AMERICAN IMMIGRATION LAW FOUNDATION

Duran Gonzalez Q & A: Considerations for § 245(i)/I-212 Applicants After the Ninth Circuit Overturned *Perez-Gonzalez*

December 19, 2007

Background:

Duran Gonzalez v. DHS is a class action challenging the Department of Homeland Security's willful refusal to follow the Ninth Circuit's decision in *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004). In *Perez-Gonzalez*, the Ninth Circuit had determined that individuals who have previously been removed or deported may apply for adjustment of status (under INA § 245(i)) along with an accompanying I-212 waiver application.

The suit was filed in federal district court in Seattle. *See Duran Gonzalez v. DHS*, No. 2:06-cv-1411 (W.D. Wash.). On November 13, 2006, the district court granted plaintiffs' motions for a preliminary injunction and class certification. The government filed an interlocutory appeal of the preliminary injunction in the Ninth Circuit. On November 30, 2007, the Ninth Circuit issued a decision in which it vacated the preliminary injunction and remanded the case to the district court. *See Duran Gonzales v. DHS*, No. 07-35021, __ F.3d __ (9th Cir. Nov. 30, 2007).[1] Lawyers for the plaintiffs plan to file a petition for rehearing en banc.

The following Q & A addresses issues that have arisen following the Ninth Circuit's adverse decision. To read more about this suit and to view the court decisions and other pleadings, see AILF's webpage at http://www.ailf.org/lac/lac_lit_92806.shtml.

Did the Ninth Circuit overturn *Perez-Gonzalez*?

Yes. In *Duran Gonzalez*, the Ninth Circuit explicitly overturns *Perez-Gonzalez*, deferring to the BIA's interpretation of law as set forth in *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006).

Matter of Torres-Garcia held that where an individual is subject to INA § 212(a)(9)(C)(i)(II) (unlawful reentry after removal) and ten years have not passed since the date of the person's last departure from the United States, the individual is not eligible for adjustment of status because a waiver is not available. If ten years have passed since the person's last departure, he or she may be eligible to adjust (see discussion below).

[1] The case was filed under the name *Duran Gonzalez*. The Ninth Circuit issued the decision as *Duran Gonzales*.

The *Duran Gonzalez* Court relied on *Brand X*: what is *Brand X* and how can I rely on a Ninth Circuit decision if it is possible for the BIA to change it by issuing a conflicting decision?

In *Duran Gonzalez*, the Ninth Circuit relied on *Brand X*, a Supreme Court decision from 2005. *Brand X* deals with whether the courts must defer to an agency interpretation of a statute that conflicts with a circuit court's prior interpretation of a statute. The full case name and citation is *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005).

In *Brand X*, the Federal Communications Commission (FCC) had issued a ruling in a case before it. On appeal, the Ninth Circuit rejected the FCC ruling, finding that it conflicted with a prior Ninth Circuit precedent. The Supreme Court reversed the Ninth Circuit. It held that the circuit court must apply *Chevron* deference to the agency's interpretation of a statute if the prior court precedent was an interpretation of an ambiguity in a statute (i.e., the court decided the case under step II of *Chevron*). The Supreme Court explained:

> A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion. . . . Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction

Thus, in limited circumstances, *Brand X* provides the BIA with authority to disagree with a circuit court decision and offer a different interpretation of a statute. However, it may do so only where the statute is ambiguous. In a case where the court of appeals decision is based on the unambiguous reading of the statute (decided under step I of the *Chevron* analysis), the BIA may not offer an interpretation contrary to circuit court precedent.

In *Duran Gonzales*, the court found that *Perez-Gonzalez* was based on a finding of statutory ambiguity, and therefore *Brand X* applied. Applying *Chevron* deference, the court concluded that the BIA's interpretation in *Matter of Torres-Garcia* is reasonable.

Is *Duran Gonzalez* binding now?

Yes. The court's decision in *Duran Gonzalez* currently is the binding law of the Ninth Circuit. That means that USCIS adjudicators and immigration judges in the Ninth Circuit are bound to follow the decision. Unless a panel or en banc court issues a subsequent favorable decision on rehearing in *Duran Gonzalez* or another case, noncitizens should not rely on *Perez Gonzalez*.

Even though the decision is binding, it has not gone into effect for class members under *Duran Gonzalez* because the court has not issued the mandate. The preliminary injunction is not vacated until the mandate issues. Thus, until the mandate issues, class members continue to be protected by the preliminary injunction. (See description of the class and the preliminary injunction below.)

Currently, the mandate is scheduled to issue on January 22, 2008. The issuance of a mandate is stayed when a petition for rehearing is filed. Class counsel are planning to seek rehearing en banc and will inform the public when the petition is filed. However, attorneys also may find this information on PACER.

When will *Duran Gonzalez* be binding for the class?

As discussed above, although *Duran Gonzalez* is the law of the circuit, the Ninth Circuit's order vacating the preliminary injunction does not go into effect until the court issues the mandate. Currently, the mandate is scheduled to issue on January 22, 2008. The issuance of the mandate will be stayed when a petition for rehearing is filed.

Who is a class member?

The district court's order granting class certification defines the class as follows:

(a) Individuals who are inadmissible under INA § 212(a)(9)(C)(i)(II) and have filed an I-212 waiver application within the jurisdiction of the Ninth Circuit in conjunction with their application for adjustment of status under INA § 245(i), prior to any final reinstatement of removal determination, where USCIS denied the I-212 application because 10 years had not elapsed since the date of the applicant's last departure from the United States; and

(b) Individuals who are inadmissible under INA § 212(a)(9)(C)(i)(II) and have filed or will file an I-212 waiver application within the jurisdiction of the Ninth Circuit in conjunction with their application for adjustment of status under INA § 245(i), prior to any final reinstatement of removal determination, where USCIS has not yet adjudicated the application but where USCIS will deny their I-212 application on the grounds that 10 years have not elapsed since the date of the applicant's last departure from the United States.

Who is not a class member?

-- Individuals outside of the Ninth Circuit are not class members. This lawsuit was filed on behalf of Ninth Circuit applicants only. This is because the lawsuit sought to compel DHS to comply with the Ninth Circuit's decision in *Perez-Gonzalez*.

-- Individuals whose I-212 applications have been denied for a reason other than that 10 years have not elapsed since the date of the applicant's last departure from the United States. For example, if USCIS denied the application on the merits or as a matter of discretion, the applicant would not qualify as a class member.

-- Individuals who initially filed their adjustment of status applications with the immigration court are not class members. The class includes only individuals whose applications were denied by USCIS or who expected that USCIS would deny their application. However, individuals whose removal proceedings are pending or on appeal would benefit if the Ninth Circuit were to

issue a favorable decision on rehearing in *Duran Gonzalez* or in another case. See discussion about removal proceedings below.

Did my client have to "sign up" to be a class member?

No. Individuals who fall within the class definition are automatically class members and do not need to sign up to be class members or to be protected by the preliminary injunction.

What does the preliminary injunction do?

The preliminary injunction protects individuals with pending I-212 waiver applications and individuals whose I-212 applications already have been denied.

Pending I-212 Waiver Applications
The court's order says that government "may not deny any class member's I-212 applications in the Ninth Circuit on the grounds that the applicant is inadmissible under INA § 212(a)(9)(C)(i)(II) and ten years have not elapsed since the applicant's last departure from the United States."

Denied I-212 Waiver Applications
The court's order also enjoins the government from giving "any legal effect to denied I-212 applications of class members" if:

(a) the I-212 application was adjudicated in a USCIS district office located within the Ninth Circuit;
(b) the application was denied between August 13, 2004 (the date *Perez-Gonzalez* was filed) and the date of the order [November 13, 2006]; and
(c) the application was denied solely on the grounds that the applicant was inadmissible under INA § 212(a)(9)(C)(i) and ten years had not elapsed since the applicant's last departure from the United States.

What if my client currently is in removal proceedings before the immigration judge?

If your client is in removal proceedings and is not protected by the preliminary injunction, the IJ is bound by the Ninth Circuit's decision in *Duran Gonzalez*. That means that your client will not be able to adjust. However, because the mandate has not issued in *Duran Gonzalez* and a petition for rehearing is planned, individuals with cases pending before the immigration courts and the BIA may want to ask that the case be held in abeyance pending a decision on the petition for rehearing. In addition, individuals may want to preserve their arguments by filing a BIA appeal and, if necessary, a petition for review in the court of appeals if the BIA denies the appeal. If the Ninth Circuit were to issue a favorable decision on rehearing in *Duran Gonzalez* or in another case, individuals whose cases are on appeal could seek a remand to the immigration court.

My client was called in for an appointment at USCIS. What should I do?

If your client is a class member and is protected by the preliminary injunction, he or she remains protected until the mandate issues. That means that USCIS may not deny the application because ten years have not elapsed since his or her last departure from the United States. In addition, DHS may not give "legal effect" to a denial, if the denial is based on the finding that ten years have not elapsed since his or her last departure from the United States. (See above description of the preliminary injunction.) Be prepared to explain to the USCIS officer the status of *Duran Gonzalez* and why your client is protected under the preliminary injunction. The district court orders are available from AILF's webpage at http://www.ailf.org/lac/lac_lit_92806.shtml. Generally, postponement of an appointment is warranted only if the parties are unavailable. However, USCIS may be inclined to postpone an appointment until the mandate issues.

If your client is not a class member or is not covered by the preliminary injunction, your client should be aware that USCIS will likely follow the Ninth Circuit's decision in *Duran Gonzalez*. That means that a client who is subject to INA § 212(a)(9)(C)(i)(II) is not eligible to adjust status and may be arrested and subjected to reinstatement of removal under INA § 241(a)(5). Attorneys should discuss with these clients whether to continue pursuing the adjustment application.

Is there an argument that my client relied on *Perez-Gonzalez* when he or she filed the I-212 because it was the law of the circuit at that time and therefore *Perez-Gonzalez* should apply to my client?

Yes. This is one of the arguments class counsel is evaluating and may be raising in the petition for rehearing en banc and in further proceedings at the district court. It may take a while before the agency or the courts address this issue. While the preliminary injunction still is in effect (pending issuance of the mandate), class members are protected and will not yet need to address this issue. Lawyers for the class will provide additional guidance if and when the vacated order goes into effect.

Should I file any new adjustment and I-212 applications for persons who were removed and then reentered without authorization?

In most cases, it is not advisable to file an adjustment application. Under *Duran Gonzalez* a person who was removed and reentered without authorization is not able to adjust status under INA § 245(i) because he or she is not eligible for a waiver unless ten years have elapsed from his or her last departure from the U.S. Moreover, he or she is subject to reinstatement of removal under INA § 241(a)(5). Even if ten years have elapsed and the person is eligible to adjust with a waiver, he or she still is subject to reinstatement of removal. Under current DHS policy, DHS decides whether to reinstate the removal order *before* considering the adjustment application.

My client was deported and reentered before April 1, 1997. Can he or she file an I-212?

INA § 212(a)(9)(C)(i)(II) applies only to individuals who were ordered removed and then reentered unlawfully any time *on or after April 1, 1997*. *See* Memorandum from Paul Virtue, Acting Executive Associate Commissioner of INS, dated June 17, 1997, entitled "Additional Guidance for Implementing Sections 212(a)(6) and 212(a)(9) of the Immigration and Nationality Act (Act)," *available at* http://www.aila.org/Content/default.aspx?docid=4548. As a result, a person who was ordered removed and reentered prior to April 1, 1997 is not covered by the decision in *Matter of Torres-Garcia.* Thus, INA § 212(a)(9)(C)(i)(II) is not a bar to adjusting status under INA § 245(i) in this situation.

It is important to note, however, that even if the reentry was prior to April 1, 1997, the person may be subject to reinstatement of removal under INA § 241(a)(5). In *Fernandez-Vargas*, the Supreme Court held that § 241(a)(5) may be applied to an individual who reentered the U.S. before April 1, 1997 and who did not take any affirmative steps to legalize his or her unlawful status in the United States before that date (the date §241(a)(5) took effect).[2] Thus, a potential adjustment applicant must consider the possible adverse ramifications of filing an application.

What if my client departed the United States more than ten years ago?

The government has acknowledged that where a person is inadmissible under INA § 212(a)(9)(C)(i), but more than ten years have passed since his or her last departure from the United States, he or she is eligible to apply for a waiver. However, if such a person files adjustment and waiver applications, USCIS likely will refer the case to USICE for consideration of whether to reinstate the order of removal or deportation. USCIS has indicated that it only will adjudicate the application if USICE declines to reinstate the order.[3]

What is the status of *Acosta*?

In *Duran Gonzalez*, the Ninth Circuit did not address the status of *Acosta v. Gonzales*, 439 F.3d 550 (9th Cir. 2006). *Acosta* addressed the related issue of whether a person inadmissible under INA § 212(a)(9)(C)(i)(I) (reentry after being unlawfully present for more than one year) is eligible to adjust status under INA § 245(i). The court held that such individuals are eligible to adjust. *Acosta* relied, in part, on *Perez-Gonzalez*. Now that *Perez-Gonzalez* is no longer the law of the circuit, the Ninth Circuit may reconsider whether *Acosta* continues to be valid.

In addition, the BIA recently issued a precedent decision, *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007), in which it explicitly disagreed with *Acosta* and a Tenth Circuit case, *Padilla-*

[2] The Tenth Circuit distinguished *Fernandez-Vargas* in a case where a person applied for adjustment of status before April 1, 1997. *See Valdez-Sanchez v. Gonzales*, 485 F.3d 1084 (10th Cir. 2007). In *Valdez-Sanchez*, the court said that the application of INA § 241(a)(5) was impermissibly retroactive as applied to the petitioner.

[3] After *Perez Gonzalez* was decided, USCIS explained this procedure for cases arising outside of the Ninth Circuit. *See* Memorandum from Michael Aytes, USCIS Acting Associate Director for Operations, and Dea Carpenter, Acting Chief Counsel, to the field, dated March 31, 2006, entitled "Effect of *Perez-Gonzalez v. Ashcroft* on adjudication of Form I-212 applications filed by aliens who are subject to reinstated removal orders under INA § 241(a)(5)," *available at* http://www.aila.org/content/default.aspx?docid=20233. Now that the Ninth Circuit has overturned *Perez Gonzalez*, it is likely that USCIS will follow these procedures in the Ninth Circuit as well.

Caldera v. Gonzales, 453 F.3d 1237 (10th Cir. 2005). The BIA held that a person subject to INA § 212(a)(9)(C)(i)(I) is not eligible to adjust status under INA § 245(i). In its decision, the BIA said that it was not addressing whether to apply its holding in the Ninth and Tenth Circuits, but noted that under the Supreme Court decision *Brand X* (discussed above), "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." Importantly, the Ninth Circuit relied on the *Brand X* decision in *Duran Gonzalez*.

My client's *Acosta* case is pending before USCIS or the immigration judge. What arguments should I make?

--The BIA has not ruled on whether *Matter of Briones* (the recent precedent disagreeing with *Acosta*) is binding in the Ninth Circuit. *See Matter of Briones*, 23 I&N Dec. at 371 n.9.

--Under *Brand X*, a BIA decision trumps a prior circuit decision only if the prior court decision was decided under step II of *Chevron*. Therefore, to the extent one can argue that *Acosta* was decided under step I of *Chevron*, the BIA's decision in *Matter of Briones* does not trump the rule set forth in *Acosta*, and USCIS and IJs must continue to apply *Acosta* to Ninth Circuit applicants.

Over the next few weeks and months, we expect to learn whether the IJs, the BIA and USCIS will take the position that *Matter of Briones* has trumped *Acosta*. The issue likely will have to be resolved by the Ninth Circuit. It may be in your client's interest to ask the court to hold the case in abeyance pending the final resolution by the court of appeals in both *Duran Gonzalez* and a case addressing the issue in *Acosta*. If the IJ and/or BIA issues an adverse decision in your client's case, your client may want to file an appeal or petition for review so that he or she may seek a remand if the Ninth Circuit upholds *Acosta*.

Should I file a mandamus if USCIS is holding (not adjudicating) my client's *Acosta* case?

Given that the future of *Acosta* is unclear, it is unlikely that filing a mandamus action will result in a quick, favorable resolution of your client's case. If you file a mandamus case, be prepared for the government to fight about whether *Acosta* is binding law. Also, the government may challenge the district court's jurisdiction over the case; this has been the trend in mandamus actions in adjustment cases nationwide. Even if you are successful at the district court, the government probably would appeal the case to the Ninth Circuit.

It may be preferable and more cost effective to await a decision from the Ninth Circuit. There are cases pending at the immigration courts – and perhaps at the BIA – that likely will make their way to the court of appeals (via a petition for review) within the next few months. It seems unlikely that a mandamus action that has not yet been filed would be decided by the court of appeals quicker.