AMERICAN IMMIGRATION LAW FOUNDATION
LEGAL ACTION CENTER
LITIGATION CLEARINGHOUSE NEWSLETTER

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FRAP AMENDMENTS ALLOW FOR CITATION OF UNPUBLISHED DECISIONS, AUTHORIZE COURTS TO REQUIRE ELECTRONIC FILING

Amendments to the Federal Rules of Appellate Procedure (FRAP) went into effect in all circuits on December 6, 2006. The amendments address citation of unpublished opinions and electronic filing. Please note that not all of the courts of appeals have incorporated the FRAP amendments to the rules posted on their web pages. If your circuit has not changed its website, you can view the amendments at http://www.uscourts.gov/rules/supct1105/AP_Clean_revision321.pdf. Amendments to other federal court rules also went into effect on December 1, 2006. For more information about these other amendments, see http://www.uscourts.gov/rules/congress0406.html.

Unpublished Opinions
New FRAP 32.1 permits citation of opinions, orders, or judgments that are unpublished, including decisions that have been designated "not for publication" or "non-precedential." The rule applies prospectively to decisions filed on or after January 1, 2007. FRAP 32.1 requires the party citing an unpublished opinion to serve a copy of the unpublished decision if it is not available in a publicly accessible electronic database. The rule takes no position on whether the unpublished opinion has any precedential value.

Already, several courts of appeals have implemented new or amended local rules related to new FRAP 32.1. See First Circuit Local Rules 32.1 and 36.0; Fourth Circuit Local Rule 32.1; Seventh Circuit Rule 32.1, Ninth Circuit Rule 36-3; Tenth Circuit Rule 32.1, DC Circuit Rule 32. 1. Several of the local rules indicate that unpublished opinions have no precedential value, but may be considered persuasive authority.

Electronic Filing
FRAP 25(a)(2)(D) was amended to authorize the court of appeals to require electronic filing if reasonable exceptions are allowed. Prior to the amendment, the courts could permit, but not require, electronic filing. Several courts are planning to implement mandatory electronic filing procedures.

NOT RECEIVING AN INTERIM EAD? CONTACT AILF!

AILF's Legal Action Center is considering litigation against the USCIS for not providing an interim EAD when an EAD application has been pending for more than 90 days. 8 C.F.R. § 274a.13(d) requires that an interim EAD be granted if the EAD application is not decided within 90 days. The regulation says that the interim EAD may be valid for a maximum of 240 days. Please see AILF's FAQ and potential plaintiff questionnaire, http://www.ailf.org/lac/lac_lit.shtml, if your client is encountering this problem. If you have additional questions, email AILF at InterimEAD@ailf.org.

GOVERNMENT FILES NOTICE OF APPEAL IN *DURAN GONZALEZ*, I-212/*PEREZ-GONZALEZ* LITIGATION

On January 8, 2007, the defendants filed a Notice of Appeal to the Ninth Circuit Court of Appeals from the district court's order granting class certification and a preliminary injunction in *Duran Gonzalez v. DHS*, 2:06-cv-1411 (W.D. Wash). This suit challenges DHS's willful refusal to follow the Ninth Circuit's decision *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004). Plaintiffs are represented by Northwest Immigrants Right Project, the American Immigration Law Foundation, and Van Der Hout, Brigagliano & Nightingale, LLP. The notice of appeal was filed pursuant to 28 U.S.C. § 1292(a)(1), which grants the courts of appeals jurisdiction over interlocutory appeals. The class certification and preliminary injunction remain in effect.

In *Perez-Gonzalez*, the Ninth Circuit determined that individuals who have previously been removed or deported may apply for adjustment of status (under INA § 245(i)) along with an accompanying I-212 waiver application. The preliminary injunction

protects individuals with pending I-212 waiver applications and individuals whose applications already have been denied. For more information about the preliminary injunction and a description of the class, see http://www.ailf.org/lac/lac_lit_92806.shtml.

After REAL ID Act, Courts Retain Jurisdiction Over Habeas Corpus Petitions Challenging Detention

The REAL ID Act of 2005 purported to eliminate habeas corpus jurisdiction over final orders of removal, deportation, and exclusion and consolidate such review in the court of appeals. The REAL ID Act, however, did not impact the ongoing availability of habeas corpus to challenge the length or conditions of immigration detention. Since the REAL ID Act's enactment on May 11, 2005, the courts of appeals uniformly have upheld the right to file a habeas corpus petition to challenge detention. Below are decisions that acknowledge this right. In circuits where the court of appeals has not addressed this issue, a district court case is provided.

1st Cir.: *Hernandez v. Gonzales*, 424 F.3d 42, 42 (1st Cir. 2005). **2d Cir.:** *DeBarreto v. INS*, 427 F. Supp. 2d 51, 55 (D. Conn. 2006). **3d Cir.:** *Bonhometre v. Gonzales*, 414 F.3d 442, 446 n.4 (3d Cir. 2005). **4th Cir.:** *Ali v. Barlow*, 446 F. Supp. 2d 604 (E.D. Va. 2006) (assuming without addressing jurisdiction). **5th Cir.:** *Baez v. BICE*, No. 03-30890, 2005 U.S. App. LEXIS 21503, *2 (5th Cir. Oct. 4, 2005) (unpublished). **6th Cir.:** *Kellici v. Gonzales*, 2006 U.S. App. LEXIS 31388, *9 (6th Cir. Dec. 21, 2006). **7th Cir.:** *Adebayo v. Gonzales*, 2006 U.S. Dist. LEXIS 9343, *3 (N.D. Ill. Mar. 7, 2006) (unpublished). **8th Cir.:** *Moallin v. Cangemi*, 427 F. Supp. 2d 908, 920 (D. Minn. 2006). **9th Cir.:** *Nadarajah v. Gonzales*, 443 F.3d 1069, 1075 (9th Cir. 2006). **10th Cir.:** *Ferry v. Gonzales*, 457 F.3d 1117, 1131 (10th Cir. 2006). **11th Cir.:** *Madu v. Atty. Gen.*, 2006 U.S. App. LEXIS 29501, *10-12 (11th Cir. Dec. 1, 2006).

Clearinghouse Highlight

In each edition of this newsletter, the Clearinghouse highlights cases that showcase novel arguments, creative lawyering, and issues of first impression.

3d and 6th Circuits Follow Other Courts in Rejecting BIA's Interpretation of CAT in *Matter of S-V-*.

Amir v. Gonzales, 467 F.3d 921 (6th Cir. 2006). *Silva-Rengifo v. AG of the United States*, __ F.3d __, 2007 U.S. App. LEXIS 386 (3d Cir. 2007). In *Amir* and *Silva-Rengifo*, the Third and Sixth Circuits joined the Second and Ninth Circuits in explicitly rejecting the BIA's interpretation of what constitutes "acquiescence" on the part of the government for purposes of CAT relief. To establish eligibility for CAT, an applicant must show that the torture be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." In *Matter of S-V-*, 22 I&N Dec. 1306 (BIA 2000), the Board said that "acquiescence" requires that an applicant "do more than show that the officials are aware of the activity but are powerless to stop it. He must demonstrate that . . . officials are willfully accepting of the guerillas' torturous activities."

The petitioners in *Amir* and *Silva-Rengifo* both claimed that they would experience torture by non government entities. In both cases, the Board upheld the denials of their CAT claims in reliance of *Matter of S-V-*. In *Amir*, the Sixth Circuit concluded that the "willfully accepting" standard is too stringent and conflicts with Congress's clear intent to include "willful blindness" in the meaning of "acquiescence." The Third Circuit in *Silva-Rengifo* also found that "acquiescence" includes "willful blindness."

The two other cases rejecting the Board's interpretation are *Zheng v. Ashcroft*, 332 F.3d 1186 (9th Cir. 2003), and *Khouzam v. Ashcroft*, 361 F.3d 161 (2d Cir. 2004). The Fourth and Fifth Circuits – without explicitly rejecting Board case law – have applied a "willfully blind" standard. *See Lopez-Soto v. Ashcroft*, 383 F.3d 228 (4th Cir. 2004); *Ontunez-Tursios v. Aschcroft*, 303 F.3d 341 (5th Cir. 2002).

AILF Legal Action Center, Litigation Clearinghouse
www.ailf.org/lac
clearinghouse@ailf.org

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.