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SUPREME COURT GRANTS CERTIORARI PETITIONS CHALLENGING BROAD INTERPRETATION OF DRUG/AGGRAVATED FELONY; AMICUS BRIEF COORDINATION UNDERWAY

The Supreme Court granted certiorari in *Lopez v. Gonzales* (No. 05-547) and *Toledo-Flores v. U.S.* (No. 05-7664). These cases address 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). *Lopez*, an 8th Circuit case, arose in the removal context. *Toledo-Flores*, a Fifth Circuit case, arose in the drug sentencing context.

The circuits are split on this issue. Several circuits have adopted the government's broad interpretation of what constitutes an aggravated felony in either the immigration or sentencing contexts, including the 1st, 2nd (sentencing context only), 4th, 5th, 8th, 9th (sentencing context only), 10th, and 11th Circuits. Other circuits have rejected the government's arguments in one or the other context, including the 2nd (immigration context only), 3rd, 6th, 7th, and 9th (immigration context only) Circuits. The Supreme Court now has the opportunity to resolve the circuit splits in both the immigration and sentencing contexts.

Given the importance of this issue, amicus brief coordination is underway. The New York State Defenders Association (NYSDA) Immigrant Defense Project and the National Immigration Project are consulting with a number of organizations and experts to develop a coordinated amicus strategy for these and any other cases that raise this issue. They welcome further input. Please contact Benita Jain at (718) 858-9658 ext. 231, Manny Vargas at (718) 858-9658 ext. 208, or Dan Kesselbrenner at (617) 227-9727.

Also, if you currently are litigating this issue, please contact NYSDA or National Immigration Project for assistance on legal strategy. If you are litigating this issue in a Circuit that has clearly decided that state classification controls or where the judge/court is poised to make such a ruling, consider asking the judge/court to hold the case in abeyance and grant a stay of removal pending a decision by the Supreme Court. Even if the court has denied a stay request, the court may be inclined to reconsider a stay motion in light of the pending Supreme Court cases.

COURTS REJECT *DANILOV* IN NATZ DELAY ACTIONS, FINDING JURISDICTION

Numerous district courts nationwide are rejecting the government's arguments that *Danilov v. Aguirre*, 370 F. Supp 2d 441 (E.D. Va. 2005) applies. Instead, the courts are finding that they have jurisdiction over petitions for hearing on naturalization applications brought under INA § 336(b), 8 U.S.C. § 1447(b), even when the FBI check is not complete.

The INA requires the government to make a determination on naturalization applications within 120 days of the interview (i.e., the "examination.") If the application is not adjudicated 120 days after the "examination is conducted," under INA § 336(b), an applicant may file a petition in district court seeking judicial adjudication of the application or a remand to USCIS. The government takes the position that the "examination" encompasses the entire process that USCIS uses to gather information about an applicant, including the completion of the FBI check. Therefore, the government argues, if the FBI check still is pending, the 120-day period has not begun running. The district court in *Danilov* adopted this reasoning and dismissed the petition where the FBI check was not complete.

After *Danilov*, other courts have rejected the government's argument that the "examination" encompasses the FBI name check. The following cases interpret the 120-day period as running from the date of the naturalization interview:

U.S.A. v. Hovsepian, 359 F.3d 1144, 1151 (9th Cir. 2004); *Al-Kudsi v. Gonzales*, No. 05-1584 (D. Ore.

Mar. 22, 2006) (unpublished) (explicitly rejecting *Danilov*); *Shalan v. Chertoff*, No. 05-10980, 2006 U.S. Dist. LEXIS 253 (D. Mass. 2006) (unpublished) (explicitly rejecting *Danilov*); *Saidi v. Jenifer*, No. 05-71832, 2005 U.S. Dist. LEXIS 35466 (E.D. Mich. 2005) (unpublished) (explicitly rejecting *Danilov*); *Essa v. USCIS*, No. 05-1449, 2005 U.S. Dist. LEXIS 38803 (D. Minn. 2005) (unpublished) (explicitly rejecting *Danilov*); *El-Daour v. Chertoff*, No. 04-1911, 2005 U.S. Dist. LEXIS 18325 (W.D. Pa. 2005) (unpublished) (explicitly rejecting *Danilov*); *Castracani v. Chertoff*, 377 F. Supp. 2d 71 (D.D.C. 2005); *Angel v. Ridge*, No. 04-4121, 2005 U.S. Dist. LEXIS 10667 (S.D. Ill. 2005); *Sweilem v. USCIS*, NO. 05-125, 2005 U.S. Dist. LEXIS 19630 (N.D. Ohio 2005).

Despite finding jurisdiction over the petitions, most of the courts ultimately declined to adjudicate the applications because the FBI checks were not complete. In several cases, the courts remanded the naturalization applications to USCIS.

However, in one significant case, ***Al-Kudsi v. Gonzales***, No. 05-1584 (D. Ore. Mar. 22, 2006) (unpublished), the district court ordered Attorney General Gonzales to instruct the FBI to complete a name check for a naturalization applicant awaiting a decision for several years. The court said that if USCIS did not receive a completed name check within 90 days, USCIS shall treat that failure as a successfully completed name check and issue the certificate of naturalization. In a footnote, the court observed that the FBI is a component of the Department of Justice. Thus, it was important that the petitioner in the INA § 336(b) action had named not only DHS officials, but the Attorney General as well.

For more information about judicial remedies for a stalled naturalization petition, see AILF's Practice Advisory, "Circumventing Naturalization Delays: How to Get Judicial Relief Under 8 U.S.C. § 1447(b) for a Stalled Naturalization Application" (Updated October 6, 2005) (available at http://www.ailf.org/lac/lac_pa_index.asp).

*The Clearinghouse would like to hear about your experiences with INA § 336(b) petitions. Please contact us at clearinghouse@ailf.org.

IMMIGRATION EQUALITY LEADS EFFORTS ON LGBT AND HIV BASED ASYLUM CLAIMS, PROVIDES TECHNICAL ASSISTANCE

Immigration Equality is a national organization that fights for equality under U.S. immigration law for lesbian, gay, bisexual, transgender, and HIV-positive individuals. By providing direct services and technical assistance, Immigration Equality is leading efforts to gain asylum for LGBT and HIV-positive individuals who have fled persecution or who fear returning to a country where they will not be free to express their sexuality or gender identity, or to receive life-saving medication.

Immigration Equality's website, www.immigrationequality.org, is host to a variety of legal resources, including decisions, briefs, and articles. Also, the recently revised "Manual for Asylum, Withholding and CAT Cases Based on Sexual Orientation, Transgender Identity and/or HIV Positive Status" is available for free on the website.

Immigration Equality runs a listserv for immigration practitioners who work on LGBT and/or HIV based asylum claims. The listserv is relatively low-volume. It allows both private practitioners and non-profit practitioners in this area to share ideas, country conditions information and names of experts. Attorneys who are interested in being added to this listserv can email Victoria Neilson, Legal Director, at vneilson@immigrationequality.org.

In addition, Immigration Equality is expanding its appellate and amicus work at the BIA and the Circuit Courts. Please direct referrals or requests for amicus briefs to Victoria Neilson.

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 information about your cases.

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