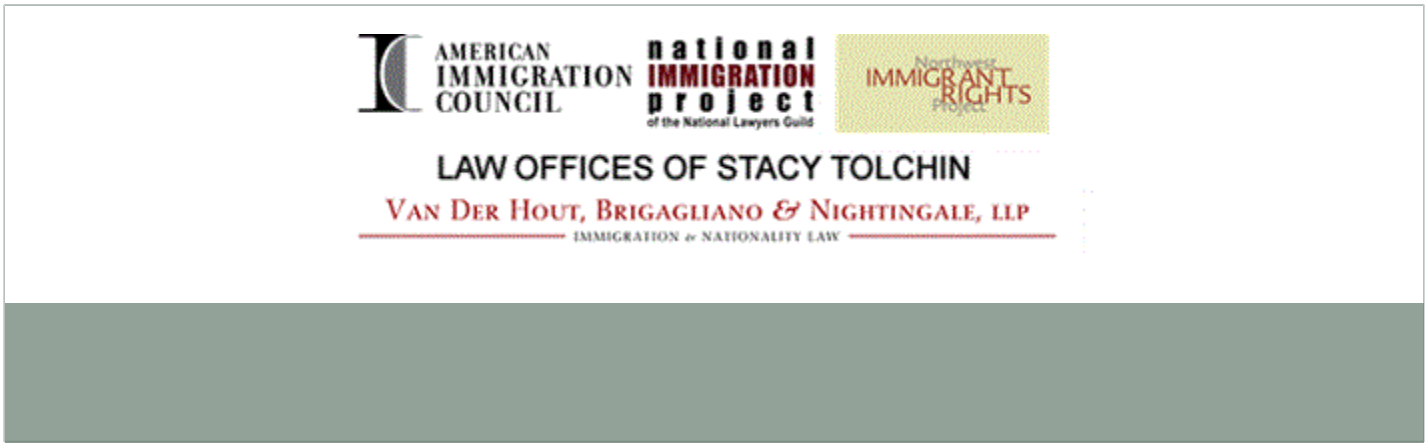
DURAN GONZALEZ v. DHS:
SETTLEMENT AGREEMENT WEBINAR



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**

CLASS COUNSEL

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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 **A**wesome 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 **B**rave Subclass)

- Physically present in the U.S. since filing their I-485 and I-212 applications;
- Has an ***un***executed 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); and
- 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

Subclass C – Outside the United States

(the **C**onsular 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)

Montgomery Ward & Co., Inc. v. FTC, 691 F.2d 1322, 1328 (9th Cir. 1982)

(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

GARFIAS-RODRIGUEZ APPLICATION OF FACTORS #2 AND #3

(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.

GARFIAS-RODRIGUEZ APPLICATION OF *MONTGOMERY WARD* FACTORS

- 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

Aug. 13, 2004 & Jan. 26, 2006
Perez-Gonzalez & Matter of Torres-Garcia
show *per se* reliance and eligible to have AOS and I-212 adjudicated on the merits

Jan. 26, 2006 & Nov. 13, 2006
***Matter of Torres-Garcia* & District Court injunction**
demonstrate reasonable reliance on *Perez-Gonzales* in light of *Matter of Torres-Garcia*
(and distinguish *Carrillo 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"

EVIDENTIARY STANDARD FOR I-212 WAIVERS

- ***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.