



AMERICAN IMMIGRATION LAW FOUNDATION  
LEGAL ACTION CENTER  
LITIGATION CLEARINGHOUSE  
NEWSLETTER

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## GOVERNMENT MOVES TO DISMISS MANDAMUS ACTIONS

Lawyers are reporting increased government resistance to mandamus actions where plaintiffs ask the court to compel USCIS to adjudicate immigrant petitions or applications. In December 2006, USCIS instituted a new policy that it no longer will request that name checks be expedited when a mandamus action is filed in federal court. See [http://www.ailf.org/lac/lac\\_mandamus\\_aytesmemo.pdf](http://www.ailf.org/lac/lac_mandamus_aytesmemo.pdf) As a result, instead of mooted mandamus actions by deciding the petition or application the government often responds to the complaint with a motion to dismiss. Among the arguments the government makes is that INA § 242(a)(2)(B) – the provision that limit courts' jurisdiction over discretionary decisions – bars courts from exercising jurisdiction over mandamus actions.

Plaintiffs have responded, and some courts have agreed, that INA § 242(a)(2)(B) does not apply because USCIS has a nondiscretionary duty to adjudicate plaintiffs' petition or application within a reasonable time. However, some courts have sided with the government and dismissed mandamus actions finding that the agency's decision to act on the applications was discretionary. At least two adverse decisions are expected to be reviewed by the courts of appeals. See *Grinberg v. Swacina*, No. 06-22593, 2007 U.S. Dist. LEXIS 19684 (S.D. Fla. 2007), *appeal docketed*, No. 07-11594 (11th Cir. Apr. 17, 2007) and *Feng Li v. Gonzales*, No. 06-5911, 2007 U.S. Dist. LEXIS 32608 (D.N.J. 2007) (appeal expected).

AILF's "Recent Mandamus Litigation" Issue Page outlines common government arguments and plaintiff responses and provides examples of cases where these issues were addressed, [http://www.ailf.org/lac/clearinghouse\\_mandamus.shtml](http://www.ailf.org/lac/clearinghouse_mandamus.shtml). See also AILF Practice Advisory, "Federal Court Jurisdiction over Discretionary Actions after REAL ID: Mandamus, Other Suits and Petitions for Review" (April 5, 2006) *available at* [http://www.ailf.org/lac/lac\\_pa\\_index.shtml](http://www.ailf.org/lac/lac_pa_index.shtml).

## SURVIVING SPOUSE VICTORY

In a recent decision, a district court rejected the government's position that the death of a U.S. citizen within two years of marriage nullifies the surviving spouse's immediate relative status and thus makes the spouse ineligible for a visa. The plaintiff and her  
*(Continued)*

### NEW AT THE LAC ...

#### AILF Practice Advisory on APA Lawsuits.

"Immigration Lawsuits and the APA: The Basics of a District Court Action," (May 9, 2007) *available at* [http://www.ailf.org/lac/lac\\_pa\\_index.shtml](http://www.ailf.org/lac/lac_pa_index.shtml). This Practice Advisory discusses the primary issues involved in an APA suit, with examples of how these issues have been decided in immigration cases and arguments that can be made to meet the various procedural requirements for an APA action.

**AILF/AILA Litigation Institute.** AILF and AILA are presenting the popular Litigation Institute this summer, July 27-29 in Louisville, Colorado (near Denver). The Institute is an interactive, participatory weekend workshop designed for both neophytes and experienced attorneys to acquire new skills, practice their technique, and become more confident and knowledgeable about litigation in immigration court and federal court. Enrollment is limited to 60 individuals and space is filling up! The application deadline is *June 1*.

<http://www.aila.org/content/default.aspx?docid=22009>.

**Litigation and Detention Meetings at AILA Annual Conference.** Please join us for litigation and detention meetings at AILA's Annual Conference in Orlando, Florida. AILF is sponsoring a litigation meeting on Wednesday, June 13, from 6:30 - 8:30 p.m. The Detention Watch Network and AILF are sponsoring a detention meeting on Saturday, June 16 from 12-2 p.m. Both meetings will be held in the Chicago Room in the Marriott Hotel (conference headquarters). For more information about the AILA Annual Conference and to register, see <http://www.aila.org/content/default.aspx?docid=11163>.

## COURTS CONSIDER BIA'S AUTHORITY TO ENTER REMOVAL ORDER

Under INA § 242, the courts of appeals have authority to review only “final” orders of removal. Section 101(a)(47)(A) of the INA defines an “order of deportation” as an IJ order either finding a person deportable or ordering deportation. Section 101(a)(47)(B) states that an order becomes final when (1) the BIA affirms the order on appeal, or (2) the period for seeking BIA review has expired. Neither the statute nor the regulations provide explicit authority for the BIA to enter an order of removal, but in numerous cases, the BIA has reversed immigration judge decisions and, without remand, entered an order of removal. As a result, the courts have been called on to consider whether when the BIA reverses an Immigration Judge’s decision, the removal order is “final” for purposes of INA § 242, or whether the BIA must remand for the IJ to enter the removal order.

In cases where an IJ concluded that the person was not removable (or made no explicit removability finding) and the BIA reversed that finding, the courts uniformly have said that the BIA must remand the case to the IJ for entry of an order of removal.

*Noriega-Lopez v. Ashcroft*, 335 F.3d 874, 880-81 (9th Cir. 2003)

*James v. Gonzales*, 464 F.3d 505 (5th Cir. 2006)

*Sosa-Valenzuela v. Gonzales*, \_\_ F.3d \_\_, 2007 U.S. App. LEXIS 10052 (10th Cir. May 1, 2007)

Other courts, in cases cited below, have distinguished these cases from those where an IJ found a person removable and granted relief from removal, and then the BIA reversed the grant of relief. In the latter scenario, the courts have found that the IJ’s initial removability determination was sufficient to meet § 101(a)(47)(A)’s definition of a removal order, and that the order of removal became final under INA § 101(a)(47)(B) after the BIA reversed the decision on relief. The most recent decision on this issue was the Ninth Circuit’s en banc opinion in *Lolong v. Gonzales*, which vacated an earlier decision

holding the opposite, *Molina-Camacho v. Ashcroft*, 393 F.3d 937 (9th Cir. 2004).

*Solano-Chicas v. Gonzales*, 440 F.3d 1050 (8th Cir. 2006)  
*Delgado-Reynua v. Gonzales*, 450 F.3d 596 (5th Cir. 2006)

*Lazo v. Gonzales*, 462 F.3d 53 (2d Cir. Sept. 2006)

*Guevara v. Gonzales*, 472 F.3d 972 (7th Cir. 2007)

*Lolong v. Gonzales*, \_\_ F.3d \_\_, 2007 U.S. App. LEXIS 10791 (9th Cir. May 7, 2007)

### *Surviving Spouse Continued*

husband had filed an I-130 visa petition and adjustment application. Subsequently, the U.S. citizen husband died. USCIS denied the visa petition finding the wife was no longer an immediate relative under INA § 201(b)(2) because the couple had been married less than two years. USCIS relied on the second sentence of INA § 201(b)(2)(A)(i), which says “an alien who was the spouse of a citizen of the United States for at least 2 years at the time of the citizen’s death ... shall be considered ... to remain an immediate relative after the citizen death but only if the spouse files a [visa] petition ... within 2 years after such date....”

The wife brought a lawsuit under 28 U.S.C. § 1331 (federal question jurisdiction) and the Administrative Procedure Act. The court, relying on the Ninth Circuit’s decision *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006), found that the plaintiff was an immediate relative because her spousal status vested at the time of filing the visa petition. The court further found that the second sentence of INA § 201(b)(2)(A)(i) is intended to provide surviving spouses the right to self petition if the U.S. citizen spouse dies after two years of marriage and the deceased had not filed a petition. This provision has no effect on the status of a surviving spouse married less than two years and who filed a visa petition prior to the U.S. citizen’s death.

The case is *Robinson v. Chertoff*, No. 06-5702, 2007 U.S. Dist. LEXIS 34956 (D.N.J. May 14, 2007) (unpublished).

#### **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 case information.

**Litigation Clearinghouse Newsletters are posted on AILF’s web page at [www.aifl.org/lac/litclearinghouse.shtml](http://www.aifl.org/lac/litclearinghouse.shtml).**

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