court – the nationwide class action, *Costelo v. Napolitano*, No. 09-56846, and the companion case, *Cuellar de Osorio*, No. 09-56786 – is *who* Congress intended to benefit in § 203(h)(3). This section provides alternate benefits to derivative beneficiaries of immigrant petitions who, because of the long waiting lines for visas, turned 21 before a visa became available to them. Without § 203(h)(3), these young adults, who have already waited years for a visa, would be forced to the back of the line.

Amici American Immigration Council and National Immigrant Justice Center (NIJC), represented by Nickolas Kacprowski of Kirkland and Ellis, argue that § 203(h)(3) was intended to benefit derivative beneficiaries in *all* family and employment-based visa categories. In contrast, the BIA in *Matter of Wang*, 25 I&N Dec. 28 (2009), interprets § 203(h)(3) as applying only to derivative beneficiaries of the Family 2A visa category – which would leave many thousands of "aged-out" youth without the benefit of the statute. Although a panel of the Ninth Circuit upheld the BIA interpretation, that decision was vacated when the *en banc* court granted rehearing.

LAC Seeks Wider Availability of § 212(h) Waivers
Hanif v. Attorney General, No. 11-2643 (3d Cir. argued April 11, 2012)
Mendoza Leiba v. Holder, No. 11-1845 (4th Cir. *supplemental brief filed* June 11, 2012)

Former LAC Law Fellow Ben Winograd participated in oral argument in a Third Circuit case challenging *Matter of Koljenovic*, 25 I&N Dec. 219 (BIA 2010), a decision limiting lawful permanent residents' ability to obtain waivers of inadmissibility under INA § 212(h). The case involves a statutory amendment enacted in 1996 that imposed certain bars on such waivers for applicants who have previously been "admitted" to the United States in lawful permanent resident (LPR) status. In an *amicus* brief, the LAC asked the court to adhere to the definition of "admitted" in the INA and join several other federal circuits in holding that the amendment applies only to immigrants who entered the United States as LPRs, not those who adjusted to LPR status post-entry.

The LAC also filed a supplemental *amicus* brief in the Fourth Circuit addressing the effect of the decision in *Bracamontes v. Holder*, 675 F.3d 380 (4th Cir. 2012), which involved a petitioner who was "admitted" to the United States prior to adjusting to LPR status, on petitioners with no pre-adjustment admission.

"REQUESTS FOR EVIDENCE"

- **CBP Monitoring Efforts:** The LAC is interested in learning about cases where (1) CBP officers have assisted local law enforcement agencies by serving as Spanish-English interpreters, or (2) CBP officers have been involved in 911 dispatch activities. Please send relevant information to clearinghouse@immcouncil.org.

QUICK LINKS

Practice Advisories

- The LAC, in collaboration with the Immigrant Defense Project and the National Immigration Project of the National Lawyers Guild, issued a Practice Advisory, *Vartelas v. Holder: Implications for LPRs Who Take Brief Trips Abroad and Other Potential Favorable Impacts* (April 5, 2012).

- The LAC, in collaboration with the National Immigration Project of the National Lawyers Guild, Boston College Post Deportation Human Rights Project, and New York University School of Law's Immigrant Rights Clinic, issued a Practice Advisory, *Seeking a Judicial Stay of Removal in the Court of Appeals* (May 25, 2012).

Blog Posts

- LAC Deputy Director Beth Werlin discussed recent developments regarding the federal Defense of Marriage Act (DOMA) and a lawsuit filed in New York challenging DOMA in the immigration context. (*Appellate Court Hears Arguments in Case Challenging DOMA, Bi-National Married Couples File New Suit*, April 10, 2012).

- LAC Director Melissa Crow discussed Border Patrol agents' abuse of their role as interpreters to aid immigration enforcement (*Border Patrol Agents Abusing Role as Interpreters*, May 1, 2012).

Press

- LAC Director Melissa Crow's Letter to the Editor of the Washington Post regarding the SB 1070 arguments in the Supreme Court was published on April 29, 2012.

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