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IMMIGRATION FIRM FILES SUIT AGAINST DEPARTMENT OF LABOR

An immigration law firm, Fragomen, Del Ray, Bernsen Loewy LLP, has filed suit against the Department of Labor (DOL). The suit challenges the DOL's "new" interpretation of 20 CFR § 656.10(b)(2), a regulation governing the labor certification process. The regulation addresses, *inter alia*, the procedure for evaluating whether a U.S. applicant for a position is "qualified," and how counsel may represent employers throughout the labor certification process.

According to the complaint, DOL's new interpretation improperly bars employers from consulting with counsel to determine whether U.S. applicants are "qualified" under the regulations, only allowing employers to consult with an attorney after initially assessing that the applicant is "unqualified." Fragomen alleges that this interpretation resulted in a 100 percent audit of all its labor certifications.

Fragomen claims that the agency's interpretation of the regulation and actions related to this interpretation exceed its statutory authority; violate the Constitutional rights of employers to consult with their counsel and the rights of counsel to provide advice to their clients; and contravene the regulation the DOL purports to be implementing. Plaintiff is seeking injunctive and declaratory relief and attorneys fees. The case is *Fragomen v. Chao*, No. 08-01387 (D.D.C. *filed* Aug. 8, 2008).

On August 29, 2008, DOL issued a Restatement of the PERM Program Guidance Bulletin on the Clarification of Scope of Consideration Rule in 20 CFR § 656.10(b)(2). DOL argues that the issuance of this guidance renders plaintiff's challenges to previous guidance moot. http://www.foreignlaborcert.doleta.gov/.

The complaint, motion for preliminary injunction, and other documents are posted on AILF's Other Impact Litigation Issue Page at www.ailf.org/lac/clearinghouse_otherissues.shtml.

CLEARINGHOUSE HIGHLIGHT

Seventh Circuit Holds Denial of Continuance "[N]ullifies" Arriving Alien's Adjustment Opportunity

Ceta v. Mukasey, No. 07-1863, 2008 U.S. App. LEXIS 15873 (7th Cir. 2008).

The BIA abused its discretion in affirming the denial of a continuance of an "arriving alien" who sought additional time for USCIS to decide his adjustment of status application, the Seventh Circuit held. The petitioner's adjustment was based on marriage to a U.S. citizen.

The BIA denied the continuance because neither the BIA nor the IJ had jurisdiction over the adjustment application under the interim regulations. These regulations deleted the prior bar to an "arriving alien" in removal proceedings adjusting status, and granted USCIS exclusive jurisdiction over these adjustment applications. See 71 Fed. Reg. 27585 (May 12, 2006).

The Seventh Circuit first found an exception to its general rule that it had no jurisdiction over discretionary continuance decisions. The exception was triggered because the denial of the continuance nullified petitioner's statutory opportunity to apply

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NEW AT THE LAC …

***Poliakova v. Gonzalez*, No. 08-13313 (11th Cir. amicus brief *filed* 8/19/08).** AILF's brief argues that district courts have jurisdiction over agency delay in adjustment cases.

Updated Practice Advisory, *"Finality" of Removal Orders for Judicial Review Purposes* (August 5, 2008). This practice advisory addresses whether a removal decision issued by an Immigration Judge or the BIA is a "final" removal order for purposes of federal court review. It addresses whether a BIA remand, for example, affects the "finality" of the order. AILF's Practice Advisories are available at http://www.ailf.org/lac/lac_pa_topics.shtml.

AILF and AILA Comment on EOIR'S Proposed Rule on "Streamlining." This comment emphasizes the need for federal court oversight of the use of the "AWO" procedure, and also objects to EOIR's proposal to allow two permanent members of the BIA to issue precedent decisions. *See* http://www.ailf.org/lac/chdocs/BIAAWO-egcmts.pdf.

Clearinghouse Highlight Continued

for adjustment. The court reasoned that the INA provided for a removal order to be executed within 90 days. Once removed, petitioner would become ineligible for adjustment. Thus, by denying the continuance, the petitioner is "trapped" – the statute and the amended regulation afford him the opportunity to seek adjustment with USCIS, but he will be deported by ICE before USCIS can act.

The court also held that, where the BIA's denial of a continuance nullified the right to apply for adjustment, the BIA must provide a reason consistent with the statute. Here, the BIA's explanation was a statement of the obvious and unresponsive to the motion. The BIA's finding that the immigration court lacked jurisdiction over adjustment applications was not a rational basis for denying petitioner's continuance request, but merely a reiteration of the amended regulation. The BIA failed to address the critical point that, under the amended regulations, the petitioner needed more time for USCIS to complete its adjudication.

Ceta joins the Ninth Circuit in adopting arguments suggested by AILF in "Adjustment of Status of 'Arriving Aliens' Under the Interim Regulations: Challenging the BIA's Denial of a Motion to Reopen, Remand, or Continue a Case," http://www.ailf.org/lac/lac_pa_topics.shtml. *See Kalilu v. Mukasey*, 516 F.3d 777 (9th Cir. 2008). The Second Circuit has also ruled favorably. *See Ni v. BIA*, 520 F.3d 125 (2d Cir. 2008).

Second Circuit Rules on APA Review – Arguments Useful in Delay Litigation

Reversing the district court, the Second Circuit has found jurisdiction over an APA challenge to a USCIS decision to rescind plaintiff's lawful permanent residence (LPR) status. Plaintiff alleged that USCIS did not follow mandatory statutory and regulatory procedures governing rescission.

The district court had held that decisions to rescind LPR status are wholly discretionary, and thus the APA does not apply and 8 U.S.C. § 1252(a)(2)(B) strips the court of jurisdiction. The Second Circuit reversed, holding that § 1252(a)(2)(B) did not bar review as the agency has a non-discretionary duty to comply with rescission procedures. While revocation of LPR status would be discretionary, adherence to mandatory procedures for rescission is not. Also, because the challenged actions did not involve agency discretion, 5 U.S.C. § 701(a)(2) did not bar review under the APA.

The court's holding can be used to support arguments for jurisdiction in naturalization and adjustment delay litigation. Like the non-discretionary duty to comply with rescission procedures, USCIS has the non-discretionary statutory and regulatory duty to adjudicate a person's application for adjustment of status or naturalization. Therefore, courts have subject matter jurisdiction to consider whether adjudication delays are unreasonable under the APA. The case is *Sharkey v. Quarantillo*, No. 06-1397, 2008 U.S. App. LEXIS 18793, __ F.3d __, (2d Cir. 2008).

First Circuit Affirms EAJA Award in Natz Delay Case

The First Circuit upheld a district court's award of attorney's fees in a suit challenging delay of the adjudication of a naturalization application under 8 U.S.C. § 1447(b). The court found that plaintiff was a prevailing party because the district court's remand order referred to the terms of the parties' joint motion for remand. In addition, the agency did not have jurisdiction under 8 U.S.C. § 1447(b) to naturalize the plaintiff until the district court returned jurisdiction to the agency. Thus, the court's order was "indispensable" to the naturalization outcome. The court also found that the government's position was not substantially justified. No statutory provision requires an FBI name check, and thus, there was no reasonable basis in law or fact to delay adjudication beyond 120 days after the naturalization interview.

The dissent argued that plaintiff was not a prevailing party because the remand to the agency did not include a statement incorporating the agreement between the parties or require that the parties act in a particular way. The dissent further argued that the government's position was substantially justified because it "was a reasonable interpretation of a legislative command, and that interpretation was committed to the agency's expertise."

The case is *Aronov v. Chertoff*, 536 F.3d 30 (1st Cir. 2008). *See* AILF's Natz Delay Litigation Issue Page for updates on related litigation, http://www.ailf.org/lac/natz_delay0806.shtml.

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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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