

## **February 23, 2009: Important Information for *Duran Gonzales* Class Members**

### **District Court Denied Preliminary Injunction and Temporary Restraining Order Expired; Class Members Now Subject to Removal**

#### ***Contact Class Counsel if Class Member is Reinstated or Placed in Removal Proceedings***

As previously reported, on February 6, 2009, the district court denied Plaintiffs' request for a preliminary injunction. A preliminary injunction would have stopped the government from denying class members' I-212 applications and giving legal effect to class members' denied I-212s. The previously granted temporary restraining order (TRO) also expired on February 6, 2009. As a result, *USCIS now is allowed to deny class members' I-212 applications and give effect to already denied applications, which could result in individuals being put in removal proceedings or being subject to reinstatement of removal.* See below for a discussion about steps class members may take if they are put in removal proceedings or reinstated.

Class counsel urge class members to contact class counsel if they are placed in removal proceedings or their prior order is reinstated. Email us at [clearinghouse@ailf.org](mailto:clearinghouse@ailf.org).

### **Background**

*Duran Gonzales* is a circuit-wide class action challenging DHS' refusal to follow *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004). In *Duran Gonzales*, the Ninth Circuit overturned *Perez-Gonzalez*, deferring to the BIA's holding that individuals who have previously been removed or deported are not eligible to apply for adjustment of status (under INA § 245(i)) along with an accompanying I-212 waiver application. See *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006).

Plaintiffs asked the Ninth Circuit to rehear the case en banc. On January 16, 2009, the Ninth Circuit denied the request. The following week, class counsel filed a motion to amend the complaint, a motion to amend and redefine the class, and a request for a temporary restraining order (TRO). The amended complaint alleges that the government cannot apply the *Duran Gonzales* decision retroactively to the detriment of class members who relied on *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004).<sup>1</sup> On January 23, 2009 – the same day the Ninth Circuit issued the mandate – the district court granted a TRO protecting class members. Subsequently, the TRO expired and the court denied the request for a preliminary injunction. In denying the preliminary injunction, the court found that Plaintiffs did not raise serious questions on the merits of their retroactivity claim and that they are not likely to succeed on the merits.

For more background information about the suit see [http://www.ailf.org/lac/lac\\_lit\\_92806.shtml](http://www.ailf.org/lac/lac_lit_92806.shtml).

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<sup>1</sup> Class counsel has argued that the decision should not apply retroactively to the following class members: individuals who are inadmissible under INA § 212(a)(9)(C)(i)(II) and whose I-212 waiver applications were filed within the jurisdiction of the Ninth Circuit in conjunction with applications for adjustment of status under INA § 245(i) and were pending at any time on or after August 13, 2004 and on or before November 30, 2007 and prior to any final reinstatement of removal decision.

## Next Steps in the Class Action

Based on the district court's denial of the preliminary injunction, class counsel anticipate that the district court will enter a final judgment in favor of the government. Assuming this happens, class counsel are planning to appeal this decision to the Ninth Circuit in order to pursue the argument that the Ninth Circuit's *Duran Gonzales* decision should not apply retroactively to class members who relied on *Perez-Gonzalez*. We do not know for sure when the district court judgment will be entered and when we file the appeal, but we estimate that much of the appeal briefing will happen during the spring and summer, 2009.

Because there is no injunction currently in place, class members are not protected from the government putting them in removal proceedings or reinstating their orders of removal. Filing the appeal in the Ninth Circuit also will not prevent the government from taking such actions.

## What Should Class Members Expect and What Actions Can They Take in Their Individual Cases?

Because the district court denied the preliminary injunction, USCIS now is allowed to deny class members' I-212 applications and give effect to already denied applications. As a result, class members may be placed in removal proceedings before an immigration judge (INA § 240) or may have their prior orders reinstated (INA § 241(a)(5)). The government also may detain class members pending removal. Class members who have interviews scheduled should be prepared for the government to take these actions. Please contact class counsel at [clearinghouse@ailf.org](mailto:clearinghouse@ailf.org) if a class member is placed in removal proceedings or reinstated.

*Individuals in Removal Proceedings.* Class members placed in removal proceedings may argue, if applicable, that the Ninth Circuit's decision in *Duran Gonzales* should not apply retroactively to them because they relied on *Perez-Gonzalez*. They also may consider asking the immigration judge and/or the BIA to hold the case in abeyance pending the Ninth Circuit's resolution of this issue in the class action appeal.<sup>2</sup>

If a final order of removal is issued by the BIA, the person may file a petition for review in the Ninth Circuit to challenge the retroactive application of *Duran Gonzales*. Importantly, the petition for review must be filed within 30 days of the BIA's decision. For more information about filing a petition for review, see AILF's Practice Advisory, "How to File a Petition for Review" at [http://www.ailf.org/lac/pa/lac\\_pa\\_041706.pdf](http://www.ailf.org/lac/pa/lac_pa_041706.pdf). The Practice Advisory includes a sample petition for review. In addition, see AILF's Practice Advisory about seeking a stay of removal, "Applying for a Stay of Removal During Federal Court Proceedings" at [http://www.ailf.org/lac/pa/stay\\_pa.pdf](http://www.ailf.org/lac/pa/stay_pa.pdf). Again, please contact class counsel at [clearinghouse@ailf.org](mailto:clearinghouse@ailf.org) if a class member is placed in removal proceedings.

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<sup>2</sup> Class counsel will notify class members when the district court enters a final judgment and an appeal is filed. All announcements to class members are posted on AILF's website at [http://www.ailf.org/lac/lac\\_lit\\_92806.shtml](http://www.ailf.org/lac/lac_lit_92806.shtml). Please be sure to check this website for updated information.

*Individuals with Reinstatement of Removal Orders.* Class members whose prior orders are reinstated may file a petition for review in the Ninth Circuit to challenge the retroactive application of *Duran Gonzales*. Importantly, the petition for review must be filed within 30 days of the reinstatement order. For more information about filing a petition for review, see AILF's Practice Advisory, "How to File a Petition for Review" at [http://www.ailf.org/lac/pa/lac\\_pa\\_041706.pdf](http://www.ailf.org/lac/pa/lac_pa_041706.pdf). The Practice Advisory includes a sample petition for review. In addition, see AILF's Practice Advisory about seeking a stay of removal, "Applying for a Stay of Removal During Federal Court Proceedings" at [http://www.ailf.org/lac/pa/stay\\_pa.pdf](http://www.ailf.org/lac/pa/stay_pa.pdf). Again, please contact class counsel at [clearinghouse@ailf.org](mailto:clearinghouse@ailf.org) if a class member has his or her prior order reinstated.