DURAN GONZALEZ v. DHS: SETTLEMENT AGREEMENT WEBINAR

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AMERICAN IMMIGRATION COUNCIL
National Immigration Project of the National Lawyers Guild
RESOURCES/WEBSITES

• Duran Gonzalez v. DHS Settlement Q&A (July 30, 2014)
• For Subclass B: cover sheet and joint motion to reopen
• For Subclass C: Form I-824
• American Immigration Council, Duran Gonzalez Website
• National Immigration Project, Duran Gonzalez Website
• Northwest Immigrant Rights Project
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WHAT IS THIS CASE ABOUT?

• Ninth Circuit-wide class action about eligibility to adjust status under INA § 245(i) with an I-212 waiver for individuals who are inadmissible under INA § 212(a)(9)(C)(i)(II) because they entered the U.S. without admission after 4/1/1997 following a prior removal order.

• Non-class members must wait outside the U.S. for 10 years before they can apply to waive INA § 212(a)(9)(C)(i)(II) (aka the “permanent bar”)

• Class members need not wait the 10 years, but must take steps to pursue de novo adjudication of AOS and waiver applications
KEY DATES

- **Aug. 13, 2004 - Perez-Gonzalez** - 9th Cir. says need not wait 10 years outside the U.S. to apply for a waiver of § 212(a)(9)(C)(i)(II)

- **Jan 26, 2006 - Matter of Torres-Garcia** - BIA says “oh yes you do”

- Sept. 28, 2006 – Duran Gonzalez law suit filed

- **Nov. 13, 2006 – District Court injunction** requiring DHS to follow Perez-Gonzalez

- **Nov. 30, 2007 - Duran Gonzales I** - 9th Cir. vacates injunction and defers to BIA interpretation pursuant to Brand X
TWO MORE KEY CASES
(MORE ON THEM LATER)

BAD CASE
• Carrillo de Palacios v. Holder, 708 F.3d 1066 (9th Cir. 2013) – person who filed AOS application after Matter of Torres-Garcia must wait 10 years outside the U.S. because she was “on notice” of the vulnerability of Perez-Gonzalez

GOOD CASE (on the law)
• Garfias-Rodriguez v. Holder, 702 F.3d 504, 521 (9th Cir. 2012) (en banc), individualized review to determine whether an agency decision, adopted by a circuit pursuant to Brand X, applies retroactively.
  • Involved inadmissibility under INA § 212(a)(9)(C)(i)(I) [not (II)]
  • Person filed AOS application prior to Acosta v. Gonzales, 439 F.3d 550 (9th Cir. 2006) (and prior to Perez-Gonzalez)
**WHO IS COVERED?**

- Individuals in the Ninth Circuit who filed § 245(i) AOS (Form I-485 and Supp. A) **AND** I-212 waiver applications on or after **August 13, 2004** (P-G) and on or before **November 30, 2007** (Duran I)

- INA § 245(i) eligible:
  - beneficiary or derivative beneficiary of an immigrant visa petition or labor certification filed on or before 4/30/01,
  - if the immigrant visa petition or labor certification was filed after 1/14/98, physically present in the US on 12/21/00

- inadmissible under INA § 212(a)(9)(C)(i)(II)
WHO IS COVERED?

• The forms were denied or are still pending.

• Not currently in removal proceedings (IJ, BIA) or before the Ninth Circuit on a petition for review of a removal under INA § 240.

• The person did not attempt to reenter without being admitted after November 30, 2007.
WHO IS NOT COVERED?

Eligible for AOS under a provision other than INA § 245(i) – e.g., INA § 245(a)

Acosta cases – i.e., persons who are inadmissible under INA § 212(a)(9)(C)(i)(I) for having reentered without admission after 4/1/1997 after having accrued an aggregate of 1 year of unlawful presence

Currently in removal proceedings, including persons with pending petition for review of a BIA order.

Ninth Circuit or BIA already applied Montgomery Ward test

Filed AOS and I-212 waiver application before Perez-Gonzalez or after Duran Gonzales I
SUBCLASS A

• **Subclass A - Not in Removal Proceedings and Inside the United States**
  (the Awesome Subclass)

• Have been physically present in the U.S. since filing their I-485 and I-212 applications; **and**

• Removal proceedings under INA § 240 were **not** initiated.
SUBCLASS A - ACTION PLAN

• Ask USCIS to join motion to reopen
• File request before Jan. 21, 2016
• File it with same USCIS office as originally filed
• Provide evidence of Subclass A class membership
• Include brief and MW factor and waiver evidence
• If enough evidence → USCIS will reopen
• If not enough evidence → USCIS will give 30 days to submit a brief and evidence
• If reinstatement order → ICE will cancel it w/in 30 days of receiving notice that motion was filed
• If meet MW factors → de novo adjudication
• If do not meet MW factors or AOS denied → can pursue whatever admin or federal court options are available
SUBCLASS B

- **Subclass B - Final Orders of Removal and Inside the United States**
  (the Brave Subclass)

- Physically present in the U.S. since filing their I-485 and I-212 applications;

- Has an **unexecuted** final order of removal issued by an IJ or BIA but it is **not** an in absentia order;

- No pending petition for review in the Ninth Circuit;

- AOS/I-212 application denied based on INA § 212(a)(9)(C)(i)(II);

- If sought judicial review, the 9th Cir. must not have applied the “Montgomery Ward” retroactivity analysis.
SUBCLASS B – ACTION PLAN

• Ask ICE Trial Counsel to join motion to reopen before IJ / BIA
• Make request before Jan. 21, 2016 – use coversheet
• Provide evidence of Subclass B membership
• If enough evidence of membership → ICE will join motion to reopen
• In reopened proceedings → IJ applies retroactivity analysis
  • ICE bound to certain positions (settlement at p. 9-10) and will not oppose allowing class members to update and supplement AOS/I-212 applications.
  • ICE may move for dismissal w/o prejudice to allow USCIS to apply retroactivity analysis and
  • ICE may oppose AOS/I-212 grant based on discretion
• If IJ’s MW analysis is unfavorable or IJ denies AOS/I-212 → can administrative appeal to BIA and, if nec, PFR
Subclass C – Outside the United States
(the Consular Subclass)

- Departed the U.S. (including persons deported) after filing their I-485 and I-212 applications;
- Remain outside the U.S.; and
- Either (a) have a properly filed visa application with the Department of State; or (b) will file a visa application within one year of the settlement agreement’s effective date (i.e., by July 21, 2015).
SUBCLASS C - CONPROS PLAN

- Initiate the immigration visa process within one year (i.e., by July 21, 2015) by contacting the NVC
  - Request that the visa petition that was previously the basis of the I-485 be transferred to the NVC (Form I-824)

- If the Department of State finds that INA §212(a)(9)(C)(i)(II) applies → request that USCIS file a service motion to reopen based on the settlement agreement
  - Must be done within 18 months of the effective date (i.e., by January 21, 2016)
  - Provide evidence of Subclass A class membership
  - Include brief and MW factors and waiver evidence

- If USCIS approves the waiver → USCIS shall promptly notify the NVC to initiate the issuance of the immigrant visa
DEADLINES

- **July 21, 2014**: District Court approves settlement agreement

- **July 21, 2015**: Deadline for Subclass C members to request visa petition transferred to National Visa Center (12 months)

- **January 21, 2016**: Deadline for Requests for Motions to Reopen (18 months)
(1) whether the particular case is one of first impression,

(2) whether the new rule represents an abrupt departure from well-established practice or merely attempts to fill a void in an unsettled area of law,

(3) the extent to which the party against whom the new rule is applied relied on the former rule,

(4) the degree of the burden which a retroactive order imposes on a party, and

(5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.
IT’S A BALANCING TEST
GARFIAS-RODRIGUEZ APPLICATION OF MONTGOMERY WARD FACTORS

(1) **first impression** – not “well suited” to imm law

(2) **abrupt departure**

(3) **reliance on former rule**

(4) **burden** – favored Mr. G-R, faces deportation without opportunity to apply for relief

(5) **statutory interest** – favors the gov’t b/c of uniformity in immigration law is well-established
(2) **abrupt departure** & (3) **reliance on former rule**

-- “closely intertwined”

- -- 2 factors favor retroactivity if a party could reasonably have anticipated the change in the law so that change would not be a complete surprise.
- If a rule = abrupt departure from well established practice → reliance on the prior rule is likely to be reasonable
- If the rule “merely attempts to fill a void in an unsettled area of law” → reliance less likely to be reasonable.
Only window in which Mr. Garfias-Rodriguez could have shown reasonable reliance was “between the issuance of Acosta and Briones” because “[a]fter Briones was issued, he was on notice of Acosta’s vulnerability.”

Ninth Circuit found against Mr. Garfias-Rodriguez because he filed before Acosta and before Perez-Gonzales; i.e., before there was an official position.
SATISFYING FACTORS #2 AND #3 IN DURAN GONZALEZ CASES

Perez-Gonzalez & Matter of Torres-Garcia
show per se reliance and eligible to have AOS and I-212
adjudicated on the merits

Matter of Torres-Garcia & District Court injunction
demonstrate reasonable reliance on Perez-Gonzales in
light of Matter of Torres-Garcia
(and distinguish Camillo de Palacios)

Nov. 13, 2006 & Nov. 30, 2007 –
District Court injunction & Duran Gonzales I
demonstrate reasonable reliance on Perez-Gonzales in
light of District Court’s injunction* requiring DHS to follow it
*reliance on injunction is “relevant”
• Matter of Lee, 17 I&N Dec 275 (Comm. 1978); Matter of Tin, 14 I&N Dec. 371 (R.C. 1973): factors include: moral character; recency of deportation; need for the applicant’s services in the U.S.; knowledge of deportation order; length of time in the United States; basis for deportation; applicant’s respect for law and order; evidence of reformation and rehabilitation; family responsibilities; inadmissibility under other sections of law; hardship involved to himself and others. See also 8 C.F.R. § 212.2 (DHS); § 1212.2 (EOIR).
EVIDENTIARY STANDARD FOR I-601 WAIVERS

- **Matter of Cervantes-Gonzalez, 22 I&N Dec. 560, 565-566 (BIA 1999):** factors include: presence of LPR or USC family ties to the US; the qualifying relative's family ties outside the US; conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties to such countries; financial impact of departure from the US; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate.

- **Matter of O-J -O-, 21 I&N Dec. 381 (BIA 1996) - “[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists.”**
OTHER ISSUES

• Form I-601 waivers for fraud or CIMTS may be required

• Reinstatement of removal:
  - Within 30 days of being notified that the motion was filed, the reinstatement order is cancelled.
  - Class members may submit a receipt notice for the motion to reopen to ICE.