LEGAL ACTION CENTER

AMERICAN IMMIGRATION COUNCIL

FEDERAL COURT JURISDICTION OVER DISCRETIONARY DECISIONS AFTER REAL ID: MANDAMUS, OTHER AFFIRMATIVE SUITS AND PETITIONS FOR REVIEW

Practice Advisory[1]

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Section 242(a)(2)(B) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1252(a)(2)(B), restricts federal court review of certain discretionary decisions in immigration cases. The REAL ID Act[2] made two changes to INA § 242(a)(2)(B). This practice advisory discusses the changes made by the REAL ID Act. It also outlines an analysis for determining whether § 242(a)(2)(B) applies to a particular case. This same analysis can be used for either removal or non-removal cases. Thus, the analysis is useful in mandamus actions or other affirmative suits, such as a claim under the Administrative Procedures Act (APA), or in an appeal of a final removal order brought by a Petition for Review.[3]

Courts are continuing to interpret the impact of the REAL ID Act – including the changes to § 242(a)(2)(B) – on their jurisdiction. The cases included here are cited as examples only and do not represent an exhaustive search of the case law in all federal circuits. Practitioners will need to research the current case law in your own circuit to ensure that there is no new and/or conflicting precedent. The information contained in this practice advisory is not legal advice and does not substitute for individual legal advice supplied by a lawyer familiar with a client's case.

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[1] This practice advisory updates an earlier advisory dated September 7, 2005.

[2] *See* REAL ID Act, P.L. 109-13, 119 Stat. 231 (May 11, 2005).

[3] This practice advisory does not address jurisdiction over discretionary decisions in habeas cases, as other considerations come into play in these cases. For a discussion of how the REAL ID Act impacted habeas petitions, *see* AILF's practice advisory "Judicial Review Provisions of the REAL ID Act," http://www.ailf.org/lac/lac_pa_index.shtml.

What is INA § 242(a)(2)(B)?

INA § 242(a)(2)(B), entitled "Denials of Discretionary Relief," restricts when federal courts have jurisdiction to review certain types of discretionary decisions and action by the government in immigration cases.

INA § 242(a)(2)(B) includes two subparts. For § 242(a)(2)(B) to apply, a case must fall within one of these two subparts. The first limits federal court jurisdiction over a "judgment regarding the granting of relief under section 212(h), 212(i), 240A, 240B, or 245." 8 U.S.C. § 1252(a)(2)(B)(i). The second subpart restricts federal court jurisdiction over "any other decision or action … the authority for which is specified under this title [Title II] to be in the discretion or the Attorney General or the Secretary of Homeland Security." 8 U.S.C. § 1252(a)(2)(B)(ii). Asylum decisions are specifically exempted from this bar on jurisdiction. *Id.*

How did the REAL ID Act amend INA § 242(a)(2)(B)?

The following is the amended version of § 242(a)(2)(B). The amendments made by the REAL ID Act are identified in bold.

> (B) Denials of Discretionary Relief.-Notwithstanding any other provision of law **(statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings,** no court shall have jurisdiction to review –
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> > (i) any judgment regarding the granting of relief under section 212(h), 212(i), 240A, 240B, or 245, or
> > (ii) any other decision or action of the Attorney General **or the Secretary of Homeland Security** the authority for which is specified under this title to be in the discretion of the Attorney General **or the Secretary of Homeland Security**, other than the granting of relief under section 208(a).

The REAL ID Act did not change the language of either subpart (i) or (ii), other than by adding a reference to the Secretary of Homeland Security. The Act did make two substantive changes to the paragraph preceding these subparts. First, it specified that the phrase "notwithstanding any other provision of law" applied to "statutory and nonstatutory" law and included the habeas corpus statute, the mandamus statute, and the All Writs Act. REAL ID Act § 106(a)(1).[4]

[4] This amendment was effective May 11, 2005 and applies to cases in which the final order of removal was issued before, on, or after May 11, 2005. REAL ID Act § 106(b). Of course, in a non-removal case, there will be no final order of removal. Thus there is a question as to how this effective date provision will be interpreted in the non-removal context.

Second, the REAL ID Act also expanded the scope of § 242(a)(2)(B) so that it now applies "regardless of whether the [discretionary] judgment, decision, or action is made in removal proceedings." REAL ID Act § 101(f)(2).[5] Prior to the REAL ID Act, some – though not all – courts had held that § 242(a)(2)(B) was applicable only in removal cases.[6] Presumably, this amendment was intended to reverse these earlier court decisions.

Do these amendments eliminate all mandamus and other types of affirmative suits in non-removal cases?

No, these changes do not eliminate all jurisdiction over mandamus and other affirmative lawsuits in non-removal cases. To determine whether jurisdiction remains available in a particular case, a practitioner may carry out a several step analysis. This analysis is essentially the same as the analysis to determine whether jurisdiction exists in a removal case involving agency discretion. Consequently, court decisions interpreting § 242(a)(2)(B) in the removal context will be helpful in determining whether the provision applies in a non-removal case.

What steps are involved in determining whether a court has jurisdiction under § 242(a)(2)(B) in a removal or non-removal case?

The following is an outline of the analysis that can be used to determine whether a court has jurisdiction under § 242(a)(2)(B), whether in a petition for review of a final removal order, or in a mandamus or APA challenge in a non-removal case. A more detailed explanation follows this outline.

1. Does the issue/case fall completely outside the scope of INA § 242(a)(2)(B)?
   A. INA § 242(a)(2)(B) only limits jurisdiction over certain discretionary actions and decisions.
   B. INA § 242(a)(2)(B) does not apply to asylum decisions.
   C. INA § 242(a)(2)(B) also does not apply to naturalization decisions.
   D. INA § 242(a)(2)(B) does not apply to other discretionary decisions that fall outside of Title II, including discretionary decisions required in INA § 101, 8 U.S.C. § 1101.

2. Does the case fall under INA § 242(a)(2)(B)(i)?
   A. Has there been an actual exercise of discretion?
   B. Where the application for relief was addressed by the IJ, does the issue on appeal involve an exercise of discretion?

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[5] This amendment was effective May 11, 2005 and applies to all cases pending before any court on or after the date of enactment. REAL ID Act § 101(h)(4).

[6] *See, e.g.*, *Ana International Inc. v. Way*, 393 F.3d 886, 891 and n. 3 (9th Cir. 2004) (declining to resolve this issue, but listing both cases that found INA § 242(a)(2)(B) was limited to removal and those that applied it in the non-removal context).

3. Does the case fall under INA § 242(a)(2)(B)(ii)?
   A. Is the challenged action or decision discretionary?
   B. Is the decision or action *specified by Title II of the statute* to be discretionary?
   C. Is the grant of discretion one of pure discretion unguided by legal principles? (9th Circuit cases).

How is this analysis applied?

The following is a discussion of each of these steps in the analysis:

1. Does the issue/case fall completely outside the scope of INA § 242(a)(2)(B)?

INA § 242(a)(2)(B) does not apply to every immigration-related case. Thus, the first step is to determine if the case is entirely outside the reach of § 242(a)(2)(B). There are at least four general categories of cases that arguably fall outside the reach of this section.

A. INA § 242(a)(2)(B) only limits jurisdiction over certain discretionary actions and decisions. Neither this section nor the REAL ID Act stripped federal courts of jurisdiction where the government has a nondiscretionary duty to act. In mandamus cases in particular, the existence of a mandatory, non-discretionary duty on the part of the government is an essential element of the claim. Thus, mandamus actions by definition generally should not fall within the restrictions of INA § 242(a)(2)(B).[7] For more on mandamus actions, *see* "Mandamus Actions: Avoiding Dismissal and Proving the Case," http://www.ailf.org/lac/lac_pa_index.shtml.

B. INA § 242(a)(2)(B) does not apply to asylum decisions. As noted, for § 242(a)(2)(B) to apply, a case must fall within one of its two subsections. Asylum cases do not fall within either subsection. Asylum is not one of the forms of discretionary relief specifically mentioned in § 242(a)(2)(B)(i). Additionally, asylum is specifically exempted from § 242(a)(2)(B)(ii). Consequently, § 242(a)(2)(B) should never be an issue with respect to federal court jurisdiction over asylum cases, even if the challenged agency action is a discretionary one. Of course, in any case there may be other bars to federal court jurisdiction, and a practitioner must thoroughly consider all other possible bars.

C. INA § 242(a)(2)(B) also does not apply to naturalization decisions. Similarly, neither subsection of § 242(a)(2)(B) covers naturalization cases.

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[7] The REAL ID restriction on mandamus jurisdiction in § 242(a)(2)(B) is identical to six other amendments that the REAL ID Act made to sub-sections of INA § 242. *See amended* INA §§ 242(a)(2)(A) and (C); new §§ 242(a)(4) and (5); amended § 242(b)(9); and amended § 242(g). These other amendments all relate to removal proceedings. It is likely that Congress simply inserted the same language in all of the subsections for the sake of consistency, even though the mandamus restriction in § 242(a)(2)(B) should have – at most – limited application.

Naturalization is not among the benefits specifically listed in § 242(a)(2)(B)(i). Additionally, § 242(a)(2)(B)(ii) states that it applies to agency decisions or action, "the authority for which is specified *under this title*" to be discretionary. The "title" referred to is Title II of the INA.[8] Naturalization provisions do not appear in Title II but rather in Title III of the INA. *See* INA § 310 et seq., 8 U.S.C. § 1421 et seq. Consequently, INA § 242(a)(2)(B) should never be an issue in federal court jurisdiction over a naturalization decision, even one involving discretion.

D. INA § 242(a)(2)(B) should not apply to other discretionary decisions that fall outside of Title II, including discretionary decisions required in INA § 101, 8 U.S.C. § 1101. There are a number of discretionary decisions that are authorized in provisions that fall within Title I of the INA, rather than Title II. As with naturalization cases, because these decisions fall outside of Title II they are not covered by INA § 242(a)(2)(B)(ii). Examples of these include (this is not an exhaustive list):

- Special Immigrant Juvenile Status (SIJS): The criteria for granting special immigrant juvenile status are contained in INA § 101(a)(27)(J). The government has argued that district courts do not have jurisdiction under § 242(a)(2)(B) to review the agency's denial of "consent" required as part of SIJS proceedings, because the decision to grant consent is discretionary. A district court has rejected this argument because § 101(a)(27)(J) – which contains the consent requirements – is found in *Title I* of the INA, not in Title II. *See Young Zheng v. Pogash*, 2006 U.S. Dist. LEXIS 9383 (S.D. Tex. 2006).
- S, T, and U visas: The definition of the non-immigrant "T" visa category includes as an eligibility requirement that the Attorney General determine if the individual "would suffer extreme hardship involving unusual and severe harm upon removal." INA § 101(a)(15)(T), 8 U.S.C. § 1101(a)(15)(T). The determination of extreme hardship has been held to be a discretionary determination. The exercise of the Attorney General's discretion with respect to a T visa should not fall within the bar to jurisdiction in § 242(a)(2)(B)(ii), however, because the statutory authority for this discretion is found in Title I, not Title II. The definitions of the "S" and "U" visa categories contain similar grants of discretion that fall outside the scope of § 242(a)(2)(B). *See* INA §§ 101(a)(15)(S) and (U), 8 U.S.C. §§ 1101(a)(15)(S) and (U). To date, there have been no cases addressing this issue.

2. Does the case fall under INA § 242(a)(2)(B)(i)?

If the issue/case does not fall completely outside of the scope of INA § 242(a)(2)(B), the next step is to determine if it falls under the bar found in subsection (i) of INA §

[8] The codified version of the statute refers in 1252(a)(2)(B)(ii) to the term "title" II while the INA refers to "subchapter" II. Regardless of which name is used, the referenced provisions are the same.

242(a)(2)(B). This subsection restricts jurisdiction over "any judgment regarding the granting of relief under section 212(h), 212(i), 240A, 240B, or 245."

Where your case involves an application for relief under one of the provisions specified in § 242(a)(2)(B)(i), you must first consider whether jurisdiction is barred by this subsection. The following questions are relevant to this inquiry:

A. Has there been an actual exercise of discretion? The majority of courts that have interpreted this provision have found that the phrase "judgment regarding the granting of relief" applies only to the discretionary portion of the decision. *See, e.g., Iddir v. INS*, 301 F.3d 492, 497 (7th Cir. 2002); *Montero-Martinez v. Ashcroft*, 277 F.3d 1137 (9th Cir. 2002); *Mendez-Moranchel v. Ashcroft*, 338 F.3d 176 (3d Cir. 2003). Where there has been no exercise of discretion, there is no bar on jurisdiction.

Thus, under the majority line of cases there would be no bar either to the filing of a mandamus action or to the court's ability to grant the mandamus and compel CIS to adjudicate a long-delayed case, since no discretionary decision had yet been made by the agency. *See Iddir*, 301 F.3d at 497.

B. Where the application for relief was addressed by the IJ, does the issue on appeal involve an exercise of discretion?

If it does, then jurisdiction will likely be barred under § 242(a)(2)(B)(i). *See, e.g., De la Vega v. Gonzales*, 436 F.3d 141 (2d Cir. 2006) (citing cases) (hardship determination for cancellation is discretionary and therefore unreviewable); *Martinez-Rosas v. Gonzales*, 424 F.3d 926 (9th Cir. 2005) (same); *Bugayong v. INS*, __ F.3d __, 2006 U.S. App. LEXIS 6230 (2d Cir. 2006) (denial of an INA § 212(h) waiver in connection with an adjustment application was discretionary and therefore unreviewable).

In many cases, however, the issue will *not* be an exercise of discretion, but instead will be a non-discretionary eligibility issue involving a question of law. Ten Courts of Appeals have unanimously held that § 242(a)(2)(B)(i) does not apply to non-discretionary questions of statutory eligibility for the enumerated immigration benefits.[9] The following are examples of issues over which courts found jurisdiction even though the underlying application for relief was specified in § 242(a)(2)(B)(i):

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[9] *See Singh v. Gonzales*, 413 F.3d 156, 160, n.4 (1st Cir. 2005); *Sepulveda v. Gonzales*, 407 F.3d 59, 63 (2d Cir. 2005); *Mendez-Moranchel v. Ashcroft*, 338 F.3d 176 (3d Cir. 2003); *Mireles-Valdez v. Ashcroft*, 349 F.3d 213 (5th Cir. 2003); *Santana-Albarran v. Ashcroft*, 393 F.3d 699, 703 (6th Cir. 2005); *Morales-Morales v. Ashcroft*, 384 F.3d 418, 423 (7th Cir. 2004); *Ortiz-Cornejo v. Gonzales*, 400 F.3d 610, 612 (8th Cir. 2005); *Montero-Martinez v. Ashcroft*, 277 F.3d 1137, 1140 (9th Cir. 2002); *Schroeck v. Gonzales*, 429 F.3d 947, 950 n.2 (10th Cir. 2005); *Gonzales-Oropeza v. U.S. Attorney General*, 321 F.3d 1331, 1332 (11th Cir. 2003). The only court that has not yet ruled on the issue is the Fourth Circuit. *Jean v. Gonzales*, 435 F.3d 475 (4th Cir. 2006).

- Whether a person has satisfied the continuous presence eligibility requirement for cancellation. *See Mireles-Valdez v. Ashcroft,* 349 F.3d 213 (5th Cir. 2005); *Reyes-Vasquez v. Ashcroft,* 395 F. 3d 903 (8th Cir. 2005); *Tapia v. Gonzales,* 430 F.3d 1330 (11th Cir. 2005).
- Whether an adult daughter is a qualifying relative for purposes of the hardship requirement for cancellation. *See Montero-Martinez v. Ashcroft,* 277 F.3d 1137 (9th Cir. 2001).
- Whether a regulation violates INA § 245 (adjustment of status). *See Succar v. Ashcroft,* 394 F.3d 8, 19-20 (1st Cir. 2005).
- Whether a person lacks good moral character as a matter of law. *See Sepulveda v. Gonzales,* 407 F.3d 59 (2d Cir. 2005).
- Denials of motions to reopen, reconsider or remand where the agency has not yet made a discretionary decision on the underlying application. For example, courts agree that where the motion seeks reopening to apply for the discretionary relief in the first instance, the court has jurisdiction – because no application has yet been filed, the agency has not yet made a discretionary decision. Where the motion to reopen seeks review of the underlying discretionary determination, courts agree that there is no jurisdiction. *See, e.g., Fernandez v. Gonzales,* 439 F.3d 592 (9th Cir. 2006) (setting forth a detailed explanation of when motions to reopen are reviewable and when they are not); *Obioha v. Gonzales,* 431 F.3d 400 (4th Cir. 2005); *Pilica v. Ashcroft,* 388 F.3d 941 (6th Cir. 2004); *Martinez-Maldonado v. Gonzales,* 437 F.3d 679 (7th Cir. 2006).

3. Does the case fall under INA § 242(a)(2)(B)(ii)?

In all other cases involving the exercise of agency discretion, a practitioner should finally consider whether subpart (ii) of § 242(a)(2)(B) applies. This subpart bars federal court jurisdiction over "any other decision or action" the "authority for which is specified under this title" to be in the agency's discretion.

The Supreme Court has made clear that this subpart does not apply to issues that do not involve the exercise of discretion, such as a determination of the extent of the Attorney General's authority under the INA. *Zadvydas v. Davis,* 533 U.S. 678, 688 (2001). Thus, for example, courts would retain jurisdiction to determine if the agency action was *ultra vires*. *Spencer Enterprises, Inc, v. United States,* 345 F.3d 683, 689 (9th Cir. 2003) (*citing Zadvydas,* 533 U.S. at 688).

Beyond this, there is disagreement among the courts as to how narrowly subpart (ii) should be interpreted. The following questions are relevant to an analysis of whether subpart (ii) of § 242(a)(2)(B) precludes jurisdiction.

A. Is the challenged action or decision discretionary?

An initial question is whether the challenged action is actually a discretionary one. The government is quick to argue that many actions and decisions have been left to agency discretion, but courts do not always agree. While the term "discretion" does not actually have to be used, courts have held that it must be clear that the agency is free to exercise its independent judgment.

For example, some courts have found that there is no grant of discretion where the statute *mandates* a certain result if the individual meets the eligibility requirements. *See e.g., Spencer Enterprises, Inc. v. U.S.A.*, 345 F.3d 683, 691 (9th Cir. 2003) (the statute mandates that immigrant investor visas "shall be made available … to qualified immigrants); *Camphill Soltane v. U.S. DOJ*, 381 F.3d 143, 147 (3d Cir. 2003) (the statute "makes clear that the Attorney General is required to grant preference visas to those who fall within certain numerical limitations and qualify as 'special immigrants'"); *Shokeh v. Thompson*, 369 F.3d 865, 868 (5th Cir. 2004) ("Nowhere is it 'specified' that the bond determination is a 'discretionary' decision of the Attorney General"). Similarly, courts have found that the agency is not exercising discretion where there are specific legal guidelines that must be applied to reach a decision. *See e.g., Nakamoto v. Ashcroft*, 363 F.3d 874 (9th Cir. 2004) (the question of whether marriage fraud exists is a factual issue determined through the application of traditional legal standards).

Even where the statute does authorize discretion on the part of the agency, one court has found that jurisdiction remains if the agency has not satisfied a statutorily mandated prerequisite to the exercise of discretion. *See Firstland v. INS*, 377 F.3d 127 (2d Cir. 2004) (interpreting prior version of the statute).

In contrast, there are other decisions which courts have found to be clearly discretionary. *See, e.g., Van Dinh v. Reno*, 197 F.3d 427 (10th Cir. 1999) (no jurisdiction over discretionary decision as to where to detain non-citizen); *CDI Information Services, Inc., v. Reno*, 278 F.3d 616 (6th Cir. 2002) (no jurisdiction over discretionary denial of an extension of a non-immigrant visa); *Urena-Taverez v. Ashcroft*, 367 F.3d 154 (3d Cir. 2004) (denial of a waiver of the joint filing requirement to lift conditional residency for lack of good faith marriage is a discretionary decision); *Zhu v. Gonzales*, 411 F.3d 292 (D.C. Cir. 2005) (denial of a waiver of the labor certification requirement is a discretionary decision); *Saloum v. USCIS*, 437 F.3d 238 (2d Cir. 2006) (no jurisdiction over denial of a smuggling waiver under INA § 212(d)(11)).

B. Is the decision or action *specified by Title II of the statute* to be discretionary?

INA § 242(a)(2)(B)(ii) requires that the action or decision be *specified* by Title II of the statute to be in the agency's discretion. Thus, even where the challenged action or decision is clearly discretionary, it is important to evaluate whether the authority for the

action is "specified" by statute.[10] Some courts have interpreted this language very strictly, holding that for the subpart to apply, the "language of the statute must provide the discretionary authority." *Spencer Enterprises, Inc. v. U.S.A.*, 345 F.3d at 689.

Several courts have held that INA § 242(a)(2)(B)(ii) does not preclude jurisdiction over a motion to reopen because the *statute* does not specify a grant of discretion to the Attorney General with respect to motions to reopen. *See Zhao v. Gonzales*, 404 F.3d 295, 302-03 (5th Cir. 2005) (as it is only the regulations that specifically authorize discretion over these motions, there is no bar to jurisdiction); *Singh v. Gonzales*, 404 F.3d 1024 (7th Cir. 2005); *Infanzon v. Ashcroft*, 386 F.3d 1359 (10th Cir. 2004) (reaching the same result but relying on slightly different reasoning).

Courts are divided with respect to this same issue as it applies to continuances. Two courts have held that they retain jurisdiction to review the denial of a continuance since only the regulations – not the statute – address continuances. *Manzano-Garcia v. Gonzales*, 413 F.3d 462 (5th Cir. 2005); *Zafar v. Attorney General*, 426 F.3d 1330 (11th Cir. 2005). Two other courts have also found jurisdiction, though based on different reasoning. *See Subhan v. Ashcroft*, 383 F.3d 591 (7th Cir. 2004); *Abu-Khaliel v. Gonzales*, 436 F.3d 627 (6th Cir. 2006). At least two courts have reached the opposite conclusion. Both of these courts found that INA § 242(a)(2)(B)(ii) was applicable because the regulations governing continuances were promulgated pursuant to INA § 240, 8 U.S.C. § 1229a. *Onyinkwa v. Ashcroft*, 376 F.3d 797 (8th Cir. 2004); *Yerkovich v. Ashcroft*, 381 F. 3d 990 (10th Cir. 2004).

C. Third, is the grant of discretion one of pure discretion unguided by legal principles?

Finally, in at least the Ninth Circuit, the *degree* of discretionary authority is relevant. The Ninth Circuit has held that § 242(a)(2)(B)(ii) "applies only to acts over which a statute gives the Attorney General pure discretion unguided by legal standards or statutory guidelines." *Oropeza-Wong v. Gonzales*, 406 F.3d 1135, 1142 (9th Cir. 2005) *quoting Medina-Morales v. Ashcroft*, 371 F.3d 520, 528 (9th Cir. 2004). Under this standard, the Ninth Circuit has found § 242(a)(2)(B) to be inapplicable if "there are legal and factual questions that are not subject to the pure discretion of the [agency]." *Oropeza-Wong*, 406 F.3d at 1142. Explained another way, "if the statutory provision granting the Attorney General power to make a given decision also sets out specific standards governing that decision, the decision is not "in the discretion of the Attorney General.'" *Ana International Inc. v. Way*, 393 F.3d 886, 892 (9th Cir. 2004). Under this standard, the court has found that the following issues do not involve "pure" discretion and thus are not subject to the bar on jurisdiction found in § 242(a)(2)(B)(ii):

[10] As noted earlier, an initial step in the analysis is also to determine whether the case involves Title II of the INA. Where it does not, INA § 242(a)(2)(B) should not apply. *See* page 4-5, *infra.*

- The authority to revoke a visa under the statutory standard of "good and sufficient cause," *Ana International Inc. v. Way*, 393 F.3d at 893-94 (this refers to a meaningful standard that the Attorney General may "deem" applicable or inapplicable in a particular case, but which he does not manufacture anew in every case"); *but see El Khader v. Monica*, 366 F.3d 562 (7th Cir. 2004) (a visa revocation was a discretionary decision over which jurisdiction was barred by INA § 242(a)(2)(B)(ii)).
- A determination as to whether a marriage was entered in good faith for purposes of a waiver of the joint filing requirement to remove conditional residency, *Oropeza-Wong v. Gonzales*, 406 F.3d 1135 (9th Cir. 2005)*; accord Cho v. Gonzales*, 404 F.3d 96 (1st Cir. 2005); *but see Urena Taverez v. Ashcroft*, 367 F.3d 154 (3d Cir. 2004) (the good faith waiver was explicitly discretionary).

Although other courts have not adopted this "pure discretion" standard, practitioners can argue that it should be adopted in any circuit where the issue has not yet been decided.

What is the impact of INA § 242(a)(2)(D)?

INA § 242(a)(2)(D), 8 U.S.C. § 1252(a)(2)(D), was added to the statute by the REAL ID Act. It restores jurisdiction to federal courts over legal and constitutional issues where such jurisdiction would be otherwise precluded by other statutory provisions such as INA § 242(a)(2)(B). As relevant here, § 242(a)(2)(D) states that:

> Nothing in [INA § 242(a)(2)](B) …. which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

In essence, this section codifies for purposes of petitions for review the court decisions that held that § 242(a)(2)(B) did not apply to statutory eligibility issues and similar questions of law. It thus provides an additional basis for demonstrating to a court that it has jurisdiction over legal issues in a petition for review.

AILF believes that § 242(a)(2)(D) only applies to petitions for review of final orders of removal and has no applicability in non-removal cases in district court. The government has argued in district court APA cases that this new section strips district courts of jurisdiction over the action. AILF believes that this interpretation is wrong. If you have a non-removal case in district court where this issue has been raised, please contact Mary Kenney at mkenney@ailf.org.

In interpreting this new provision, several courts have held that a constitutional claim must be colorable to restore jurisdiction under INA § 242(a)(2)(D). *See Saloum v. USCIS*, 437 F.3d 238 (2d Cir. 2006) (alleged due process claim was actually a claim of abuse of discretion which was not reviewable under INA § 242(a)(2)(B)); *Elysee v.*

Gonzales, 437 F. 3d 221 (1st Cir. 2006) (no colorable constitutional claim where claims concern factual findings and balancing of factors behind discretionary decision).

The following are examples of constitutional or legal issues over which courts have found that they have jurisdiction under INA § 242(a)(2)(D):

- Whether the Board applied the correct legal standard to determine if a crime was "particularly serious" for purposes of withholding of removal. *Afridi v. Gonzales,* __ F.3d __, 2006 U.S. App. LEXIS 8073 (9th Cir. 2006).
- Whether the withdrawal of an application for admission constitutes a break in physical presence for cancellation. *Mendez-Reyes v. Attorney General,* 428 F.3d 187 (3d Cir. 2005).
- Whether the IJ's denial of an adjustment application violated res judicata. *Hamdan v. Gonzales,* 425 F.3d 1051 (7th Cir. 2005).
- Whether the agency's interpretation of the hardship standard for cancellation violated international treaties. *Cabrera-Alvarez v. Gonzales,* 423 F. 1006 (9th Cir. 2005).