AMERICAN IMMIGRATION LAW FOUNDATION
LEGAL ACTION CENTER
LITIGATION CLEARINGHOUSE NEWSLETTER

Vol. 2, No. 3 February 28, 2007

NATZ DELAY CLASS ACTION FILED IN N.D. CALIFORNIA

A class action was filed on February 8, 2007 by the ACLU Immigrants' Rights Project, the ACLU of Northern California, the Asian Law Caucus, and the Council on American-Islamic Relations, San Francisco Bay Area Chapter. The case is *Zhang v. Gonzales*, 07-CV-0503 (N.D. Cal.). The amended complaint asks the court to adjudicate naturalization applications that have been pending for more than 120 days after the naturalization interview. The complaint names as defendants DHS, CIS officers, the Attorney general and the director of the FBI. It alleges that the FBI failed to complete background checks within a reasonable time period. For more information about this suit and other naturalization delay litigation, please see AILF's Litigation Issue Page at http://www.ailf.org/lac/lit_issue_pages.shtml.

ARRIVING ALIEN ADJUSTMENT: HAS THE BIA REFUSED TO CONTINUE OR REOPEN A CASE WHILE THE ADJUSTMENT APPLICATION IS PENDING AT CIS?

Under an interim rule, USCIS has jurisdiction to adjudicate adjustment of status applications for "arriving aliens" in removal proceedings. *See* 71 Fed. Reg. 27585 (May 12, 2006). However, the BIA has refused to reopen, continue or otherwise hold a removal proceeding in abeyance pending CIS adjudication of the adjustment application. AILF has filed amicus briefs in two petitions for review challenging this practice. (See "New at the LAC.") Please email us at clearinghouse@ailf.org if the BIA refused to continue or reopen your client's case. AILF is available to advise attorneys with "arriving alien" adjustment cases and may be able to appear as amicus curiae at the court of appeals.

Resource: AILF Practice Advisory, *"Arriving Aliens" and Adjustment of Status: What is the Impact of the Government's Interim Rule of May 12, 2006?* (Updated October 3, 2006) available at http://www.ailf.org/lac/lac_pa_chrono.shtml.

NEW AT THE LAC …

Fourth Circuit Sides With AILF in INA § 204(j) Case: AILF appeared as amicus curiae in the Fourth Circuit case vacating *Matter of Perez Vargas*. For more information about this decision, see the article on the following page.

***Ventura* and the Remand Rule:** The LAC submitted an amicus brief on behalf of AILF, Greater Boston Legal Services and the Harvard Immigration and Refugee Clinic in an asylum case that is being reheard en banc in the First Circuit. *Castaneda-Castillo v. Gonzales,* No. 05-2384, 464 F.3d 112 (1st Cir. 2006) (amicus brief filed 2/15/07). The amicus brief sets forth a framework for when the court should remand a case for further review and when outright reversal is appropriate. It argues that the panel's decision to reverse the BIA was proper.

Court's Jurisdiction to Order Petitioner to be Returned to the U.S.: The LAC submitted a supplemental amicus brief to address the Tenth Circuit's concerns about whether it has jurisdiction to order the petitioner to be returned to the U.S. if his petition for review is successful. *Valdez-Sanchez v. Gonzales,* No. 05-9506 (10th Cir. supplemental amicus brief filed 2/16/07). The LAC argues that the circuit court's authority to order a petitioner's return is inherent in the equitable powers of the federal court as well as the court's jurisdiction under 8 U.S.C. §§ 1252(a) and (b)(3)(B).

Adjustment of Status for "Arriving Aliens": The LAC submitted an amicus brief in a case where the BIA refused to reopen removal proceedings for an "arriving alien" whose adjustment of status application is pending before CIS. *Budrys v. Gonzales,* No. 06-2187 (4th Cir. amicus brief filed 2/7/07). The LAC argues that the BIA's decision violates the INA and the interim regulations regarding adjustment of status for arriving aliens. *See* 71 Fed. Reg. 27585 (May 12, 2006). The LAC made similar arguments in a Second Circuit case, *Wang v. Gonzales,* No. 05-2894-ag, (2d Cir. amicus brief filed 2/16/07).

FOURTH CIRCUIT VACATES *MATTER OF PEREZ VARGAS*, BIA PRECEDENT ON INA § 204(j)

The Fourth Circuit vacated *Matter of Perez Vargas*, 23 I&N Dec. 829 (BIA 2005), and held that IJs have jurisdiction to make findings regarding the validity of an approved I-140 under INA § 204(j). *Perez-Vargas v. Gonzales*, 05-2313 (4th Cir. Feb. 22, 2007). Section 204(j) provides that, for purposes of an adjustment application that has been pending for more than 180 days, an approved I-140 petition remains valid even if the applicant changes jobs, so long as the new job is in the same or similar occupational classification. The BIA had held that IJs lack jurisdiction to make a finding that a visa is valid under section 204(j). The Fourth Circuit found that the BIA's decision conflicted with clear statutory language.

AILF anticipates that the BIA will take the position that precedent decisions that are vacated are still binding on all IJs/BIA in cases arising outside of the circuit that vacated it. However, there are arguments to the contrary. We would advise attorneys to argue that *Matter of Perez Vargas* has been vacated, and in the alternative, is wrong. Please email us at clearinghouse@ailf.org to let us know how the IJs and the BIA are handling these cases following the Fourth Circuit's decision. AILF is interested in litigating the issue in other circuits.

NINTH CIRCUIT REISSUES DECISION IN *RAMADAN*, ASYLUM ONE YEAR FILING DEADLINE CASE

The Ninth Circuit issued a new opinion in *Ramadan v. Gonzales*, No. 03-74351 (9th Cir. Feb. 22, 2007) and held that INA § 242(a)(2)(D) allows the court to review whether changed circumstances excuse the failure to file an asylum application within one year of entry to the United States (INA § 208(a)(2)(3)). Section 242(a)(2)(D), added by the REAL ID Act, provides courts with jurisdiction over all constitutional claims or questions of law contained in notwithstanding other restrictions on review the INA.

The Ninth Circuit found that "questions of law" "extends to questions involving the application of statutes or regulations to undisputed facts, sometimes referred to as mixed questions of fact and law." Whether undisputed facts qualify as "changed circumstances" is a mixed question of fact and law over which the court has jurisdiction. The court also rejected the government's alternate claim that "changed circumstance" was a discretionary determination.

Other courts have taken a more restrictive approach as to what is a question of law under INA § 242(a)(2)(D). Many courts have declined to review BIA determinations regarding the one year filing deadline. A number of these decisions contain little independent analysis, however, and instead rely on the originally issued *Ramadan* decision that now is vacated. There may be some room to challenge these decisions based on the opinion in *Ramadan*.

THE NATIONAL CHILDREN'S CENTER FINDS PRO BONO REPRESENTATION FOR UNACCOMPANIED CHILDREN AND PROVIDES RESOURCES FOR ATTORNEYS

The National Children's Center is a partnership between the U.S. Committee for Refugees and Immigrants and AILA. The Center finds pro bono attorneys for unaccompanied immigrant children. The Center welcomes referrals through its confidential online referral system. The Center also is recruiting immigration attorneys to mentor pro bono attorneys inexperienced in immigration law.

The National Children's Center maintains a Resource Library for attorneys representing immigrant children. The Resource Library has information about Central American gangs, including articles, reports, and a list of experts. It also has a variety of resources about applying for SIJ Status, including manuals, sample petitions, and government memoranda. The Center's webpage is http://www.refugees.org/article.aspx?id=1260&subm=75&area=Participate&.

AILF Legal Action Center, Litigation Clearinghouse
www.ailf.org/lac 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 case information.

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