Duran Gonzalez v. DHS Settlement Q&A

July 30, 2014

On July 21, 2014, the District Court issued a final approval of the settlement agreement in *Duran Gonzalez v. DHS*. *Duran Gonzalez* is a Ninth Circuit-wide class action regarding eligibility for adjustment of status under INA § 245(i) along with an accompanying I-212 waiver application for individuals who previously were removed and subsequently entered the country without admission. This Q&A discusses the terms of the settlement agreement, who qualifies as a class member, and the steps that class members must take to seek relief under the agreement. Please refer to the settlement agreement itself for the full terms of the settlement.

1. What Is *Duran Gonzalez*?

Duran Gonzalez v. DHS is a Ninth Circuit-wide class action regarding eligibility for adjustment of status under INA § 245(i) along with an accompanying I-212 waiver application for individuals who previously were removed and subsequently entered the country without admission (i.e., individuals subject to inadmissibility under INA § 212(a)(9)(C)(i)(II)).

On **August 13, 2004**, the Ninth Circuit held, in *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783, 790 (9th Cir. 2004), that these individuals could apply for adjustment of status under INA § 245(i) with an I-212 waiver to overcome the grounds of inadmissibility under INA § 212(a)(9)(C)(i)(II) without remaining outside the United States for ten years. The government subsequently refused to follow *Perez-Gonzalez*.

On **January 26, 2006**, the Board of Immigration Appeals (BIA) issued its precedent decision *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006). There, the BIA rejected the Ninth Circuit's rational in *Perez-Gonzalez* and held that individuals who previously were removed and subsequently entered the country without admission are not eligible for adjustment of status with an I-212 waiver *unless they remain outside the United States for at least ten years since the date of their last departure*.

On **September 28, 2006**, Mr. Duran Gonzalez and other named plaintiffs filed this class action in the Western District of Washington to compel the government to follow *Perez-Gonzalez*.

On **November 13, 2006**, the District Court certified a Ninth Circuit-wide class and issued a preliminary injunction precluding DHS from denying class members' adjustment applications and preventing the deportation of those whose applications it already had denied. *Duran Gonzales v. U.S. Dept. of Homeland Sec.*, 239 F.R.D. 620, 629 (W.D. Wash. 2006) *vacated and remanded sub nom. Duran Gonzales v. Dep't of Homeland Sec.*, 508 F.3d 1227 (9th Cir. 2007).

On **November 30, 2007**, in *Duran Gonzales v. DHS* (*Duran I*), 508 F.3d 1227 (9th Cir. 2007), the Ninth Circuit vacated the injunction and overturned *Perez-Gonzalez*, holding that the Court must defer to the BIA's decision in *Matter of Torres-Garcia*, pursuant to *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Services ("Brand X")*, 545 U.S. 967, 968 (2005). The Ninth Circuit remanded the case to the district court for further proceedings consistent with its decision.

On remand, Plaintiffs moved to amend the complaint and class to present retroactivity claims, namely that the new circuit court decision does not apply retroactively to plaintiffs who were eligible to adjust status based on the law in effect at the time they filed their adjustment and I-212 waiver applications. The district court denied their motions and issued final judgment. Plaintiffs then filed an appeal to the Ninth Circuit Court of Appeals.

On October 25, 2011, in *Duran Gonzales v. U.S. Dept. of Homeland Sec.* (*Duran II*), 659 F.3d 930 (9th Cir. 2011), the Court of Appeals dismissed the appeal, rejecting Plaintiffs' arguments that the Court must apply a retroactivity test to determine whether the change in law is being unlawfully applied to class members. Plaintiffs then filed a petition for rehearing en banc.

On October 19, 2012, in *Garfias-Rodriguez v. Holder*, 702 F.3d 504, 521 (9th Cir. 2012) (en banc), the Ninth Circuit held that cases involving a circuit court decision deferring to an agency decision pursuant to *Brand X* require an individualized, multi-factor analysis to determine whether the change in law applies retroactively. The factors are set forth in *Montgomery Ward & Co., Inc. v. FTC*, 691 F.2d 1322, 1328 (9th Cir. 1982).

In 2013, the Ninth Circuit, following *Garfias-Rodriguez*, reversed its prior decision in *Duran II*, agreed with Plaintiffs that an individualized, multi-factor analysis is required to determine whether *Matter of Torres-Garcia* applies retroactively and remanded the case to the district court for further proceedings. *See Duran Gonzales v. DHS (Duran III)*, 712 F.3d 1271 (9th Cir. 2013).

The parties subsequently settled the case, and the District Court approved the settlement on July 21, 2014. The settlement involves remedies for class members with retroactivity claims, including some class members with reinstatement orders under INA § 241(a)(5) and class members who are outside the United States.

2. What Remedies Are Available to Class Members?

In general, class members will be eligible to have a retroactivity test applied to their case, to determine if they are eligible to have their adjustment of status and I-212 applications adjudicated on the merits even if they did not remain outside the United States for ten years.

Specifically, class members will be afforded an individualized opportunity to establish, through application of the *Montgomery Ward* factors, that *Matter of Torres-Garcia* should not apply retroactively to them. (Note that DHS automatically will assume that *Matter of Torres-Garcia* does not apply retroactively to certain class members—those who filed between August 13, 2004 and January 26, 2006. *See* discussion in question 10 below.) If they succeed, the government either must adjudicate their adjustment application and I-212 on the merits, along with any accompanying waiver, if they are in the United States, or, the government must adjudicate their I-212 on the merits if they are outside the United States.

3. Who Is Covered by the Settlement Agreement?

The amended class definition (i.e., a description of who is covered by the agreement) is set out on pages 3-5 of the settlement agreement. In general, the settlement agreement covers **individuals in the Ninth Circuit who filed an adjustment of status application and an I-212 waiver application on or after August 13, 2004 and on or before November 30, 2007**. Individuals who did not file *both* an adjustment application and an I-212 application in this window are *not* covered by the settlement agreement.

More specifically, a class member must meet the following requirements:

- The person must qualify for INA § 245(i) relief, meaning that he or she is the beneficiary or derivative beneficiary of an immigrant visa petition or labor certification filed on or before April 30, 2001, provided that, if the immigrant visa petition or labor certification was filed after January 14, 1998:

    a) the beneficiary was physically present in the United States on December 21, 2000, or

    b) if a derivative beneficiary, the derivative beneficiary or the primary beneficiary was physically present in the United States on December 21, 2000.

- The person is inadmissible under INA § 212(a)(9)(C)(i)(II), meaning that he or she was removed and then reentered, or attempted to reenter, the United States without being admitted after April 1, 1997.

- The person filed a Form I-485 and Supplement A while residing within the Ninth Circuit on or after August 13, 2004 and on or before November 30, 2007.

- The person filed a Form I-212 on or after August 13, 2004 and on or before November 30, 2007.

- DHS or EOIR denied the forms or they are still pending.

- The person is not currently in removal proceedings before the Executive Office for Immigration Review (immigration court or the 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 admission after November 30, 2007.

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In addition, all class members fall into one of three of the following subclasses:

Subclass A – Class Members Not in Removal Proceedings and Inside the United States

Subclass A is comprised of class members who have been physically present in the United States since filing their adjustment and I-212 applications and against whom removal proceedings under INA § 240 were not initiated.

Subclass B – Class Members with Unexecuted Final Orders of Removal and Inside the United States

Subclass B is comprised of class members who have been physically present in the United States since filing their adjustment and I-212 applications, but who have an *unexecuted* final order of removal issued by an immigration judge or the BIA. In addition, the following conditions must be satisfied:

- The person does not have a petition for review pending in the Ninth Circuit.
- His or her adjustment application was denied based on INA § 212(a)(9)(C)(i)(II).
- He or she does not have an in absentia order.
- If the person sought judicial review, the Ninth Circuit must not have applied the *Montgomery Ward* retroactivity analysis (discussed in more detail below).

Subclass C – Class Members Who Are Outside the United States

Subclass C is comprised of class members who departed the United States (including those DHS deported) after filing their adjustment and I-212 applications and who remain outside the United States. In addition, they must have a properly filed visa application with the Department of State or must now file a visa application within one year of the settlement agreement's effective date, i.e., within one year of July 21, 2014.

4. Do Class Members Have to Sign Up to Be Included in the Class?

No. Individuals who satisfy the terms of the class definition automatically are members of the class.

5. Do Class Members Have to Take Specific Steps to Benefit from Inclusion in the Class?

Yes. To seek remedies under the settlement agreement, class members must take certain steps within prescribed periods of time. These steps are outlined in detail below.

6. What Is the Effective Date of the Settlement Agreement and Why Is This Date Important?

The effective date of the settlement agreement is July 21, 2014. This is the date on which the court issued an order approving the settlement and issued the final judgment in the lawsuit. It is important because certain actions must take place during periods of time that run from the effective date, and certain rights and obligations expire within 30 months of the effective date.

Most importantly, as discussed below, class members must take certain steps to seek relief within **18 months** from the effective date. In addition, certain subclass C members must act with one year of the effective date. The failure to act within a specified period of time may cause the class member to lose benefits under the settlement agreement.

7. How Do Class Members Seek Relief Under the Settlement Agreement?

In general, each class member must demonstrate: (1) that he or she is, in fact, a class member, and (2) that, through application of the *Montgomery Ward* factors, *Matter of Torres-Garcia* does not apply retroactively to him or her. Thus, class members should submit evidence regarding the application of the *Montgomery Ward* factors to their individual case. In addition, given the amount of time that has passed since class members first filed their applications, class members should submit evidence demonstrating that the adjustment and I-212 waiver applications should be granted on the merits. This includes supplementing the I-212 with updated information, including information regarding any and all entries. Note that any entry after November 30, 2007, disqualifies the person for class membership.[1]

The following are the procedures for each subclass:

- ***Subclass A***

Subclass A members must file a motion with USCIS requesting reopening of their adjustment and I-212 waiver applications. A sample motion will be posted soon. There is no filing fee for this motion. The motion should be entitled a "Motion to Reopen under *Duran Gonzalez* Settlement Agreement," and no Form I-290B is required. It is sent to the local office where the original application was filed, even if the Form I-212 waiver was appealed to the Administrative Appeals Office ("AAO"). Additional evidence regarding the *Montgomery Ward* factors (*see*

[1] In addition to establishing eligibility under the *Montgomery Ward* factors, applicants also will need to establish eligibility for the I-212 waiver on the merits. Two cases, *Matter of Lee*, 17 I&N Dec 275 (Comm. 1978), and *Matter of Tin*, 14 I&N Dec. 371 (R.C. 1973), set forth a non-exclusive set of factors that may be considered in adjudicating the merits of the I-212: 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).

question 8 below), as well as in support of the waivers, should be filed with the motion or within 30 days of reopening.

Subclass A members must file the motion with USCIS within 18 months of the effective date of the settlement agreement, i.e., by January 21, 2016.

- ***Subclass B***

Subclass B members must contact the Office of Chief Counsel using the coversheet located here to request that ICE counsel join in a motion to reopen before the immigration judge or the Board of Immigration Appeals (depending on which entity last had jurisdiction over the case). ICE will verify membership in subclass B and will join the motion for the sole purpose of consideration of the *Montgomery Ward* factors and, if appropriate, adjudication of the adjustment and I-212 waiver applications. No fee is required for the joint motion. If the case is reopened, the agency's jurisdiction in reopened proceedings is not limited. However, ICE counsel is bound by certain positions in reopened proceedings (*see* pages 9-10 of the settlement agreement). Subclass B members must contact ICE within 18 months of the effective date of the settlement agreement, i.e., by January 21, 2016.

- ***Subclass C***

Subclass C members must apply through consular processing. Subclass C members first must either have already applied for an immigrant visa within the past year, or must initiate the immigration visa process **within one year** (i.e., by July 21, 2015) by contacting the National Visa Center (NVC) (i.e., requesting that the visa petition that was previously the basis of the I-485 be transferred to the NVC, by filing Form I-824). If the Department of State finds that INA §212(a)(9)(C)(i)(II) applies, then the applicant must request that USCIS file a service motion to reopen based on the settlement agreement. This request must be done within 18 months of the effective date, i.e., by January 21, 2016. Additional evidence regarding the application of *Montgomery Ward* and in support of the waivers should be submitted. If USCIS approves the waiver(s) then it must promptly notify the NVC to initiate the issuance of the immigrant visa.

Because of the two different timelines applicable to Subclass C members, it is essential that they initiate the immigrant visa process by contacting the National Visa Center as soon as possible.

8. What Are the *Montgomery Ward* Factors?

The five factors set out in *Montgomery Ward & Co., Inc. v. FTC*, 691 F.2d 1322, 1333 (9th Cir. 1982), to determine whether an agency decision may be applied retroactively are:

(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.

9. How Did the Ninth Circuit Apply the *Montgomery Ward* Factors in *Garfias-Rodriguez* and Why Does That Matter?

In *Garfias-Rodriguez v. Holder*, 702 F.3d 504, 521 (9th Cir. 2012) (en banc), the Ninth Circuit applied the *Montgomery Ward* factors to a case involving the parallel provision at INA § 212(a)(9)(C)(i)(I), inadmissibility for having reentered without admission after accruing one year of unlawful presence. Notably, the petitioner in *Garfias-Rodriguez* applied for adjustment of status prior to *both Perez-Gonzalez* and *Acosta v. Gonzales*, 439 F.3d 550 (9th Cir. 2006), which applied the reasoning of *Perez-Gonzalez* to the unlawful presence bar at INA § 212(a)(9)(C)(i)(I). The BIA disagreed with the Ninth Circuit's decision in *Acosta*, issuing a precedent decision pursuant to *Brand X* that was contrary to *Acosta*. *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007).

Applying the *Montgomery Ward* factors, the Court found:

--The **first factor**, whether the particular case is one of first impression, was not "well suited to the context of immigration law." 702 F.3d at 521.

--The **second and the third factors** are "closely intertwined": If a new rule "represents an abrupt departure from well-established practice," a party's reliance on the prior rule is likely to be reasonable, whereas if the rule "merely attempts to fill a void in an unsettled area of law," reliance is less likely to be reasonable. *Id*. at 521 (citation omitted). The Court noted that "these two factors will favor retroactivity if a party could reasonably have anticipated the change in the law such that the new 'requirement would not be a complete surprise.'" *Id*. (citing *Montgomery Ward*, 691 F.2d at 1333-34).

Mr. Garfias-Rodriguez identified his reliance as "the payment of a $1,000 penalty fee to file his application, and the fact that, by filing for adjustment of status, he admitted his unlawful presence in this country to the INS." *Id*. at 522. However, Mr. Garfias-Rodriguez filed his application for permanent residency *prior to both Perez-Gonzalez* and *Acosta*, and therefore, the Court reasoned that he did not file "his application in reliance on *Acosta*, or even the analogous decision in *Perez-Gonzalez*." *Id*. The Court identified the only available window in which Mr. Garfias-Rodriguez could have shown reasonable reliance as "the 21-month period in 2006 and 2007 between the issuance of *Acosta* and *Briones*" because "[a]fter *Briones* was issued, he was on notice of *Acosta*'s vulnerability." *Id*. *See also id*. at 523 ("[g]iven the specific facts and timing of this case, we conclude that the second and third factors weigh against Garfias.").

--The **fourth factor**, the degree of burden imposed by the retroactive application, favored Mr. Garfias-Rodriguez, as he faced deportation without the opportunity to apply for discretionary relief.

-- The **fifth factor**, regarding the statutory interest in applying the new rule, "points in favor of the government because non-retroactivity impairs the uniformity of a statutory scheme, and the importance of uniformity in immigration law is well established." *Id*. at 523.

After applying the factors, the Court found that the second, third, and fifth factors counseled in favor of retroactive application, and that the Court's adoption of *Matter of Briones* applied retroactively to Mr. Garfias-Rodriguez.

The Ninth Circuit's application of the *Montgomery Ward* factors in *Garfias-Rodriguez* is significant because its rationale will inform the application of these same factors by DHS and EOIR under the settlement agreement. Notably, as courts are unlikely to take a different view of the first and fifth factors, *Garfias-Rodriguez* indicates that the second, third and fourth factors are the most critical to the retroactivity analysis. It also will inform the application of these factors in cases that are not covered by the settlement agreement, such as cases before EOIR in pending removal proceedings and before the Ninth Circuit in pending petitions for review.

10. How Do Class Members Establish that They Satisfy These Factors?

The settlement agreement defines class members as only those who filed their applications for adjustment of status and I-212 waivers between the dates of *Perez-Gonzalez* (Aug 13, 2004) and *Duran Gonzales* (Nov. 30, 2007).

- ***Adjustment and I-212 Waiver Applications Filed Between August 13, 2004 and January 26, 2006***

Under the settlement agreement, *Matter of Torres-Garcia* does not apply retroactively to individuals who filed between August 13, 2004, the date of the *Perez-Gonzalez* decision, and January 26, 2006, the date of the *Matter of Torres-Garcia* decision. DHS will take the position that individuals who filed in this window are *per se* eligible to have their adjustment and I-212 waiver applications adjudicated on the merits.

- ***Adjustment and I-212 Waiver Applications Filed Between January 27, 2006 and November 30, 2007***

Individuals who filed their adjustment and I-212 waiver applications between January 27, 2006 and November 30, 2007, the date the Ninth Circuit vacated its preliminary injunction and deferred to *Matter of Torres-Garcia*, must demonstrate that the *Montgomery Ward* factors counsel against the retroactive application of *Matter of Torres-Garcia.*

Significantly, they must demonstrate that their reliance was reasonable in light of the Ninth Circuit's decision in *Carrillo de Palacios v. Holder*, 708 F.3d 1066 (9th Cir. 2013). In that case the court held that a person who filed his adjustment application after the BIA's decision in

Matter of Torres-Garcia did not demonstrate reliance on *Perez-Gonzalez* because he was "on notice" of the vulnerability of *Perez-Gonzalez. Id.* at 1072.

Notably, *Carrillo de Palacios* does not address the reliance interest for those who applied after the district court's injunction on November 13, 2006. Under the settlement agreement (page 8), if the person filed between November 13, 2006 and November 30, 2007, USCIS *must* deem relevant any evidence of any reliance on the District Court's November 13, 2006 preliminary injunction order. Hence, these individuals should use the circuit-wide injunction to demonstrate reliance on *Perez-Gonzalez* and to distinguish *Carrillo de Palacios*. Class counsel also will provide materials publicizing the injunction, which may be useful to demonstrate reliance on the injunction.

Furthermore, and crucially, *Carrillo de Palacios* does not foreclose eligibility for adjustment of status for persons who filed during the same period. Adjudicators must balance all five *Montgomery Ward* factors, giving more or less weight to each factor. As the Seventh Circuit recently explained, "[l]ike most such unweighted multi-factor lists, this one serves best as a heuristic; no one consideration trumps the others." *Velasquez-Garcia v. Holder*, No. 13-2610, 2014 U.S. App. LEXIS 14119, *22 (7th Cir. July 23, 2014). Therefore, there may be cases where the fourth factor (burden on the applicant) may be so significant that it would sway the balance in favor of the applicant. *Montgomery Ward*, 691 F.2d at 1333. An example may be if the applicant or her family is suffering from a significant illness.

11. Is an Individual Eligible if She Has Been Issued an Order of Reinstatement of Removal?

Yes. If the applicant is still in the United States, she may be a member of Subclass A. If so, the settlement agreement (page 8) establishes that, within 30 days after receiving notice that a motion to reopen has been filed with USCIS, U.S. Immigration and Customs Enforcement ("ICE") will cancel the reinstatement order. Class members may submit a receipt notice for the motion to reopen to ICE to request that ICE cancel the order.

If ICE removed the person pursuant to a reinstatement order, then she may be a member of Subclass C and, if so, must request that USCIS transfer the visa petition to the National Visa Center.

12. What Do Class Members Do if They Are Subject to Other Grounds of Inadmissibility?

Many class members also will require other waivers, such as a Form I-601 waiver for unlawful presence, past fraud, or possibly a crime involving moral turpitude. Class members should request that any other waiver applications be reopened and readjudicated as well as the adjustment and I-212 waiver applications.

13. What Happens If USCIS Denies the Application and Waivers?

If USCIS denies the application for adjustment of status or I-212 waiver application (or any other waiver applications), then the applicant may pursue any administrative appeals or judicial review available under the law. This includes appealing waiver denials to the AAO, although the denial of the adjustment application may not be appealed to the AAO. Class members at that time may be subject to the issuance of an order of reinstatement of removal or a Notice to Appear, placing them into removal proceedings before an immigration judge. Class members should advocate with ICE, if necessary, to issue a Notice to Appear rather than reinstatement of removal. *See Villa-Anguiano v. Holder*, 727 F.3d 873, 878 (9th Cir. 2013) (finding that reinstatement of removal is not mandatory). Class members may renew their adjustment and I-212 waiver applications before the immigration judge, and may be eligible to apply for other forms of relief, such as cancellation of removal pursuant to INA § 240A(b).

14. What Options Are Available to Individuals Who Do Not Meet the Class Definition?

The settlement agreement is not exhaustive regarding claims that *Perez-Gonzalez* should continue to apply. Counsel may raise other arguments with USCIS, the Executive Office for Immigration Review, or the federal courts, as to why *Perez-Gonzalez* should continue to govern, regardless of the limitations of the settlement agreement.

- ***Adjustment and I-212 Waiver Applications filed Prior to August 13, 2004***

In *Garfias-Rodriguez*, the Ninth Circuit held that Mr. Garfias-Rodriguez, who submitted his application for adjustment of status prior to *Acosta*, did not satisfy the second and third *Montgomery Ward* factor because he did not act in reliance on Ninth Circuit precedent. While *Garfias-Rodriguez* does not necessarily foreclose eligibility for adjustment of status for all noncitizens who applied before August 13, 2004, the date of the *Perez-Gonzalez* decision, these individuals are not class members under the settlement agreement. Such individuals still may argue that they are entitled to an individual analysis applying the *Montgomery Ward* test.

- ***Adjustment and I-212 Waiver Applications for Persons in Removal Proceedings***

The class definitions do not cover individuals who are currently in removal proceedings or individuals who currently have a pending petition for review of a final removal order under § 240 proceedings (note, however, that individuals with a pending petition for review of a reinstatement order are class members). Those individuals are entitled to apply the *Montgomery Ward* test to their case, but because they presently have a forum in which to conduct the test, they are not included in the class and do not benefit directly from the settlement agreement. Nonetheless, those individuals should be able to benefit indirectly from the settlement, as it would be arbitrary and capricious for the government to take a contrary position as to how the *Montgomery Ward* test should be applied. *See Judulang v. Holder*, 132 S. Ct. 476, 485 (2011). Any attempt to avoid the same application of the factors based solely on a person's currently being in removal proceedings (instead of having his or her removal proceedings reopened), would be arbitrary and capricious.