

July 8, 2009: Important Information for Duran Gonzales Class Members

Plaintiffs Appeal District Court's Judgment in Favor of the Government; Opening Brief Filed

As previously reported, in February 2009, the district court entered a final judgment in favor of the government. As a result, USCIS is following the Ninth Circuit's decision *Duran Gonzales v. Dept. of Homeland Sec.*, 508 F.3d 1227 (9th Cir. 2007), and is denying class members' I-212 applications and giving effect to denied applications (i.e., putting people in removal proceedings or issuing reinstatement of removal orders). Plaintiffs now are arguing that *Duran Gonzales* should not apply retroactively to individuals relied on *Perez-Gonzalez*. The district court rejected this argument, and the plaintiffs have appealed to the Ninth Circuit. Plaintiffs filed their appeal brief on June 22, 2009.

See below for a discussion about steps class members may take if they are put in removal proceedings or reinstated.

Background and Case History

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).¹ 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. Thereafter, the court denied the motions to amend the complaint and redefine the class and entered judgment in favor of the government.

¹ 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.

Plaintiffs appealed the judgment to the Ninth Circuit Court of Appeals. The case is No. 09-35174. Plaintiffs filed their opening brief on June 22, 2009. The only issue on appeal is whether *Duran Gonzales* applies retroactively to class members who filed their applications in reliance of *Perez-Gonzalez* (i.e., the application was pending anytime on or after August 13, 2004 and on or before November 30, 2007).

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

USCIS now is allowed to deny class members' I-212 applications and give effect to 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.

Individuals with Denied I-212 Waiver Applications. Individuals with denied I-212s may appeal these decisions to the AAO and argue, if applicable, that the Ninth Circuit's decision in *Duran Gonzales* should not apply retroactively to them because they relied on *Perez-Gonzalez*. See the plaintiffs' appeal brief for more information about these arguments, <http://www.aifl.org/lac/chdocs/Duran-appealbrief.pdf>. In addition, individuals should consider whether there is any reason that *Duran Gonzales* does not apply to them for another reason. For example, if more than 10 years have passed since the person's last departure from the United States, he or she may be eligible for a waiver. See further discussion in the Duran Gonzalez Q&A, page 6, at <http://www.aifl.org/lac/chdocs/DuranQ-A.pdf>.

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*. See the plaintiffs' appeal brief for more information about these arguments, <http://www.aifl.org/lac/chdocs/Duran-appealbrief.pdf>. 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. In addition, individuals should consider whether there is any reason that *Duran Gonzales* does not apply to them for another reason. For example, if more than 10 years have passed since the person's last departure from the United States, he or she may be eligible for a waiver. See further discussion in the Duran Gonzalez Q&A, page 6, at <http://www.aifl.org/lac/chdocs/DuranQ-A.pdf>.

Note that in some removal cases, DHS attorneys are moving to terminate proceedings so that ICE can issue a reinstatement order. The aforementioned arguments may help in responding to a DHS motion to terminate.

If a final order of removal is issued by the BIA, the person may file a petition for review (and request for a stay) 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.aifl.org/lac/pa/lac_pa_041706.pdf. The Practice Advisory includes a sample petition for review.

Individuals with Reinstatement of Removal Orders. Class members whose prior orders are reinstated may file a petition for review (and request for a stay) in the Ninth Circuit to challenge the retroactive application of *Duran Gonzales*. See the plaintiffs' appeal brief for more information about these arguments, <http://www.aifl.org/lac/chdocs/Duran-appealbrief.pdf>. 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.aifl.org/lac/pa/lac_pa_041706.pdf. The Practice Advisory includes a sample petition for review.

Additional Information

Additional information about this suit, including court documents, is available at http://www.aifl.org/lac/lac_lit_92806.shtml.