



AMERICAN IMMIGRATION LAW FOUNDATION
LEGAL ACTION CENTER
LITIGATION CLEARINGHOUSE
NEWSLETTER

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**SUPREME COURT: VOLUNTARY DEPARTURE
CAN BE WITHDRAWN**

A divided Supreme Court held that voluntary departure recipients are permitted to unilaterally withdraw their voluntary departure request before the expiration of the voluntary departure period. In so holding, the Court rejected the government's position that persons granted voluntary departure knowingly surrender the opportunity to seek reopening.

The Court noted that absent remedial action, a person granted voluntary departure could file a motion to reopen and depart the United States in accordance with the order, but doing so would result in the motion being deemed withdrawn. Alternatively, a person could remain in the United States to pursue reopening, but doing so would likely result in overstaying the voluntary departure period and making him or her statutorily ineligible for the very relief sought through reopening. By allowing withdrawal prior to the voluntary departure period expiring, the Court's decision sought to protect the statutory right to file a motion to reopen.

The Court, however, rejected Petitioner's argument that the voluntary departure period automatically tolls when a motion to reopen is filed. Four lower courts – the 3d, 8th, 9th, 11th Circuits -- had found that the filing of a motion to reopen automatically tolls the voluntary departure period. The 1st, 4th and 5th Circuits had rejected the tolling arguments. In the circuits without cases addressing tolling, the IJs and BIA generally refused to toll, relying on *Matter of Shaar*, 20 21 I&N Dec. 541 (BIA 1996).

AILF appeared as amicus curiae at the Supreme Court and in several cases at the courts of appeals. Following the Supreme Court's decision, AILF issued a Q&A offering preliminary analysis and initial steps to consider. At this early stage, one of the most significant questions is what the government and the courts will recognize as a withdrawal of the voluntary departure request and specifically, whether the initial motion to reopen will be construed as having sought withdrawal. AILF's immediately Q&A and a more

detailed summary of the decision are available on AILF Supreme Court Update at http://www.ailf.org/lac/supremecourt_112806.shtml.

**NINTH CIRCUIT: NO MATCH LETTER NOT
"CONSTRUCTIVE KNOWLEDGE;" DOES NOT
RESOLVE CHALLENGE TO SAFE HARBOR RULE**

The Social Security Administration's no-match letter and the employees' failure to meet a short deadline to resolve the discrepancy did not put the employer on constructive notice that it was employing undocumented workers, the Ninth Circuit held. *See Aramark Facility Services v. SEIU*, No. 06-56662, 2008 U.S. App. LEXIS 12704 (9th Cir. Jun. 16, 2008). Importantly, the events that gave rise to this case took place in 2003, prior to DHS' promulgation of the new rule regarding no-match letters and the safe harbor procedures ("safe harbor regulations"), 72 Fed. Reg. 45611 (Aug. 15, 2007), and the proposed amendments to this rule, 73 Fed. Reg. 15944 (Mar. 26, 2008).

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NEW AT THE LAC ...

Amicus Brief in Naturalization Case. *Bustamante v. Chertoff*, No-08-0990 (2d Cir. brief filed May 31, 2008). AILF argues that USCIS cannot deny a naturalization application once suit has been filed in district court under 8 U.S.C. § 1447(b), as the district court has exclusive jurisdiction over the case.

New Practice Advisory, *The Fugitive Disentitlement Doctrine: FOIA and Petitions for Review* (May 31, 2008). This advisory examines how DHS invokes the fugitive disentitlement doctrine to deny FOIA requests and how courts apply the doctrine to dismiss petitions for review. See http://www.ailf.org/lac/lac_pa_topics.shtml.

New *Brand X* Litigation Issue Page. This new AILF Litigation Issue Page provides an overview of the Supreme Court's holding in *Brand X* and identifies circuit court and agency immigration decisions that have applied or discussed the case. See http://www.ailf.org/lac/lit_issue_pages.shtml.

No-Match Case Continued

First, the court found that the no match letters themselves could not put the employer on notice that any particular employee was undocumented. The court noted that the purpose of the letters is not immigration-related and that SSA specifically tells employers that the letter itself does not provide any information about immigration status. Second, the court found that the fired employees' reactions to the no-match letters and to the employer's directive to the employees following receipt of the letters did not amount to constructive notice. After receiving the no-match letters, the employer sent letters to the employees directing them to go to the SSA office to correct the discrepancy and, within three days, provide verification that a new social security card is being processed; failure to comply with the directive would result in termination. This "extremely demanding policy" and the employees' failure to comply could not give rise to constructive notice.

There remain questions about what effect, if any, the decision may have on the challenge to the safe harbor regulations (see next paragraph about the pending legal challenge). In the opinion, the court compared the facts of the case to the safe harbor regulations. Specifically, the Court noted that even the new regulations, which "are currently subject to a preliminary injunction, would not treat the no-match letter itself as creating constructive knowledge of an immigration violation." Further, the court commented that the employer's policy of requiring employees to provide verification within three days, "was significantly more accelerated" than the policy envisioned under the safe harbor regulations, which gives the employer 90 days to resolve the discrepancy. The court did indicate how it may ultimately rule on the safe harbor regulations.

Several labor unions have sued the government to prevent the implementation of regulations. A district court preliminarily enjoined the government from enforcing the new regulations. Subsequently, DHS proposed amendments to its rule and claims to have addressed the district court's concerns. Read more about the case at http://www.ailf.org/lac/clearinghouse_otherissues.shtml#aflicio.

CLEARINGHOUSE HIGHLIGHT

2d Circuit Rejects BIA's Reasoning in *Matter of A-T- Bah v. Mukasey*, Nos. 07-1715, 07-1994, 07-2120, 2008 U.S. App. LEXIS 12407 (2d Cir. June 11, 2008)

The Second Circuit explicitly rejected the BIA's holding in *Matter of A-T-*, 24 I&N Dec. 296 (BIA 2007), that the past infliction of FGM rebuts the presumption of future persecution. Specifically, the court found that the BIA wrongly (1) "speculated" that FGM could only occur once without placing the burden on the government to show that the petitioners were not at risk of future FGM; and (2) concluded that the government satisfied its burden solely by showing that the exact same harm would not recur without requiring the government to prove that the petitioners would not face future threats to life or freedom on account of their social group membership.

The court did not reach the second holding of *Matter of A-T-*, that FGM did not constitute a continuing act of persecution, though one judge in his concurrence disagreed with the BIA on this point. The Second Circuit joins the Eighth and the Ninth Circuits, which also have rejected the BIA's arguments advanced in *Bah. Hassan v. Gonzales*, 484 F.3d 513 (8th Cir. 2007); *Mohammed v. Gonzales*, 400 F.3d 785 (9th Cir. 2005). In addition, the asylum applicant in *Matter of A-T-* currently is seeking review at the Fourth Circuit. For more information about the efforts to reverse *Matter of A-T-*, including legal resources, see the Center for Gender and Refugee Studies webpage at <http://cgrs.uchastings.edu/campaigns/matterofat.php>.

LITIGATION RESOURCE: CIVIL RIGHTS LITIGATION CLEARINGHOUSE

The Washington University School of Law has launched a new section of its Civil Rights Litigation Clearinghouse devoted to immigration litigation. The new section focuses on recent immigration class actions and other cases involving large numbers of plaintiffs. Approximately 285 immigration cases are summarized on the website. The suits range from challenges to detention conditions to suits alleging civil rights violations during workplace raids. The site provides a summary of each case, opinions and other key court documents. See <http://clearinghouse.wustl.edu/>.

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The Clearinghouse is a project of AILF's 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.

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