U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director (MS 2000)
Washington, DC 20529-2000

U.S. Citizenship and Immigration Services

August 25, 2015 **PM- 602-0121**

Policy Memorandum

SUBJECT: Additional Guidance for Implementation of the Settlement Agreement in *Duran Gonzalez v. Department of Homeland Security*—Adjudication of Requests for U.S. Citizenship and Immigration Services (USCIS) Motions to Reopen Certain Consent to Reapply and Adjustment of Status Applications Filed in the Ninth Circuit Between August 13, 2004, and November 30, 2007

Purpose
This policy memorandum (PM) supplements the guidance given in PM 602-0108 (January 31, 2015) and revises the Step-by-Step Determinations to address two legal issues not previously addressed in PM 602-0108. This supplemental guidance ensures the consistent implementation of the Settlement Agreement based on *Duran Gonzalez, et al. v. Department of Homeland Security.*[1]

Scope
This PM is binding on all USCIS employees adjudicating requests to reopen on USCIS' own motion certain consent to reapply and adjustment of status applications, as outlined in the Settlement Agreement.

Authorities
- Immigration and Nationality Act (INA) 212(a)(9)(C)
- PM 602-0108 and authorities mentioned therein

Background
PM 602-0108 provides an overview of the *Duran Gonzalez* litigation and of the terms of the Settlement Agreement. Since USCIS issued PM 602-0108, two legal issues have arisen concerning the interpretation of the Settlement Agreement:

1. Should a Class member's applications for adjustment of status and consent to reapply be denied if a Class member fails to show reasonable reliance on *Perez-Gonzalez v. Ashcroft?*[2]

[1] Civil Action No. C06-1411-MJP in the U.S. District Court for the Western District of Washington.
[2] 379 F.3d 783 (9th Cir. 2004).

2. Should USCIS deny a Class member's adjustment and consent to reapply applications if the Class member is also inadmissible under section 212(a)(9)(C)(i)(I) of the Act for unlawful reentry without admission after prior unlawful presence?

USCIS Office of the Chief Counsel (OCC) addressed these issues in the opinion that accompanies this PM.

Implementation
USCIS officers will address the issues identified in this PM in the manner specified in the OCC opinion. The Appendix to this PM revises the "Step-by-Step Determinations" accordingly.

Given the complexity of the legal issues involved, USCIS officers should work closely with local OCC attorneys when adjudicating these cases. OCC counsel can assist officers in preparing requests for evidence or notices of intent to deny that help to clarify the issues and in obtaining from Class members evidence concerning these legal issues, which are not commonly encountered in administrative cases.

Note that the revision of the "Step-by-Step Determinations" also clarifies that the office receiving a timely request for a new decision will send a written acknowledgement of the request to the Class member. Under paragraph IV(A)(3) of the Settlement Agreement, p. 8, the Class member can use the USCIS notice of acknowledgement (referred to as a "filing receipt notice" in the Settlement Agreement) when asking Immigration and Customs Enforcement (ICE) to cancel a reinstated removal order.

Use
This PM is intended solely for the guidance of USCIS personnel in the performance of their official duties. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

Contact Information
Questions or suggestions regarding this PM should be addressed through appropriate channels to OCC and the Office of Policy and Strategy.

Appendix
Revised Step-by-Step Determinations
June 19, 2015, opinion

APPENDIX

Step-by-Step Determinations

1. Class Membership

STEP	Determine if…	If yes…	If no…
1	The foreign national filed and USCIS received the request to reopen the adjustment and consent to reapply application **by January 21, 2016**.	Issue written acknowledgement of the submission; Go to **Step 2**.	Deny the request to reopen.
2	The foreign national is inadmissible INA 212(a)(9)(C)(i)(II) for unlawful reentry after prior removal[3] because the foreign national entered or attempted to reenter without being inspected and admitted or paroled : • Between April 1, 1997and Nov. 30, 2007; and • After having previously been deported or removed from the United States.	Go to **Step 3**.	Deny the request to reopen.
3	The foreign national is the primary or derivative beneficiary of an immigrant visa petition or permanent labor certification application filed on or before April 30, 2001.	Go to **Step 4**.	Deny the request to reopen.
4	The foreign national is the primary beneficiary or the derivative beneficiary of an immigrant visa petition or permanent labor certification application after January 14, 1998.	Go to **Step 5**.	Proceed to **Step 9**.

[3] See INA 212(a)(9)(C)(i)(II).

STEP	Determine if…	If yes…	If no…
5	The foreign national is a primary beneficiary.	Go to **Step 6**.	Proceed to **Step 7**.
6	The foreign national was physically present in the United States on December 21, 2000.	Go to **Step 9**.	Deny the request to reopen.
7	The foreign national is a derivative beneficiary.	Go to **Step 8**.	Deny the request to reopen.
8	Either the foreign national was present in the United States on December 21, 2000, or if the foreign national's primary beneficiary was physically present in the United States on December 21, 2000.	Go to **Step 9**.	Deny the request to reopen.
9	The foreign national properly filed an adjustment application (Form I-485 and Form I-485 Supplement A) while residing in the Ninth Circuit between August 13, 2004 and November 30, 2007.[4]	Go to **Step 10**.	Deny the request to reopen.
10	The foreign national properly filed a consent to reapply application (Form I-212) between August 13, 2004 and November 30, 2007.	Go to **Step 11**.	Deny the request to reopen.
11	The foreign national has not yet received a decision on the applications for adjustment of status and consent to reapply.	Go to **Step 13**.	Go to **Step 12**.
12	The foreign national received a denial of the adjustment of status and consent to reapply applications from USCIS or the Department of	Go to **Step 13**.	Deny the request to reopen.

[4] The Ninth Circuit has appellate jurisdiction over Federal cases arising in Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington, as well as Guam and the Commonwealth of the Northern Mariana Islands (CNMI). The INA, however, generally was not in force in the CNMI during the period covered by the Settlement Agreement. See Consolidated Natural Resources Act of 2008, Pub. L. 110-229, § 702(a), 122 Stat. 754, 854 (2008) (providing for extension of the INA to the CNMI).

STEP	Determine if…	If yes…	If no…
	Justice Executive Office for Immigration Review on or after August 13, 2004.		
13	The foreign national is currently in removal proceedings.	Deny the request to reopen.	Go to **Step 14**.
14	The foreign national has a pending petition for review of a removal order that resulted from proceedings[5] before the Ninth Circuit Court of Appeals.	Deny the request to reopen.	**The foreign national is a Class member.** **Determine Subclass membership next.**

2. <u>Subclass Membership</u>

STEP	Determine if…	If yes…	If no…
1	The Class member is physically present in the United States.	Go to **Step 2**.	Go to **Step 5**.
2	The Class member provided evidence of physical presence in the United States since filing the applications for adjustment (Form I-485 and Form I-485 Supplement A) and consent to reapply (Form I-212).	Go to **Step 4**.	Reopen on USCIS' own motion under 8 CFR 103.5(a)(5) and request the information. Go to **Step 3**.
3	The Class member has established with the response to the service motion that the Class member has been physically present in the United States since filing the applications for adjustment (Form I-485 and Form I-485 Supplement A) and consent to reapply (Form I-212).	Go to **Step 4**.	Deny the request to reopen.
4	The Class member was put into removal proceedings after filing the application for adjustment (Form I 485 and Form I-485	Deny the request to reopen.	**The Class member is a Subclass A member. The case must be reopened.**

[5] Under INA 240.

STEP	Determine if…	If yes…	If no…
	Supplement A) and consent to reapply (Form I-212).		**Next, adjudicate the consent to reapply and adjustment of status applications.**
5	The Class member departed the United States after filing the applications for adjustment (Form I-485 and Form I-485 Supplement A) and consent to reapply (Form I-212).	Go to **Step 6**.	Deny the request to reopen.
6	The Class member has remained abroad since that last departure.	Go to **Step 7**.	Deny the request to reopen.
7	The Class member either: (a) Had an immigrant visa application with the Department of State (DOS) pending **on July 21, 2014**; or (b) Filed an immigrant visa application with DOS **on or before July 21, 2015**; or (c) Filed and USCIS received a Form I-824, Application for Action on an Approved Application or Petition,[6] with the appropriate fee **on or before July 21, 2015**.[7]	**The foreign national is a Subclass C member. The case must be reopened**. **Next, adjudicate the consent to reapply application.**	Deny the request to reopen.

[6] If the visa petition approval has not already been forwarded to the National Visa Center (NVC), the applicant must file a Form I-824 to request that USCIS forward the petition. When completing the form, the Subclass C member should mark "Part 2d" on Form I-824 (Part 2, Reason for Request, "I am requesting … (d) USCIS to send my approved immigrant visa petition to the National Visa Center.").

[7] To be eligible for relief, the Settlement Agreement specifies that a Subclass C member either: (a) must have applied for an immigrant visa within the past year; or (b) must initiate the immigrant visa process within 12 months of the effective date of the Settlement Agreement. The Settlement Agreement was effective on July 21, 2014. Since a Subclass C member will have first sought adjustment, however, it will be necessary to send the approved visa petition before the Subclass C member can actually apply for an immigrant visa. For this reason, if USCIS has not already forwarded the approved visa petition to NVC, USCIS will consider the filing of a Form I-824 on or before July 21, 2015, as sufficient to initiate the immigrant visa process.

3. Consent to Reapply and Adjustment of Status Adjudication for Subclass A Members

STEP	Determine if…	If yes…	If no…
1	The Class member filed the applications for adjustment (Form I-485 and Form I-485 Supplement A) and consent to reapply (Form I-212) **between August 13, 2004 and January 26, 2006**.	Go to **Step 5**.	Go to **Step 2**.
2	The Class member filed the applications for adjustment (Form I-485 and Form I-485 Supplement A) and consent to reapply (Form I-212) **between January 27, 2006 and November 30, 2007**.	Go to **Step 3**.	N/A[8]
3	The Class member submitted evidence, either with the initial request or in response to a Request for Evidence (RFE), that supports a finding of reasonable reliance on *Perez-Gonzalez*.	Go to **Step 5**.	Go to Step 4.
4	The evidence does not show reasonable reliance, but does support a finding that, in light of the specific facts of the Class member's case, the burden of denial would be greater than the ordinary consequences of removal.[9]	Go to **Step 5**.	Deny the consent to reapply application based on *Matter of Torres-Garcia*. Deny the adjustment application for lack of eligibility because the applicant is inadmissible for unlawful reentry.
5	The Class member has a reinstated removal order.	Notify ICE of the request. No need to hold case pending cancellation of	**Go to Step 6**.

[8] The Class is limited to those having filed cases between August 13, 2004 and November 30, 2007. The chart addressing Class membership already asked whether the foreign national filed the case during this period. If the case was filed after November 30, 2007, the foreign national is not a Class member.

[9] Although, in the absence of reliance, the burden would have to be greater than the ordinary consequences of removal, it does not need to amount to "extreme hardship."

STEP	Determine if…	If yes…	If no…
		removal. Go to **Step 6**.	
6	The Class member is inadmissible on grounds other than unlawful reentry after prior removal. (May include unlawful reentry after prior unlawful presence).	Go to **Step 7**.	Go to **Step 8**.
7	The Class member has a waiver or other form of relief available to overcome the other ground(s) of inadmissibility. (A separate Form I-212 *is not* needed if the other ground is 212(a)(9)(A) or 212(a)(9)(C)(i)(I) (unlawful reentry after prior unlawful presence.)[10]	Issue an RFE or Notice of Intent to Deny (NOID) if the Class member has not yet filed the appropriate application for relief, such as a waiver.[11] Go to **Step 8**.	Deny the consent to reapply application as a matter of discretion because granting it would not render the Class member admissible. Deny the adjustment of status application for lack of statutory eligibility.
8	The waiver or other form of relief is approvable.	Go to **Step 9**.	Deny the waiver or other form of relief for lack of eligibility. Deny consent to reapply as a matter of discretion because granting it would not render the Class member admissible. Deny the adjustment of status application for lack of statutory eligibility.

[10] Under the Settlement Agreement, USCIS is not required to presume reliance on *Acosta v. Gonzales*, 439 F.3d 550 (9th Cir. 2006) for a Class member who is inadmissible under INA 212(a)(9)(C)(i)(I) (return without admission after unlawful presence) as well as under INA 212(a)(9)(C)(i)(II) (return without admission after prior removal). In a given case, however, the proof or presumption of reliance on *Perez-Gonzales* could be a strong persuasive factor in favor of finding reliance on *Acosta* as well.

[11] The Class member must pay the standard filing fee unless the Class member requested and is granted a fee waiver.

STEP	Determine if…	If yes…	If no…
9	The Class member's consent to reapply application is approvable.[12]	Go to **Step 10**.	Deny the waiver or other form of relief as a matter of discretion because granting it would not render the Class member admissible. Deny the consent to reapply application. Deny the adjustment of status application for lack of statutory eligibility.
10	The Class member's adjustment of status application filed under the exception is approvable.	Approve the waiver or other form of relief. Approve the consent to reapply application. Approve the adjustment of status application.	Deny the waiver or other form of relief as a matter of discretion because granting it would not make the Class member eligible for the benefit. Deny the consent to reapply application as a matter of discretion because granting it would not make the Class member eligible for the benefit. Deny the adjustment of status application for lack of statutory eligibility.

[12] The Settlement Agreement specifies that the application must be adjudicated according to *Perez-Gonzalez*. The officer must: 1) disregard the lack of the 10-year physical absence requirement; 2) disregard the Class member's presence in the United States; and 3) not count the unlawful reentry as a negative factor when determining whether consent to reapply is warranted as a matter of discretion.

4. Consent to Reapply Adjudication for Subclass C Members

STEP	Determine if…	If yes…	If no…
1	The Class member filed the applications for adjustment (Form I-485 and Form I-485 Supplement A) and consent to reapply (Form I-212) **between August 13, 2004 and January 26, 2006**.	Go to **Step 5**.	Go to **Step 2**.
2	The Class member filed the application for adjustment (Form I-485 and Form I-485 Supplement A) and consent to reapply (Form I-212) **between January 27, 2006 and November 30, 2007**.	Go to **Step 3**.	N/A[13]
3	The Class member submitted evidence either in the initial request or in response to an RFE that supports a finding of reasonable reliance on *Perez-Gonzalez.*	Go to **Step 5**.	Go to **Step 4**.
4	The evidence does not show reasonable reliance, but does supporting a finding that, in light of the specific facts of the Class member's case, the burden of denial would be greater than the ordinary consequences of removal.[14]	Go to **Step 5**.	Deny the consent to reapply application based on *Matter of Torres-Garcia*. Notify NVC of the denial.
5	The Class member is inadmissible on grounds other than unlawful reentry after prior removal. (May include unlawful reentry after prior unlawful presence.)	Go to **Step 6**.	Go to **Step 8**.
6	The Class member has a waiver or other form of relief available to overcome the other ground(s) of	Issue an RFE/NOID if the Class member has not yet filed the	Deny the consent to reapply application as a matter of discretion

[13] The Class is limited to those having filed cases between August 13, 2004 and November 30, 2007. The Chart addressing Class membership already asked whether the foreign national filed the case during this period. If the case was filed after November 30, 2007, the foreign national is not a Class member.
[14] Although, in the absence of reliance, the burden would have to be greater than the ordinary consequences of removal, it does not need to amount to "extreme hardship."

STEP	Determine if…	If yes…	If no…
	inadmissibility. (A separate Form I-212 *is not* needed if the other ground is 212(a)(9)(A) or 212(a)(9)(C)(i)(I) (unlawful reentry after prior unlawful presence.)[15]	appropriate application for relief, such as a waiver.[16] Go to **Step 6**.	because granting it would not render the Class member admissible. Notify DOS at the NVC of the denial.
7	The waiver or other form of relief is approvable.	Go to **Step 7**.	Deny the waiver or other form of relief for lack of eligibility. Deny the consent to reapply application as a matter of discretion because granting it would not render the Class member admissible. Notify DOS at the NVC of the denials.
8	The Class member's consent to reapply application is approvable.[17]	Approve the waiver or other form of relief. Approve the consent to reapply application. Notify DOS at the NVC of the approvals.	Deny the consent to reapply application for lack of eligibility. Deny the waiver or other form of relief (if applicable) as a matter of discretion because granting it would not render the Class member admissible. Notify DOS at the NVC of the denials.

[15] Under the Settlement Agreement, USCIS is not required to presume reliance on *Acosta v. Gonzales*, 439 F.3d 550 (9th Cir. 2006) for a Class member who is inadmissible under INA 212(a)(9)(C)(i)(I) (return without admission after unlawful presence) as well as under INA 212(a)(9)(C)(i)(II) (return without admission after prior removal). In a given case, however, the proof or presumption of reliance on *Perez-Gonzales* could be a strong persuasive factor in favor of finding reliance on *Acosta* as well.
[16] The Class member must pay the standard filing fee unless the Class member requested and is granted a fee waiver.
[17] The Settlement Agreement specifies that the application must be adjudicated according to *Perez-Gonzalez*. The officer must: 1) disregard the lack of the 10-year physical absence requirement; 2) disregard the Class member's presence in the United States; and 3) not count the unlawful reentry as a negative discretionary factor.