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Legal Opinion

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SUBJECT: Implementation of the Settlement Agreement in *Duran Gonzalez v. Department of Homeland Security*

Adjudication of Requests for 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 memorandum sets out legal advice for you to provide USCIS officers concerning the proper resolution of two legal issues arising from the implementation of the Settlement Agreement based on *Duran Gonzalez v. Department of Homeland Security ("Duran-Gonzalez I"*), Civ. No. 06-1411-MJP (W.D.Wa. Settlement approved 7/21/2014; Judgment entered 7/20/2014). Class Counsel for the *Duran-Gonzalez* plaintiffs raised these issues with the Department of Justice, which relayed the issues to USCIS. *See* Letter from Matt Adams to Elizabeth Stevens (May 8, 2015).

The issues are:

Whether failure to establish reasonable reliance on *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783(9th Cir. 2004), by itself, warrants denial of a Class Member's request for a new decision on the Class Member's adjustment of status (USCIS Form I-485) and consent to reapply for admission (USCIS Form I-212).

> Whether a Class Member's inadmissibility under INA § 212(a)(9)(C)(i)(I), 8 U.S.C. § 1182(a)(9)(C)(i)(I) (return or attempted to return without admission after prior unlawful presence), as well as under INA § 212(a)(9)(C)(i)(II), 8 U.S.C. § 1182(a)(9)(C)(i)(II) (return or attempted to return without admission after prior removal), necessarily requires denial of a Class Member's Form I-485 and Form I-212.

The answer to each question is, no.

If a Class Member fails to show reasonable reliance on *Perez-Gonzalez*, USCIS must still consider whether, under *Duran-Gonzales v. DHS ("Duran-Gonzales II")*, 712 F.3d 1271 (9th Cir. 2013) and *Montgomery Ward & Co., Inc., v. FTC*, 691 F.3d 1322 (9th Cir. 1982), the burden resulting from following *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006), is sufficiently onerous to make it improper to rely on *Matter of Torres-Garcia.*

The second issue was not part of the *Duran Gonzales* litigation and not addressed in the Settlement Agreement. Under *Garfias-Rodriguez v. Holder*, 702 F.3d 504 (9th Cir. 2012) and *Montgomery Ward & Co., Inc., v. FTC*, 691 F.3d 1322 (9th Cir. 1982), however, USCIS must determine if a class member who is also inadmissible under § 212(a)(9)(C)(i)(I) can establish that USCIS should not follow *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007). To make this determination, USCIS must apply the *Montgomery Ward* factors. However, unlike the 212(a)(9)(C)(i)(II) determination under the Settlement Agreement there need NOT be a presumption of reliance on *Acosta*. Rather, in each case, the class member would need to provide evidence to support his or her claim that USCIS should follow *Acosta*, not *Matter of Briones*.

Background

PM-602-0108 (January 31, 2015) provided a comprehensive overview of the history and resolution of *Duran-Gonzalez I. Duran-Gonzalez I* was a class action, applying to certain applications for adjustment of status (USCIS Form I-485) and consent to reapply for admission (USCIS Form I-212) filed with USCIS between August 13, 2004, and November 30, 2007. Under the Settlement Agreement and PM-602-0108, Class Members may request new decisions. To be timely, USCIS must receive a Class Member's request no later than January 21, 2016.

In acting on a timely request for new decisions, USCIS must determine, in light of *Duran-Gonzales v. DHS ("Duran-Gonzales II")*, 712 F.3d 1271 (9th Cir. 2013), whether it is proper for USCIS to rely on *Matter of Torres-Garcia*, in adjudicating the applicant's claim. This determination is governed by the factors that the *Duran-Gonzales II* panel drew from *Montgomery Ward & Co., Inc., v. FTC*, 691 F.3d 1322 (9th Cir. 1982). The *Duran-Gonzales II* panel concluded that it was bound to apply the *Montgomery Ward* factors because of the *en banc* decision in *Garfias-Rodriguez v. Holder*, 702 F.3d 504 (9th Cir. 2012). If, under the *Montgomery Ward* factors, following *Matter of Torres-Garcia* is not proper, USCIS must readjudicate the Form I-485 and Form I-212 in light of *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783(9th Cir. 2004).

The cardinal *Montgomery Ward* factors, as identified by *Duran-Gonzales II* and specifically identified in the Settlement Agreement, are whether:

- The issue resolved by *Matter of Torres-Garcia* was an issue of first impression;
- The rule established by *Matter of Torres-Garcia* is an "abrupt departure" as distinct from simply settling an unsettled legal issue;
- The Class Member reasonably relied on the *Perez-Gonzalez* rule;
- Following *Matter of Torres-Garcia* will impose an unwarranted burden on the applicant*;* and,
- The Government's interest in applying *Matter of Torres-Garcia* to the Class Member's case outweighs the applicant's interest in following *Perez-Gonzalez.*

712 F.3d at 1277.

The *Duran-Gonzales II* panel did not directly analyze these factors. But in *Garfias-Rodriguez,* 702 F.3d at 521, the court recognized that the first factor – first impression – was not well-suited to immigration proceedings. Thus, this factor is largely neutral. In both *Garfias-Rodriguez, id.* at 521-23, and in *Carrillo de Palacios v. Holder,* 708 F.3d 1066, 1072 (9th Cir. 2013), the court concluded that *Matter of Torres-Garcia* was not an abrupt departure from settled law. The court also recognized that the final factor tends to favor the Government, which has a strong interest in uniform administration of the immigration laws. *Garfias-Rodriguez,* 702 F.3d at 523; *Carrillo de Placios,* 708 F.3d at at 1072. But since *Matter of Torres-Garcia* entailed interpretation of an ambiguous statute, the interest in uniformity, by itself, is not enough to defeat a Class Member's claim. *Id.*

USCIS must weigh all 5 factors. But in light of *Garfias-Rodriguez* and *Carrillo de Palacios*, the most critical factors are the extent to which a Class Member reasonably relied on *Perez-Gonzalez* and the burden on the Class Member that would result from following *Matter of Torres-Garcia*.

The Settlement Agreement and PM-602-0108 provide explicit instructions for analysis of the reliance factor. Under the Settlement Agreement, USCIS must presume that a Class Member's reliance on *Perez-Gonzalez* was reasonable *if* the Class Member filed the Forms I-485 and I-212 between August 23, 2004, (the date of *Perez-Gonzalez*) and January 26, 2006, (the date of *Matter of Torres-Garcia*). In this situation, if USCIS receives a timely request for a new decision, the Settlement Agreement and PM-602-0108 at p. 8 provide that USCIS must determine that the *Montgomery Ward* factors preclude application of *Matter of Torres-Garcia* to the adjudication of Forms I-485 and I-212 and, therefore, the new decisions on each application must be made in light of *Perez-Gonzalez.* If, however, the Form I-485 and Form I-212 were not filed until after January 26, 2006, there is no "presumption" of reliance. Rather, the Class Member must establish, on the basis of evidence, that he or she reasonably relied on *Perez-Gonzalez.* If the evidence demonstrates reasonable reliance on *Perez-Gonzalez,* PM-602-0108 at p. 10 provides that USCIS must determine that the *Montgomery Ward* factors preclude

application of *Matter of Torres-Garcia* and make new decisions on Forms I-485 and I-212 in light of *Perez-Gonzalez.*

In effect, PM-602-0108 conclusively determines that the *Montgomery Ward* factors favor the application of *Perez-Gonzalez* if the reliance factor is satisfied. This conclusion is proper, since *Duran-Gonzales II,* following *Carrillo de Palacios,* and *Garfias-Rodriguez,* noted that the result of following *Matter of Torres-Garcia* would generally be denial of relief, which could then lead to the applicant's removal. Although it is well-settled that removal is not "punishment," *United States v. Lopez-Mendoza,* 468 U.S. 1032, 1038 (1984), it is, of course, adverse to the applicant. When reasonable reliance is found (or presumed), that reliance plus the burden resulting from following *Matter of Torres-Garcia* would generally tip the *Montgomery Ward* balance in the applicant's favor.

But PM-602-0108 also seems to give conclusive effect to the reliance factor if it is not met. Specifically, PM-602-0108 indicates that USCIS should deny the request for consent to reapply if the applicant cannot establish reasonable reliance for those cases in which the requisite applications were filed between January 27, 2006 and November 30, 2007. PM-602-0108 at p. 9, 11, 17, 19. On this point, PM-602-0108 simply did not consider the issue that Class Counsel has raised: whether, under *Montgomery Ward*, the burden factor alone might warrant following *Perez-Gonzales* rather than *Matter of Torres-Garcia*.

The *Montgomery Ward* factors, according to *Garfias-Rodriguez*, are assessed on the basis of the facts of a specific case. 702 F.3d at 519-20. For this reason, it cannot be said, categorically, that the burden alone factor is *always* enough to warrant following *Perez-Gonzales*. But it also cannot be said, categorically, that it can *never* be enough. Instead, the effect of *Duran-Gonzalez II*, in light of *Garfias-Rodriguez*, is that USCIS is under a legal obligation to *consider* whether the burden factor alone is enough. Since PM-602-0108 does not develop this point, OCC must advise officers of the legal force of this obligation.

Discussion

Question 1

> If a Class Member fails to show reasonable reliance on *Perez-Gonzalez*, the *Montgomery Ward* factors still require USCIS to consider the burden resulting from following *Matter of Torres-Garcia* .

For Class Members whose applications were filed between January 27, 2006, and November 30, 2007, USCIS is required by the Settlement Agreement to determine whether *Matter of Torres-Garcia* should not apply to the Class Member's application "through application of the *Montgomery Ward* factors." Although, as discussed above, it is proper for USCIS to give conclusive effect to the reliance factor in cases where reliance is established, it is not proper to give conclusive effect to this factor where reliance is not established.

Even if the Class Member cannot establish reasonable reliance, USCIS must still give fair consideration to each of the 5 *Montgomery Ward* factors. Factors 1, 2, and 5 will generally have the same effect in every case. Factor 1 will be, largely, neutral. Factor 5 will favor the government, but will generally not be dispositive.

The second factor – abrupt departure from settled law – is often "intertwined" with the reliance factor. *Garfias-Rodriguez*, 702 F.3d at 521. But, as noted, the Ninth Circuit held in both *Garfias-Rodriguez, id.* at 523, and in *Carrillo de Palacios*, 708 F.3d at 1072, that this factor did not weigh heavily in favor of the petitioners in those cases. Resolution of the issue resulted from a "six year dialogue," 702 F.3d at 523, concerning the interplay between § 212(a)(9)(C) inadmissibly and adjustment eligibility under § 245(i). Thus, it would be difficult to make a strong claim that the final resolution was an "abrupt" departure from prior law.

Thus, the primary issues are the third and fourth factors. Did the Class Member reasonably rely on the, now overruled *Perez-Gonzales* decision? Will following *Matter of Torres-Garcia* impose an unacceptable burden on the Class Member?

Denial may well be the correct result, if an applicant who filed between January 21, 2006, and November 30, 2007, cannot show reasonable reliance on *Perez-Gonzalez*. If there was no reliance at all, then the burden of following *Matter of Torres-Garcia* is the only factor favoring the applicant. Without the reliance factor, USCIS may properly conclude that the weight of the burden factor is less salient. Removal always imposes at least some hardship on the alien. It is well-settled that removal from the United States is not "punishment." *Lopez-Mendoza,* 468 U.S. at 1038. Nor does an applicant have any legal right to continue his or her "unlawful conduct indefinitely under the terms on which it began." *Fernandez-Vargas v. Gonzales,* 548 U.S. 30, 36 (2006). In fact, the Ninth Circuit ruled against the petitioners in *Carrillo de Palacios* and *Garfias-Rodriguez,* despite the conclusion in each case that the burden factor weighed, "heavily,"*Carrillo de Palacios*, 708 F.3d at 1072; and "strongly," *Garfias-Rodriguez,* 702 F.3d at 523, in their favor.

But USCIS *cannot* infer that the "burden" factor is not met just because the applicant cannot show reasonable reliance on *Perez-Gonzales.* As the *Garfias-Rodriguez* case shows, there will always be at least some burden to an applicant, if the applicant's case is governed by *Matter of Torres-Garcia.* Denial of adjustment would not, by itself, result directly in the Class Member's removal. But it would mean that the Class Member will remain amenable to removal. This factor will always give at least some weight in favor of following *Perez-Gonzales,* rather than *Matter of Torres-Garcia.* If the applicant fails to show reasonable reliance, any decision should note that failure. But USCIS must *separately* assess the relative strength of the "burden" factor. In other words, before denying the request because of a lack of reliance, USCIS must first consider whether, under the specific facts of a case, the "burden" factor, by itself, is enough to relieve the applicant from the effect of *Matter of Torres-Garcia,*

USCIS regularly addresses and adjudicates claims – such as in waiver applications – that denial of relief will result in a burden that is significantly greater than the usual consequences of removal. In a given case, the applicant may be able to present probative evidence that warrants a finding that the burden of denial *for this particular applicant* is greater than the ordinary consequences of removal. If the evidence does support this finding, approval could be an appropriate exercise of discretion, despite the lack of reliance on *Perez-Gonzalez*. If, by contrast, the burden to the applicant is commensurate with the ordinary consequences of removal, that *Montgomery Ward* factor, alone, may not warrant following *Perez-Gonzales*, rather than *Matter of Torres-Garcia.*

Question 2

> If a Class Member is also inadmissible under INA § 212(a)(9)(C)(i)(I), USCIS must determine whether the *Montgomery Ward* factors make it improper to rely on *Matter of Briones*.

The terms of the Settlement Agreement make it applicable *only* to aliens inadmissible under INA § 212(a)(9)(C)(i)(II). But *Carrillo de Palacios* and *Garfias-Rodriguez* recognized that *Montgomery Ward* factors may also affect the resolution of Forms I-212 filed by aliens inadmissible under INA § 212(a)(9)(C)(i)(I). Accordingly, although the Settlement Agreement, is silent on this second issue, Ninth Circuit law requires USCIS to consider whether to apply *Matter of Briones* in light of the *Montgomery Ward* factors if a class member is also inadmissible under INA 212(A)(9)(C)(i)(I).

This conclusion does not result in an "expansion" of the Settlement Agreement. As noted, the Settlement Agreement by its terms does *not* apply to aliens who are inadmissible under INA § 212(a)(9)(C)(i)(I), rather than (II). *Carrillo de Palacios* and *Garfias-Rodriguez*, however, do apply to aliens who are inadmissible under INA § 212(a)(9)(C)(i)(I).

In considering the effect of the *Montgomery Ward* factors to this second issue, however, USCIS should note that there is *no* presumption of reliance under the Settlement Agreement for 212(a)(9)(C)(i)(I) claims. That presumption only applies to 212(a)(9)(C)(i)(II) claims filed between August 13, 2004, and January 26, 2006. For this reason, as to the 212(a)(9)(C)(i)(I) claim, each Class Member who is also inadmissible under (9)(C)(i)(I) must present evidence to address both whether the Class Member reasonably relied on *Acosta v. Gonzales*, 439 F.3d 550 (9th Cir. 2006), and whether following *Matter of Briones*, would impose a burden on the applicant that is greater than the ordinary consequences of removal, in addition to the submission on the (9)(C)(i)(II) claim. As with a claim relating to 212(a)(9)(C)(i)(II), USCIS must consider the impact of the "burden" factor, even if the applicant cannot show reasonable reliance on *Acosta*.

Note that, if a Class Member who is also inadmissible under INA § 212(a)(9)(C)(i)(I) cannot establish that *Montgomery Ward* warrants following *Acosta*, then *Matter of Briones* will require

denial of the Form I-212 as to INA § 212(a)(9)(C)(i)(I). Since the Form I-212 cannot be approved, it would then be necessary to deny the Form I-485.

If USCIS finds, under the *Montgomery Ward* factors, that both *Perez-Gonzales* and *Acosta* apply, USCIS can approve both the Form I-212 and the Form I-485. Whether to do so remains a matter of agency discretion. As with any case, the proper exercise of this discretion rests on the weighing of all of the facts of the case, both favorable and unfavorable.

Conclusion

I have advised the Office of Field Operations, the Office of Policy and Strategy, and Service Center Operations that I am providing this opinion, and the Adjudications Law Division is working with those components to update PM 602-0108 to reflect the contents of this opinion. However, you should disseminate this opinion to the attorneys in the affected Districts, Field Offices, and Service Centers and inform them to provide legal advice consistent with this opinion immediately