

No. 09-35174

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**AURELIO DURAN GONZALEZ; et al.,
Plaintiffs - Appellees,**

v.

**UNITED STATES DEPARTMENT OF HOMELAND SECURITY; et
al.,
Defendants - Appellants.**

**APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF WASHINGTON
CV-06-1411-MJP**

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

Matt Adams
Northwest Immigrant Rights Project
615 Second Ave., Ste. 400
Seattle, WA 98104
Telephone: (206) 957-8611

Marc Van Der Hout
Stacy Tolchin
Van Der Hout, Brigagliano &
Nightingale
180 Sutter St., Fifth Floor
San Francisco, CA 94104

Trina Realmuto
Beth Werlin
American Immigration Law
Foundation
Suite 200, 1331 G Street NW
Washington, DC 20005

Attorneys for Plaintiffs - Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

I. INTRODUCTION. 1

II. ARGUMENT 4

A. The Rule and Defendants’ Position Regarding the Rule Has Changed. 4

B. Amending the Complaint and Class Definition Would Not Be Futile Because, Contrary to Defendants’ Assertion, This Court Did Not—Nor Could It Have—Decided the Retroactivity Issue Now Before It. 6

1. The Retroactivity Issue Was Not Before the *Duran Gonzales* Court. 7

2. The Retroactivity Claims Raised by the Proposed Redefined Class Did Not Exist Until After the *Duran Gonzales* Decision. 9

3. Adjudication of the Redefined Class’ Retroactivity Claims Does Not Render the *Duran Gonzales* Decision Advisory in Nature. 12

C. Supreme Court Case Law Dictates That *Duran Gonzales* Cannot Be Applied Retroactively to the Proposed Redefined Class. 13

1. The *Harper* and *Beam* Line of Cases Do Not Apply in the *Brand X* Context. 13

2. Even If *Harper* and *Beam* Were Applied, *Chevron Oil* Continues to Apply to Permit Prospective Application Only. 17

D.	The District Court Erred in Failing to Apply the <i>Montgomery Ward</i> Test.	21
1.	There Was A Change in the Rule.	21
2.	<i>Montgomery Ward</i> Is Applicable Where the Change in Law Involves the Interpretation of a Statute.	22
3.	Application of the <i>Montgomery Ward</i> Factors Counsels Against Retroactive Application of the New Rule.	24
III.	CONCLUSION.	27
	CERTIFICATE OF COMPLIANCE	29
	CERTIFICATE OF SERVICE.	30
	ADDENDUM OF AGENCY DECISIONS.	31

TABLE OF AUTHORITIES

Cases

Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984)..... 15

Brecht v. Abrahamson, 507 U.S. 619 (1993)..... 8

Chang v. United States, 327 F.3d 911 (9th Cir. 2003) 6, 14

Chevron Oil v. Huson, 404 U.S. 97 (1971) 3, 17, 18, 20

Cuevas-Gaspar v. Gonzales, 430 F.3d 1013 (9th Cir. 2005) 20

Danforth v. Minnesota, 552 U.S. ___, 128 S. Ct. 1029 (2008)..... 15

Davis v. Michigan Dept. of Treasury, 489 U.S. 803 (1989)..... 14

George v. Camacho, 119 F.3d 1393 (9th Cir. 1997) (en banc)..... 3, 17, 19

Glazner v. Glazner, 347 F.3d 1212 (11th Cir. 2003) 17

Harper v. Va. Dept. of Tax., 509 U.S. 86 (1993)..... passim

Heckler v. Cmty. Health Servs. of Crawford County, Inc., 467 U.S. 51
 (1984) 16

In re Mersmann, 505 F.3d 1033 (10th Cir. 2007) 17

In re Sanford Fork & Tool Co., 160 U.S. 247 (1895) 11

James B. Beam Distilling Co. v. Georgia, 501 U.S. 529 (1991)..... passim

Lehman v. Burnley, 866 F.2d 33 (2d Cir. 1989)..... 22

Miguel-Miguel v. Gonzales, 500 F.3d 941 (9th Cir. 2007) 14, 22

Montgomery Ward & Co., Inc. v. FTC, 691 F.2d 1322 (9th Cir. 1982) passim

National Cable & Telecommunications Ass'n v. Brand X Internet Services,
 545 U.S. 967 (2005) passim

Nguyen v. United States, 792 F.2d 1500 (9th Cir. 1986)..... 10, 11

Patterson v. McLean Credit Union, 491 U.S. 164 (1989)..... 23

Perez-Gonzalez, 379 F.3d 783 (9th Cir. 2004)..... passim

Quern v. Jordan, 440 U.S. 332 (1979) 10

Rivers v. Roadway Express, Inc., 511 U.S. 298 (1994)..... 23

Rogers v. Hill, 289 U.S. 582 (1933) 10

Scott v. State, 187 Ga. 702, 2 S.E.2d 65 (1939) 15

SEC v. Chenery Corp, 332 U.S. 194 (1947)..... 16

See Gen. Tel. Co. of the Southwest v. Falcon, 457 U.S. 147 (1982)..... 11

Sierra Club v. Penfold, 857 F.2d 1307 (9th Cir. 1988)..... 11

Sprague v. Ticonic National Bank, 307 U.S. 161 (1939) 10

Stevens v. F/V Bonnie Doon, 731 F.2d 1433 (9th Cir. 1984)..... 10

Statutes

INA § 212(a)(9)(C)(i)(II)..... 5

INA § 245(i)..... 4

Other Authorities

In Re: [IDENTIFYING INFORMATION REDACTED BY AGENCY], 2006
 WL 5914582 (AAO December 1, 2006) (unpublished)..... 5

In Re: Elidio Madera, A78 740 417, 2004 WL 3187213 (BIA Dec. 20, 2004)
 (unpublished)..... 5

In Re: Jose Luis Chavez A.K.A. Jose Luis Chavez Temores, A78 436 173,
 2007 WL 1129205 (BIA February 16, 2007) (unpublished) 5

In Re: Juan Zuniga-Tapia, A79 765 564, 2005 WL 1104573 (BIA Jan. 26,
 2005) (unpublished) 5

In Re: Julio Cesar Vazquez-Centeno, A78 739 650, 2004 WL 2952152 (BIA
 Nov. 19, 2004) (unpublished) 5

In Re: Manuel Luna-Sanchez, A75 616 296, 2007 WL 2197539 (BIA June
 29, 2007) (unpublished) 5

In Re: Wenceslao Rendon-Eligio, A91 639 708, 2007 WL 4182278 (BIA
 Oct. 15, 2007) (unpublished)..... 5

Matter of Anselmo, 20 I. & N. Dec. 25 (BIA 1989) 4

Matter of Babaisakov, 24 I. & N. Dec. 306 (BIA 2007) 20

Matter of Briones, 24 I & N Dec. 355 (BIA 2007) 20

Matter of K-S-, 20 I. & N. Dec. 715 (BIA 1993)..... 4

Matter of Olivares, 23 I. & N. Dec. 148 (BIA 2001) 4

Matter of Ramirez-Vargas, 24 I. & N. Dec. 599 (2008) 20

Matter of Torres-Garcia, 23 I. & N. Dec. 866 (BIA 2006) 6, 20, 21, 24

Matter of Y-L-, 23 I. & N. Dec. 270 (Op. Att’y Gen. 2002)..... 22

I. INTRODUCTION

The Court's decision in the prior appeal in this case, *Duran Gonzales v. Dept. of Homeland Security*, 508 F.3d 1227 (9th Cir. 2007), was the first time this Court applied *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005) ("*Brand X*"), to find that it would defer to, and adopt, an agency's statutory interpretation which contradicted a prior statutory interpretation of this Court. Despite Defendants attempts to side step the important issue of first impression, this Court now must address the question that necessarily follows: what retroactive analysis should be applied to those applicants who acted in reliance on the old rule?

Defendants plainly err in asserting that the agency's position has always precluded persons from the proposed redefined class from applying for and obtaining adjustment of status. Def. Br. 14. Until the policy of non-acquiescence that prompted the instant litigation, the Department of Homeland Security (DHS) consistently recognized that it was bound to adjudicate the adjustment of status and I-212 waiver applications filed by members of the proposed redefined class in accordance with this Court's decision in *Perez-Gonzalez*, 379 F.3d 783 (9th Cir. 2004). Thus, Defendants cannot plausibly dispute that their position regarding I-212 eligibility for

members of the proposed redefined has changed: members of the proposed redefined class were eligible to have their I-212 waivers adjudicated under *Perez Gonzales* and such eligibility was cut-off by *Duran Gonzales*.

Defendants twist in circles attempting to keep the Court from addressing the obvious—that this subset of the class has a separate claim that has not yet been addressed by any court: that it is impermissibly retroactive to apply this new rule adopting an agency interpretation to them where they already had acted in reliance upon the old rule by filing I-212 waiver applications in conjunction with their applications for adjustment of status.

First, Defendants mistakenly discount the significance of the application of *Brand X* in this case. It must be emphasized that the old rule set out in *Perez-Gonzalez* was not overturned because it was an unlawful interpretation. Rather, it was overturned because the agency subsequently promoted a contrary, but also permissible, interpretation of an ambiguous statute that this Court announced it must defer to under *Brand X*. Given *Brand X*'s application, an analysis is required from this Court to determine whether the new rule should be applied retrospectively to persons who acted in reliance upon an old rule.

Second, Defendants are wrong that the retroactivity issue was resolved in *Duran Gonzales*. Not only is there no language in the decision that explicitly or implicitly suggests this, but the retroactivity claim did not even exist until after the *Duran Gonzales* decision was issued. This Court's silence on a question that was not even at issue cannot be read to be its actual holding. This is especially so given that no court has ever addressed the proper retroactivity standard to be applied when *Brand X* is invoked.

Third, Defendants' reliance on *Harper v. Va. Dept. of Tax.*, 509 U.S. 86 (1993), and *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991), is based on Defendants' erroneous assertion that Plaintiffs seek "a protected expectation in continued adherence to an incorrect interpretation of a statute." Def. Br. 34. *Harper* did not involve multiple permissible interpretations of a statute, like the instant case. As noted, *Duran Gonzales* did not find that the old rule was an "incorrect interpretation."

However, even if this Court were to apply *Harper* and *Beam*, then the Supreme Court's decision in *Chevron Oil v. Huson*, 404 U.S. 97 (1971), counsels against retroactive application. Despite Defendants' assertions, it is clear that *Chevron Oil* remains good law when applied uniformly to all pending cases. *George v. Camacho*, 119 F.3d 1393 (9th Cir. 1997) (en banc).

Plaintiffs submit, however, that the proper test to determine whether the new rule should be given retroactive effect is the test laid out by this Court in *Montgomery Ward & Co., Inc. v. FTC*, 691 F.2d 1322 (9th Cir. 1982). But regardless of whether this Court applies *Montgomery Ward* or any other retroactivity test, case law requires that they be afforded the opportunity to carry forward with the applications that were filed in plain reliance upon the old rule.

II. ARGUMENT

A. The Rule and Defendants' Position Regarding the Rule Has Changed.

Despite Defendants' statement to the contrary, the rule and the agency's position has changed. The BIA has held repeatedly that it adheres to a rule of acquiescence: the agency will follow circuit court precedents in cases arising in that circuit. *See, e.g., Matter of Olivares*, 23 I. & N. Dec. 148, 149 (BIA 2001); *Matter of K-S-*, 20 I. & N. Dec. 715 (BIA 1993); *Matter of Anselmo*, 20 I. & N. Dec. 25 (BIA 1989).

In adherence to the rule of acquiescence, after the Court decided *Perez-Gonzalez*, the BIA found that individuals in the Ninth Circuit are eligible to adjust status under INA § 245(i) with an accompanying I-212

waiver, even if they were inadmissible under INA § 212(a)(9)(C)(i)(II). *See, e.g., In Re: Wenceslao Rendon-Eligio*, A91 639 708, 2007 WL 4182278 (BIA Oct. 15, 2007) (unpublished) (remanding case to IJ in order to “proceed with his application pursuant to *Perez-Gonzalez*); *In Re: Manuel Luna-Sanchez*, A75 616 296, 2007 WL 2197539 (BIA June 29, 2007) (unpublished) (agreeing with DHS position that case should be remanded to IJ for adjudication of adjustment application); *In Re: Jose Luis Chavez A.K.A. Jose Luis Chavez Temores*, A78 436 173, 2007 WL 1129205 (BIA February 16, 2007) (unpublished) (finding individual eligible for relief under *Perez-Gonzalez*).¹

USCIS’ Administrative Appeals Office similarly found such individuals eligible for adjustment of status. *See In Re: [IDENTIFYING INFORMATION REDACTED BY AGENCY]*, 2006 WL 5914582 (AAO December 1, 2006) (unpublished) (finding *Perez-Gonzalez* controlling). Further, Defendants’ *Perez-Gonzalez* Memo, E.R. at 54-57, purports to comply with *Perez-Gonzalez*.

¹ *See also In Re: Juan Zuniga-Tapia*, A79 765 564, 2005 WL 1104573 (BIA Jan. 26, 2005) (unpublished) (finding individual eligible for adjustment of status under *Perez-Gonzalez* and remanding to IJ); *In Re: Elidio Madera*, A78 740 417, 2004 WL 3187213 (BIA Dec. 20, 2004) (unpublished) (same); *In Re: Julio Cesar Vazquez-Centeno*, A78 739 650, 2004 WL 2952152 (BIA Nov. 19, 2004) (unpublished) (same).

Significantly, the BIA, AAO, and USCIS all issued the above-cited decisions and memorandum *after* the BIA decided *Matter of Torres-Garcia*, 23 I. & N. Dec. 866 (BIA 2006). These decisions confirm that the agency followed the rule of acquiescence and continued to follow circuit precedent until *Duran Gonzales* was issued.² Now that the Court has deferred to and adopted the agency's interpretation of the statute as set forth in *Matter of Torres Garcia*, the agency's application of this new interpretation represents a clear departure from prior practice.

B. Amending the Complaint and Class Definition Would Not Be Futile Because, Contrary to Defendants' Assertion, This Court Did Not—Nor Could It Have—Decided the Retroactivity Issue Now Before It.

To support its claim that the issue before this Court already has been decided, Defendants rely primarily on this Court's statement in *Duran-Gonzales* that "plaintiffs as a matter of law are not eligible to adjust their status because they are ineligible to receive I-212 waivers." Def. Br. 17.

² In general, the BIA does not issue a precedent decision to explicitly announce its determination to acquiesce to case law of a specific circuit for each issue that arises, but nonetheless there is precedent on the rule of acquiescence and a practice of following Circuit law, which in itself establishes a clear rule. *See Chang v. United States*, 327 F.3d 911, 928 (9th Cir. 2003) (applying *Montgomery Ward* factors and finding a clear change in policy where "[t]he INS's history of approving I-829 petitions without respect to the presence of redemption agreements and related provisions was a well established practice.").

However, the term “plaintiffs” included both the named plaintiffs as well as all other class members, not just those individuals who filed applications in reliance on *Perez-Gonzalez* but also all individuals who would file in the future. This one sentence cannot be read as having resolved the retroactivity issue now before the Court.

The Court did not consider the retroactivity claims raised by the proposed redefined class, and in fact, these claims did not even exist until after the *Duran Gonzales* decision was issued. Given that the retroactivity issue was not considered or resolved in *Duran Gonzales*, Defendants’ argument that Plaintiffs’ motions are futile must fail.

1. The Retroactivity Issue Was Not Before the *Duran Gonzales* Court.

The Court of Appeals was not asked to address the claims that are now presented in the current phase of this litigation. Previously, this Court was only asked by Defendants to review the preliminary injunctive relief that was granted to the *entire* certified class, including both current and future I-212 waiver applicants. In overturning the preliminary injunction, this Court announced the new rule adopting the agency’s interpretation, and accordingly remanded the matter to the District Court for further proceedings consistent with the new rule. Thus, this Court was not faced

with, and did not in any way address, whether the new rule it was announcing may have an impermissible retroactive effect on a limited subset of the class who had already filed applications in reliance upon the old rule. Defendants therefore err in assuming that *Duran Gonzales* forecloses unstated claims of impermissible retroactive application. *See Brecht v. Abrahamson*, 507 U.S. 619, 630-31 (1993) (*stare decisis* is not applicable unless the issue was “squarely addressed” in the prior decision).

Defendants concede that “[i]n using the word ‘plaintiffs,’ the *Duran Gonzalez II* Court did not distinguish between the named plaintiffs and the entire class as a whole.” Def. Br. 21. Defendants also acknowledge that the original class included not just persons who had already filed applications, but also, all future applicants. Def. Br. 20. Therefore, one sentence in the order overturning the grant of preliminary injunction, which uses a broad term encompassing those who have a retroactivity claim and those who do not, cannot be read as having decided an important retroactivity claim, especially one that was not even presented to the Court at that time and which is a matter of first impression.

2. The Retroactivity Claims Raised by the Proposed Redefined Class Did Not Exist Until After the *Duran Gonzales* Decision.

Defendants assert that since all of the proposed redefined class members were already involved in the ongoing litigation, the announcement of the new rule could not have an impermissible retroactive effect on certain members within the class. This assertion is both illogical and conflicts with established precedent.

It is illogical because it would have been premature for Plaintiffs to argue the retroactivity claim in the original complaint as the original complaint challenged the government's failure to abide by the rule in effect at that time (i.e., the rule as announced in *Perez-Gonzalez*).³ It is only after the rule in *Perez-Gonzalez* was overturned by this Court's decision in *Duran Gonzales* (deferring to and adopting the agency's interpretation pursuant to *Brand X*) that named Plaintiffs and members of the proposed redefined class were put on notice of a new rule, leaving this smaller group in a position to challenge for the first time the unlawful retroactive application of the new rule to the applications they filed under the old rule.

³ Indeed, the District Court agreed with Plaintiffs and granted preliminary injunctive relief based on its finding that the rule from this Court's holding in *Perez-Gonzalez* was controlling. *Duran Gonzales* arose from Defendants' action appealing that decision.

Moreover, the fact that all of the persons in the more limited group, the proposed redefined class, are encompassed within the broader certified class, does not, in and of itself, preclude the more limited group from presenting a claim (in this case based on the retroactive application of a new rule) that would not be applicable to the larger certified class.

Indeed, this Court has repeatedly made clear that where the Court of Appeals rejects an earlier claim and remands proceedings to the district court, the party may nonetheless amend the complaint or class to present issues not previously addressed:

Absent a mandate which explicitly directs to the contrary, a district court upon remand can permit the plaintiff to “file additional pleadings, vary or expand the issues” *Rogers v. Hill*, 289 U.S. 582, 587-88, 77 L. Ed. 1385, 53 S. Ct. 731 (1933). “While a mandate is controlling as to matters within its compass, on the remand a lower court is free as to other issues.” *Quern v. Jordan*, 440 U.S. 332, 347 n.18, 59 L. Ed. 2d 358, 99 S. Ct. 1139 (1979) (quoting *Sprague v. Ticonic National Bank*, 307 U.S. 161, 168, 83 L. Ed. 1184, 59 S. Ct. 777 (1939)). Thus, although the mandate of an appellate court forecloses the lower court from reconsidering matters determined in the appellate court, it “leaves to the district court any issue not expressly or impliedly disposed of on appeal.” *Stevens v. F/V Bonnie Doon*, 731 F.2d 1433, 1435 (9th Cir. 1984).

Nguyen v. United States, 792 F.2d 1500, 1502 (9th Cir. 1986).

Similarly, in *Sierra Club v. Penfold*, this Court affirmed a district court decision granting leave to amend, stating:

Once remanded, the district court was free to rule not only on the issue directed in the remand, but other issues as well so long

as our mandate did not direct to the contrary. *Nguyen v. United States*, 792 F.2d 1500, 1502 (9th Cir. 1986). Thus, the remand could include allowance of additional pleadings or amendments varying or expanding the issues. *Id.*

Our mandate is broadly written. It contains no language which expressly or impliedly foreclosed the district court from addressing the additional issues it did in its November 6 order. The district court therefore did not err in addressing issues other than the one indicated in our order of remand.

857 F.2d 1307, 1312 (9th Cir. 1988) (internal footnote omitted). *See also Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 160 (1982) (trial judge is free to modify certification order in light of subsequent developments in the litigation); *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895) (lower court “may consider and decide any matters left open by the mandate of [the higher court]...”).

Thus, the District Court erred in finding that the instant claims would be futile based on the prior ruling of this Court. Here, retroactivity claims of Plaintiffs and the proposed redefined class have yet to be addressed by any Court. The current phase of this litigation does not challenge the agency’s rejection of the old rule in *Perez-Gonzalez*. Rather, for the first time, Plaintiffs and members of the proposed redefined class present the issue of whether the new rule adopting the agency’s interpretation can be applied to

persons who submitted applications in reliance on the old rule that was in effect at the time of the application.⁴

3. Adjudication of the Redefined Class' Retroactivity Claims Does Not Render the *Duran Gonzales* Decision Advisory in Nature.

Defendants incorrectly assert that Plaintiffs suggest that the holding in *Duran Gonzales* should not bind any part of the class, thereby making the decision an impermissible advisory opinion. Def. Br. 23. This is clearly not the case. Not only did the Court's decision eliminate the preliminary injunctive relief, it also established the new rule, adopting the agency's contrary statutory interpretation. As Defendants acknowledge, the certified class included both current I-212 applicants and all future applicants. The *Duran Gonzales* decision undoubtedly eliminates any right future applicants would otherwise have to submit such applications for relief. Specifically, it

⁴ Defendants also err in asserting that the motion to amend the class definition failed to satisfy the legal requirements for the proposed redefined class. Def. Br. 20. There is no basis for this contention as the District Court did not make any finding that Plaintiffs had failed to satisfy the requirement for Fed. R. Civ. P. 23. And as Defendants recognize, this Court now reviews a denial of a motion for leave to amend the class based on a standard of abuse of discretion. Moreover, the District Court had already certified the broader class as Plaintiffs had previously demonstrated full satisfaction of all requirements, which are equally applicable to the more narrow proposed redefined class. Indeed, Defendants did not even appeal the District Court's original order granting class certification.

clearly precludes class members' applications where the applications were filed on or after this Court issued *Duran Gonzales*, as well as all future applications. Therefore, Defendants' assertion that Plaintiffs' claims would render *Duran Gonzales* an advisory opinion is simply not accurate.

C. Supreme Court Case Law Dictates That *Duran Gonzales* Cannot Be Applied Retroactively to the Proposed Redefined Class.

1. The *Harper* and *Beam* Line of Cases Do Not Apply in the *Brand X* Context.

Defendants have attempted to re-characterize Plaintiffs' claim as a standard civil case involving retroactive application of a judicial decision. Specifically, Defendants assert that the Supreme Court's decisions in *Harper v. Va. Dept. of Tax.*, 509 U.S. 86, 97 (1993), and *Beam Distilling Co. v. Georgia*, 501 U.S. 529, 543 (1991), require the retroactive application of *Duran Gonzales* to all class members.⁵

Defendants' reliance on the Supreme Court's civil retroactivity case law fails to take into account the unique posture of a case that invokes *Brand X*, where a subsequent circuit court decision has adopted an agency decision,

⁵ *Harper* and *Beam* stand for the proposition that when a court "applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." *Harper*, 509 U.S. at 97.

as opposed to having found that the prior circuit court decision was an erroneous interpretation of law. As such, the Court should not view the retroactivity analysis from the ill-fitting lens proposed by Defendants; instead it should recognize that a *Brand X* decision adopting an agency's interpretation of an ambiguous statute requires consideration of factors such as those laid forth in *Montgomery Ward & Co., Inc. v. FTC*, 691 F.2d 1322 (9th Cir. 1982), *Chang v. United States*, 327 F.3d 911 (9th Cir. 2003), and *Miguel-Miguel v. Gonzales*, 500 F.3d 941 (9th Cir. 2007).

Importantly, *Harper* and *Beam* simply do not address a situation such as this, where a federal court has adopted the position of the agency and has overturned its prior decision. Rather, *Harper* and *Beam* involve cases where a court reversed a prior judicial ruling as an erroneous interpretation of a statute or constitutional provision. For instance, in *Harper*, the Supreme Court addressed a prior decision in *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803 (1989), which held that “a State violates the constitutional doctrine of intergovernmental tax immunity when it taxes retirement benefits paid by the Federal Government but exempts from taxation all retirement benefits paid by the State or its political subdivisions.” *Harper*, 509 U.S. at 89.

Likewise, in *Beam*, the Supreme Court addressed its prior decision in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984),⁶ which had found that a Hawaii law which “imposed an excise tax on imported liquor at a rate double that imposed on liquor manufactured” in Hawaiian products violated the Commerce Clause and was unconstitutional. 501 U.S. at 532.⁷

In sum, both *Harper* and *Beam* involve situations where the court found that prior published decisions had erroneously interpreted a statute as consistent with the Constitution, when in fact the statutes were unconstitutional. Hence, while announcing new rules of law, they in effect announced the law as it always had been. *See also Danforth v. Minnesota*, 552 U.S. ___, 128 S. Ct. 1029, 1035 (2008) (explaining that in criminal cases, a new rule on constitutional grounds addresses the law as it always has been and that the underlying legal issue existed prior to the court’s articulation of the rule).

Unlike *Harper* and *Beam*, in cases involving the retroactive application of agency decisions, courts generally do not follow the Supreme

⁶ *Dias* established a new rule of law in that it overruled prior Hawaiian Supreme Court law which had found that the state tax was constitutional. 468 U.S. at 275.

⁷ *Bacchus* overruled prior Georgia Supreme Court law which had found a similar statute consistent with the constitution and thus announced a new principle of law. *Scott v. State*, 187 Ga. 702, 2 S.E.2d 65 (1939); *Beam*, 479 U.S. at 533.

Court's presumption of uniform retroactive application. *See* Pet. Op. Br. 26. This is supported by the Supreme Court's decisions in *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947), and *Heckler v. Cmty. Health Servs. of Crawford County, Inc.*, 467 U.S. 51, 60 n.12 (1984), where the court recognized the particular posture of agency decisions and that administrative agencies may not apply new rules retroactively when to do so "would unduly intrude upon reasonable reliance interests." *Heckler*, 467 U.S. at 60 n.12. *See also Greene v. United States*, 376 U.S. 149 (1964) (holding that a litigant who relied on agency regulations continued to be eligible for relief despite a change in regulation because his right vested prior to the change).

In a *Brand X* case, the court is reversing prior precedent – not because it was wrong – but because the agency has offered a different, permissible construction of the statute.⁸ *Harper* and *Beam*, therefore, do not apply because *Brand X* cases by definition involve ambiguous statutes with multiple reasonable interpretations of the statute and thus raise the concerns expressed in *Chenery* and *Heckler*.

⁸ For that reason, Defendants misstate Plaintiffs' position when they argue that "[t]he fact that Plaintiffs experienced an adverse ruling does not make that rule less binding." Def. Br. 22. Plaintiffs do not argue that this Court's order in *Duran Gonzales* is not binding and, in fact, because it is binding, the entire class now faces the consequences of moving forward without a preliminary injunction. However, the instant litigation did not occur in the context of an issue where "the law is unclear" or where the Court was faced with a statutory issue of first impression. Def. Br. 22.

2. Even If *Harper* and *Beam* Were Applied, *Chevron Oil* Continues to Apply to Permit Prospective Application Only.

Even if *Harper* and *Beam* were applicable in *Brand X* cases where a court has adopted an agency's decision, as opposed to overturned a prior erroneous interpretation of law, then the court should still conclude that *Duran Gonzales* does not apply retrospectively based on *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). In *George v. Camacho*, 119 F.3d 1393 (9th Cir. 1997) (en banc), the Court recognized the vitality of the *Chevron Oil* retroactivity test for judicial decisions post *Harper* and *Beam*.⁹ Defendants go through a lengthy discussion of *Harper's* rationale for withdrawing from the *Chevron Oil* test, yet Defendants fail to inform that the Ninth Circuit and other Circuit Courts have acknowledged that *Chevron Oil* continues to apply to civil judicial cases, but no longer in piecemeal adjudication that the Court barred in *Harper* and *Beam*. *George v. Camacho*, 119 F.3d at 1399. See also *In re Mersmann*, 505 F.3d 1033, 1038 (10th Cir. 2007); *Glazner v. Glazner*, 347 F.3d 1212, 1215 (11th Cir. 2003).

⁹ The case cited by Defendants for the proposition that *Chevron Oil* has been abrogated fails to acknowledge the *en banc* court's decision in *George v. Camacho* or its discussion of *Chevron Oil* after *Beam* and *Harper*. Def. Br. 24, citing *Ditto v. McCurdy*, 510 F.3d 1070, 1077 n.5 (9th Cir. 1997).

Hence, even assuming that *Harper* and *Beam* apply to *Brand X* cases, *Chevron Oil* counsels against retroactive application. *See* Pet. Op. Br. at 41. For purposes of *Chevron Oil*, this Court engages in a three part test: First, the court considers whether a decision establishes a new principle of law. If so, it may be applied prospectively (as opposed to retrospectively). *George v. Camacho*, 119 F.3d at 1401. Second, the court examines whether retrospective application will advance the new holding. *Id.* Third, the Court looks to fundamental principles of fairness. *Id.* As addressed in Plaintiffs' Opening Brief, Plaintiffs meet this test, and thus *Chevron Oil* counsels against retroactive application. Op. Br. at 42.

Defendants argue that by issuing *Duran Gonzales*, and by failing to "limit its holding to only future cases" the decision is presumed to apply retroactively to all class members. Def. Br. 28. However, not only has no court found that a decision invoking *Brand X* is presumed to be retroactive unless there is an explicit invocation of prospective application, but there is nothing in *Duran Gonzales* to indicate that the Court considered the retroactivity claim at all, let alone that the Court decided the issue "explicitly or by necessary implication." Def. Br. 27. As addressed in section II.B.2, the issue was not before this Court previously and it was the decision itself that gave rise to the claim.

Moreover, neither *Harper* nor *Beam* were class actions and therefore did not address the current situation where the class was comprised both of individuals who relied on a prior rule and have a retroactivity claim, and other future applicants whose reliance interest was speculative. Hence, the distinction between those class members who had relied on *Perez-Gonzalez* and those who had not could not have been presented in the original complaint, given that at the time of the litigation all class members' interests were the same as this Court had established one rule that was applicable to everyone.

Additionally, the *Duran Gonzales* decision was a dissolution of a preliminary injunction and not a final judgment of the case. Defendants note that in *George v. Camacho* this Court "specifically noted that if the new rule is applied in the case in which it was announced, it must be applied to all pending cases." Def. Br. 39. Defendants fail to acknowledge that this case continues as a live matter before this Court; this Court will only now determine whether this new rule will be applied retroactively. The whole point of the current stage of the litigation is that this Court has not yet determined whether the new rule should be applied retroactively in the instant case.

Defendants also assert that *Chevron Oil* does not counsel against retroactive application because Plaintiffs have not suffered significant harm as their entitlement to immigration benefits was never settled law. Def. Br. 29. However, such a claim is without merit. This Court's published decision in *Perez-Gonzalez* was precedent for litigants within this Circuit, and both the Department of Homeland Security and the Board of Immigration Appeals previously adhered to the decision. *See supra* sect. II.A. In fact, the BIA continued to adhere to *Perez-Gonzalez* even after *Matter of Torres-Garcia* was issued. *See supra* at 5.¹⁰ Furthermore, *Duran Gonzales* was the first case of this Circuit to apply *Brand X* to an immigration case. It is disingenuous to assert now that noncitizens could not

¹⁰ While Defendants argued that this Court should defer to the Board's decision in *Matter of Torres-Garcia*, a decision arising out of the Fifth Circuit, the Board itself did not announce that it would no longer acquiesce to *Perez-Gonzalez*, and in fact, the Board did just opposite – it continued to adhere to *Perez-Gonzalez* for cases arising out of the Ninth Circuit. This contrasts sharply with *Matter of Ramirez-Vargas*, 24 I. & N. Dec. 599 (2008) (invoking *Brand X* in announcing that it will no longer follow this Court's decision in *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013 (9th Cir. 2005)). *C.f.*, *Matter of Babaisakov*, 24 I. & N. Dec. 306, 322 (BIA 2007) (citing *Brand X* but stating “[w]e leave for another day any questions that may arise with respect to circuit law that may be in tension with this decision, as we ordinarily follow circuit law in cases arising within the particular circuit and the ground for any departure would need to be developed in the context of specific cases”); *Matter of Briones*, 24 I & N Dec. 355, 371 n.9 (BIA 2007) (noting disagreement with both Ninth and Tenth Circuit precedent, but ultimately not resolving issue of what rule should be followed in those circuits).

rely on *Perez-Gonzalez* in affirmatively applying for permanent residency prior to this Court's holding in *Duran Gonzales*.

D. The District Court Erred in Failing to Apply the *Montgomery Ward* Test.

Defendants attempt to refute Plaintiffs' argument that the district court should have applied the *Montgomery Ward* test by arguing that there is no new agency rule and that this case involves "pure statutory interpretation." Def. Br. 31-34. The Defendants are simply wrong about whether there was a change in the rule, and their assumption that *Montgomery Ward* does not apply when the underlying issue involves a statutory interpretation is also unfounded.

1. There Was a Change in the Rule.

As discussed above, *supra*, sect. II.A, despite Defendants' statement to the contrary, the rule and the agency's position has clearly changed. The BIA has held repeatedly that it is bound by circuit court precedents in cases arising in that circuit, and the BIA continued to adhere to *Perez-Gonzalez* even after it issued *Matter of Torres-Garcia*.

Thus, until this Court issued *Duran Gonzales*, the agency's rule was to follow *Perez-Gonzalez* in cases arising in this Circuit. Now that the Court has deferred to and adopted the agency's interpretation of the statute as set

forth in *Matter of Torres Garcia*, the agency's application of this new interpretation represents a clear departure from prior practice.

2. *Montgomery Ward* Is Applicable Where the Change in Law Involves the Interpretation of a Statute.

Defendants attempt to distinguish *Montgomery Ward* and *Miguel-Miguel* from the current case because the current case involves “an issue of pure statutory interpretation” as opposed to “setting forth a new rule of law.” Def. Br. 33. However, *Miguel-Miguel* and *Duran Gonzales* both involve statutory interpretation and therefore, the Defendants' attempt to distinguish these cases fails.

Miguel-Miguel, like the instant case, involved an interpretation of an ambiguous statute. *See Miguel-Miguel v. Gonzales*, 500 F.3d 941, 947-49 (9th Cir. 2007). In *Miguel-Miguel*, the Court considered whether the Attorney General's decision in *Matter of Y-L-*, 23 I. & N. Dec. 270 (Op. Att'y Gen. 2002), was a permissible construction of the particularly serious crime statute at 8 U.S.C. § 1231(b)(3). *Id.* As in *Duran Gonzales*, the Court held that the Attorney General's construction of the ambiguous statute – which differed from a previously binding construction of the statute – was permissible in light of the statute's text, structure and purpose. *See Miguel-Miguel*, 500 F.3d at 946-47, 949; *see also Lehman v. Burnley*, 866 F.2d 33, 37-38 (2d Cir. 1989) (applying *Chevron* and deferring to an agency's

reasonable interpretation of a statute, but concluding that the new interpretation should not apply retroactively). Consequently, Defendants' attempt to distinguish *Miguel-Miguel* from *Duran Gonzales* by labeling one a "new rule" and one a "pure statutory interpretation" is unavailing.

Furthermore, Defendants' reliance on *Rivers v. Roadway Express, Inc.*, 511 U.S. 298 (1994), is misplaced. In *Rivers*, the Supreme Court noted that its decision *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), "did not overrule any prior decision of this Court; rather, it held and therefore established that the prior decisions of the Courts of Appeals which read § 1981 to cover discriminatory contract termination were *incorrect*." *Rivers*, 511 U.S. at 312. The Court went on to say that in the "hierarchical federal court system," the fact that lower courts had reached a different conclusion about the meaning of the statute did not mean that the Supreme Court's decision in *Patterson* "changed" the law. *Id.* at 312-13 & n.12. "Rather, given the structure of our judicial system, the *Patterson* opinion finally decided what § 1981 had *always* meant and explained why the Courts of Appeals had misinterpreted the will of the enacting Congress." *Id.* at 313 n.12 (emphasis in the original).

The situation addressed in *Rivers* differs in significant ways from the current situation. First, unlike *Rivers*, where the Supreme Court did not

overrule one of its own decisions, the Ninth Circuit in *Duran Gonzales*, did, in fact, overrule its prior precedent *Perez-Gonzalez*. Second, *Duran Gonzales* is not about the hierarchy of the federal court system. *Duran Gonzales* did not hold that the prior rule “misinterpreted the will of the enacting Congress” or even was “incorrect,” nor could it have made such a finding regarding another panel’s decision. Instead, the Court deferred to and adopted the agency’s subsequent permissible interpretation of the statute.

3. Application of the *Montgomery Ward* Factors Counsels Against Retroactive Application of the New Rule.

Plaintiffs have demonstrated that the issue in *Duran Gonzales* was not an issue of first impression. This Court previously addressed this precise issue in *Perez-Gonzalez*. Then, in *Matter of Torres-Garcia*, the BIA adopted a different position, and in doing so, acknowledged that its decision was contrary to the rule in the Ninth Circuit. *See Matter of Torres-Garcia*, 23 I. & N. Dec. at 873. Moreover, as discussed above, the BIA’s binding case law and practice establish that it followed the rule in *Perez-Gonzalez* in cases arising in the Ninth Circuit. Thus, Defendants’ unsupported conclusion that the agency always followed one rule is plainly wrong.

The named Plaintiffs and the proposed modified class also have shown that they properly relied on the prior rule. Given that binding Circuit precedent – to which the agency adhered – clearly established their eligibility for adjustment of status, it was entirely reasonable for plaintiffs to rely on the old rule.

Additionally, named Plaintiffs and the proposed modified class have shown that retroactive application of the new rule would impose an immense burden on them because their applications for adjustment of status would be denied, they would be subject to reinstatement of removal and detention, and they would have lost thousands of dollars. Defendants do not attempt to refute these facts.

Instead, Defendants argue that retroactive application “would not be fundamentally unfair because Plaintiffs have benefitted from entitlements, including American jobs, that they were ineligible to receive under the plain language of the statute.” Def. Br. 35. Again, Defendants’ statement reflects its misreading of *Duran Gonzales*. *Duran Gonzales* involves deference to an agency’s interpretation of an ambiguous statute, and therefore Defendants’ are wrong that the plain language compels any one reading of the statute. *See Duran Gonzales*, 508 F.3d at 1237. Plaintiffs applied for benefits in reliance on Ninth Circuit precedent, which the agency followed,

that clearly established their eligibility to apply for adjustment of status (and allowed them to work lawfully while the application was pending). Given that the statutory scheme was not clear on its face and the Ninth Circuit and the Board reached opposite conclusions in interpreting the statute, this Court should reject Defendants' suggestion that is not fundamentally unfair to apply the decision retroactively.¹¹

Finally, Plaintiffs have shown that Defendants' statutory interest in a retroactive application is negligible. While Plaintiffs do not dispute the government's interest in enforcing the immigration laws, *see* Def. Br. 36, that interest does not compel a finding that the new rule should be applied retroactively here. As the Court found in *Duran Gonzales*, Congress was ambiguous regarding whether Plaintiffs are eligible to adjust along with an I-212 waiver. Given this ambiguity, and in light of the fact that conflicting

¹¹ Similarly, Defendants argue that Plaintiffs suffer no new liability because they were never entitled to residency. Def. Br. 30. However, as discussed above, Plaintiffs were entitled to adjudication of their applications for residency under the *Perez-Gonzalez* decision *as a matter of law*. Hence, Plaintiffs *were* eligible for a benefit when they filed this litigation. *Duran Gonzales* does not reach back in time to invalidate the legal rationale in *Perez-Gonzalez*. The only reason Plaintiffs were denied the opportunity to have their applications adjudicated was because Defendants failed to follow Ninth Circuit precedent and disregarded the BIA's established rule of adhering to *Perez-Gonzalez* for applicants in the Ninth Circuit. For that same reason, Defendants' argument that Plaintiffs cannot prevail in a retroactivity claim because they initiated litigation must fail. Def. Br. 29.

interpretations have been approved by this Court, there is no clear statutory interest in denying Plaintiffs permanent residency.

III. CONCLUSION

In sum, the District Court, relying on an overly broad construction of the *Duran Gonzales* decision, erroneously failed to permit Plaintiffs to amend the complaint and narrow the class definition. Nothing in that decision precluded the District Court on remand from considering Plaintiffs' retroactivity challenge, which had never previously been addressed.

For the reasons set forth above and in Plaintiffs' Opening Brief, this Court should reverse and vacate the District Court's final judgment and order denying Plaintiffs' motions to amend the complaint and redefine the class. The Court should remand the case to the District Court with instructions to amend the complaint, redefine the class, and find that the newly adopted rule should not be applied retroactively to members of the redefined class who acted in reliance on the law in effect prior to the *Duran Gonzales* decision.

Date: August 3, 2009

Respectfully submitted,

S/ Matt Adams

Matt Adams

Northwest Immigrant Rights Project
615 Second Avenue, Ste. 400
Seattle, WA 98104
(206) 957-8611

Marc Van Der Hout
Stacy Tolchin
Van Der Hout, Brigagliano & Nightingale
180 Sutter St., Fifth Floor
San Francisco, CA 94104
(415) 981-3000

Trina Realmuto
Beth Werlin
American Immigration Law Foundation
Suite 200, 1331 G Street NW
Washington, D.C. 20005
(202) 507-7522

Attorneys for Plaintiffs – Appellants

CERTIFICATE OF SERVICE

RE: Duran Gonzalez, et al., v. U.S.D.H.S., et al., Case No. 09-35174

I hereby certify that I electronically filed the reply with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following CM/ECF participants:

Elizabeth J. Stevens
Assistant Director
Email: Elizabeth.Stevens@usdoj.gov

Sherease Pratt
Trial Attorney
United States Department of Justice
OFFICE OF IMMIGRATION LITIGATION
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044
Email: Sherease.Pratt@usdoj.gov

Priscilla To-Yin Chan
OFFICE OF THE U.S. ATTORNEY
700 Stewart Street
Seattle, WA 98101-1271
Email: Priscilla.Chan@usdoj.gov

Date: August 3, 2009

Executed in Seattle, Washington, on August 3, 2009.

s/ Matt Adams
Matt Adams
Attorney for Petitioner

ADDENDUM OF AGENCY DECISIONS

1. *In Re: Wenceslao Rendon-Eligio*, A91 639 708, 2007 WL 4182278 (BIA Oct. 15, 2007) (unpublished) (remanding case to IJ in order to “proceed with his application pursuant to *Perez-Gonzalez*);
2. *In Re: Manuel Luna-Sanchez*, A75 616 296, 2007 WL 2197539 (BIA June 29, 2007) (unpublished) (agreeing with DHS position that case should be remanded to IJ for adjudication of adjustment application);
3. *In Re: Jose Luis Chavez A.K.A. Jose Luis Chavez Temores*, A78 436 173, 2007 WL 1129205 (BIA February 16, 2007) (unpublished) (finding individual eligible for relief under *Perez-Gonzalez*);
4. *In Re: [IDENTIFYING INFORMATION REDACTED BY AGENCY]*, 2006 WL 5914582 (AAO December 1, 2006) (unpublished) (finding *Perez-Gonzalez* controlling);
5. *In Re: Juan Zuniga-Tapia*, A79 765 564, 2005 WL 1104573 (BIA Jan. 26, 2005) (unpublished) (finding individual eligible for adjustment of status under *Perez-Gonzalez* and remanding to IJ);
6. *In Re: Elidio Madera*, A78 740 417, 2004 WL 3187213 (BIA Dec. 20, 2004) (unpublished) (same); *In Re: Julio Cesar Vazquez-Centeno*, A78 739 650, 2004 WL 2952152 (BIA Nov. 19, 2004) (unpublished) (same);
7. *In Re: Julio Cesar Vazquez-Centeno*, A78 739 650, 2004 WL 2952152 (BIA Nov. 19, 2004) (unpublished) (same).



2007 WL 4182278 (BIA)

Page 1

2007 WL 4182278 (BIA)

** THIS IS AN UNPUBLISHED DECISION THAT CANNOT BE CITED **

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

IN RE: WENCESLAO RENDON-ELIGIO

FILE: A91 639 708 - SAN DIEGO, CA

October 15, 2007

IN REMOVAL PROCEEDINGS
APPEAL

ON BEHALF OF RESPONDENT:

Ann A. Lim, Esquire

ON BEHALF OF DHS:

Michael P. Rummel
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] - Present without being admitted or paroled

APPLICATION: Reinstatement

The Department of Homeland Security (DHS) appeals from the Immigration Judge's decision dated June 13, 2006. The respondent submitted a brief in response to the DHS' appeal. The appeal will be sustained, the proceedings will be reinstated, and the record will be remanded.

The DHS contends that the Immigration Judge improperly terminated proceedings in this case. We agree. An Immigration Judge's authority to terminate the proceedings is limited by regulation to a few narrow circumstances which are not here. *See* 8 C.F.R. §§ 1238.1(e) and 1239.2(f). Absent an express statutory or regulatory grant of authority, an Immigration Judge may not terminate otherwise valid removal proceedings on the basis of considerations unrelated to the validity of the charge contained in the Notice to Appear (NTA). Here, without prompting from either party, the Immigration Judge terminated proceedings in the absence of any issues relating to the validity of the charge in the NTA. In fact, as our prior decision remanding this matter to the Immigration Judge made clear, the respondent is removable from the United States, but may be eligible for a waiver of inadmissibility in conjunction with his application for adjustment of status. Therefore, the Immigration Judge acted incorrectly in terminating proceedings. Consequently, the proceedings will be reinstated.

With respect to the confusion over whether *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004) applies in this case, we note the finding in our prior decision that the respondent is inadmissible under section 212(a)(9)(C)(i) of the Act. That determination remains the law of the case, and the respondent should be able to proceed with his application pursuant to *Perez-Gonzalez*. On remand, the parties are free to present additional evidence and argument, bearing in mind the prior ruling of the Board.

ORDER: The DHS' appeal is sustained.

FURTHER ORDER: The record is remanded to the Immigration Court for further proceedings consistent with the foregoing opinion, and the entry of a new decision.

Neil P. Miller
FOR THE BOARD

2007 WL 4182278 (BIA)
END OF DOCUMENT



2007 WL 2197539 (BIA)

Page 1

2007 WL 2197539 (BIA)

** THIS IS AN UNPUBLISHED DECISION THAT CANNOT BE CITED **

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

IN RE: MANUEL LUNA-SANCHEZ

FILE: A75 616 296 - SAN DIEGO, CA

June 29, 2007

IN REMOVAL PROCEEDINGS
APPEAL

ON BEHALF OF RESPONDENT:

Barbara Strickland, Esquire

ON BEHALF OF DHS:

Janet L. Murray
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&Y Act [8 U.S.C. § 1182(a)(6)(A)(i)] - Present without being admitted or paroled

APPLICATION: Adjustment of status; motion to reopen

The respondent, a native and citizen of Mexico, appeals an Immigration Judge's April 4, 2007, decision terminating proceedings regarding the respondent's application for adjustment of status under section 245(i) of the Immigration and Nationality Act (hereinafter "Act") and his motion to reopen a prior decision that denied relief from removal. The appeal will be sustained.

An Immigration Judge issued an oral decision on November 13, 2003, that denied the respondent's application for cancellation of removal and the Immigration Judge ordered the respondent removed to Mexico. This decision was appealed to the Board and we dismissed the appeal. The current charge arises from the respondent reentering the United States on or about April 22, 2006. The Department of Homeland Security (hereinafter "DHS") issued a Notice to Appear on April 24, 2006. *See* Exh. 1. On February 16, 2007, the Immigration Judge issued an order that directed the parties to submit briefs regarding the issue of whether the Immigration Court has jurisdiction in this case as the respondent had illegally reentered the United States after having been removed pursuant to an order of removal by a prior Immigration Judge and whether section 241 (a)(5) of the Act required DHS to pursue reinstatement. The DHS submitted a brief in February 2007 that noted the Department's position was that termination of pro-

ceedings was at that time premature as the respondent claimed to be eligible to adjust his status pursuant to section 245(i) of the Act and, therefore, it was prudent to allow the respondent to demonstrate whether he was in fact eligible to adjust his status. [FN1] The DHS maintained that if it is demonstrated that the respondent was not so eligible, termination would be appropriate. Disregarding the DHS's brief, the Immigration Judge issued a decision in April 2007 that found the provisions of section 241(a)(5) of the Act and regulations at 8 C.F.R. § 241.8 require DHS to pursue reinstatement of the respondent's removal order. Based on this finding, the Immigration Judge determined he did not have jurisdiction to hear the respondent's application and terminated removal proceedings. *See* I.J. at 3-4.

On appeal, the respondent argues that precedent opinions of the United States Court of Appeals for the Ninth Circuit (hereinafter "Ninth Circuit") have ruled that until the DHS has properly reinstated an alien's prior removal order, an Immigration Judge has jurisdiction to hear applications for adjustment of status and motions to reopen prior adverse decisions. We agree.

In *Zi-Xing Lin v. Gonzales*, 473 F.3d 979 (9th Cir. 2007), the Ninth Circuit heard a case of an alien that had illegally reentered the United States after being previously removed when an Immigration Judge had denied an asylum application and, after reentering the United States, the respondent filed a Motion to Reopen his prior asylum application on the basis of changed circumstances. *Id.* at 980-81. The Immigration Judge found that she lacked jurisdiction over this motion as the alien was subject to reinstatement of his prior removal order and, on appeal to the Board, we held that the original deportation order had been automatically reinstated by operation of law upon the alien's illegal reentry into the United States. *Id.* at 981. Even though the DHS opposed the motion before the Immigration Judge and the Board, the Ninth Circuit found that DHS had not complied with the requirements of 8 C.F.R. § 241.8 which governed reinstating a prior removal order. *Id.* at 983. The Ninth Circuit explicitly ruled that only if the requirements of 8 C.F.R. § 241.8 have been satisfied is an alien removable under a prior order, and an Immigration Judge is not divested of jurisdiction over an alien's application until such requirements are met. *Id.*

Furthermore, the record indicates that the respondent has applied for permission to reapply for adjustment of status. *See* Exh. 9. In *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004), the Ninth Circuit held that when a respondent applies for permission to reapply for an adjustment of status prior to reinstatement of a removal order, it is error to deny the application for adjustment of status on the ground that it is barred by the removal order being reinstated. *Id.* at 795-96. Therefore, we agree with the DHS brief of July 2007 that acknowledged that the Immigration Judge should adjudicate the application for adjustment of the respondent's status prior to a decision on reinstatement of the prior removal order.

In his decision of April 2007, the Immigration Judge primarily relied on two cases to support his termination of the proceeding. The first case was *Morales-Izquierdo v. Gonzales*, 477 F.3d 691 (9th Cir. 2007) (en banc), amended 486 F.3d 484 (2007), in which the Ninth Circuit ruled that an alien who reenters the United States illegally is not entitled to a hearing before an Immigration Judge to determine whether to reinstate a prior removal order. *Id.* at 705. However, this decision only addresses the issue of jurisdiction over the reinstatement of the removal order and does not divest jurisdiction on other issues. The second case was the Board's decision in *Matter of W-C-B-*, 24 I&N Dec. 118 (BIA 2007), which concerned an Immigration Judge decision to terminate proceedings based on a DHS motion alleging that this proceeding was improvidently begun as the alien was subject to reinstatement of a prior deportation order. *Id.* at 119. In the current case, the DHS has not opposed the proceedings or indicated that it was going to initiate reinstatement of the respondent's prior removal order. Regardless, the precedent opinion of the Ninth Circuit discussed above controls this case and clearly requires that in the facts of the present appeal the Immigration Judge has jurisdiction over the respondent's application for adjustment and motion to reopen, and termination of the proceedings was inappropriate.

We find that the fact pattern in *Zi-Xing Lin* is virtually the same as the current record and, therefore, the Ninth Circuit's holding is directly applicable. In the current appeal, there is no evidence that DHS has instigated the reinstatement.

ment process, let alone actually complied with the requirements of 8 C.F.R. § 241.8. Based on the foregoing, we will sustain the respondent's appeal and remand for adjudication of his application for adjustment of status and motion to reopen a prior removal determination.

Accordingly, the following orders will be entered.

ORDER: The appeal is sustained.

FURTHER ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion.

Roger A. Pauley
FOR THE BOARD

FN1. We note that in May 2007 the DHS submitted a Motion for Summary Affirmance of the Immigration Judge's April 2007 decision. However, this motion fails to discuss the DHS's seemingly contradictory position in its brief of February 2007. Our reading of the May 2007 motion indicates that, other than the identification of the April 2007 decision, this motion is merely generic boilerplate.

2007 WL 2197539 (BIA)
END OF DOCUMENT



2007 WL 1129205 (BIA)

Page 1

2007 WL 1129205 (BIA)

** THIS IS AN UNPUBLISHED DECISION THAT CANNOT BE CITED **

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

IN RE: JOSE LUIS CHAVEZ A.K.A. JOSE LUIS CHAVEZ TEMORES

File: A78 436 173 - San Francisco

February 16, 2007

IN REMOVAL PROCEEDINGS
APPEAL

ON BEHALF OF RESPONDENT:
Philippe Dwelshauvers, Esquire
ON BEHALF OF DHS:

Grace H. Cheung
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] - Present without being admitted or paroled
212(a)(9)(C)(i)(II), I&N Act [8 U.S.C. § 1182(a)(9)(C)(i)(II)] - Alien previously removed who enters or attempts to reenter without being admitted

APPLICATION: Adjustment of status

The respondent, a native and citizen of Mexico, appeals from the Immigration Judge's December 30, 2005, decision. The Department of Homeland Security (the "DHS," formerly the Immigration and Naturalization Service) urges affirmance of the Immigration Judge's decision. The respondent's appeal will be sustained, and the case will be remanded to the Immigration Judge for further proceedings.

The respondent was removed from the United States on October 15, 1998, pursuant an order of removal issued on the same date (Exh. 3). The respondent reentered thereafter without inspection and subsequently married a United States citizen, who filed an 1-130 immediate relative petition on his behalf in 2001. On May 4, 2005, the DHS denied the respondent's application for adjustment of status, finding that because the respondent was subject to reinstatement of his prior removal order, he was ineligible for any relief from removal pursuant to section 241(a)(5) of the Immigration and Nationality Act (Exh. 2).^[FNI] On that same date, the DHS initiated removal proceedings against the respondent. At the initial hearing before the Immigration Judge on August 10, 2005, the respondent sought to file

an application for permission to reapply for admission in the United States after deportation or removal, Form I-212, and a waiver, Form I-601. The DHS moved to reinstate the previous removal order at the August 10, 2005, hearing.

In her December 30, 2005, decision, the Immigration Judge determined that because the respondent was given proper written notice by the DHS of its intent to reinstate the removal order in the May 4, 2005, decision denying his adjustment application, he is ineligible for any relief pursuant to section 241(a)(5) of the Act. Relying on *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004), the respondent asserts on appeal that the Immigration Judge erred, arguing that because he filed his application for permission to reapply for admission and waiver request before his previous removal order was reinstated, he is not subject to the bar to relief under section 241(a)(5) of the Act.

Unlike the Immigration Judge, we find that *Perez-Gonzalez v. Ashcroft, supra*, is controlling in this case. In *Perez-Gonzalez, supra*, the Ninth Circuit found that the reinstatement provision did not categorically bar an alien from adjusting status under section 245(i) of the Act, 8 U.S.C. § 1255(i), where an application for advance permission to reapply for admission, Form I-212, had been submitted *prior* to the reinstatement of his deportation order. While the Immigration Judge is correct that the respondent in this case had notice of possible reinstatement before removal proceedings were initiated, like the alien in *Perez-Gonzalez, supra*, the respondent filed his waiver application before a reinstatement order was entered. Although the DHS argued before the Immigration Judge that a distinction should be made in this case because reinstatement proceedings were initiated with its oral motion to reinstate on August 10, 2005, before the respondent filed his I-212 application, we are not persuaded that the Ninth Circuit would not apply its holding in *Perez-Gonzalez v. Ashcroft, supra*, to this case (Tr. at 2-3). The record reflects that the DHS actually moved to reinstate after the respondent expressed his desire to file the I-212 application, and more importantly, the respondent *filed* his application for a I-212 waiver *before* his previous removal order was reinstated (Tr. at 2-3; Exh. 4). Because the respondent was not yet subject to the terms of the reinstatement order when he filed his application for a I-212 waiver on November 28, 2005, he was not barred from applying for relief from removal. See *Perez-Gonzalez v. Ashcroft, supra*, 379 F.3d at 788; section 241(a)(5) of the Act.

In view of the foregoing, the following order shall be entered.

ORDER: The respondent's appeal is sustained.

FURTHER ORDER: The Immigration Judge's December 30, 2005, order is vacated, and the case is remanded to the Immigration Judge for further proceedings not inconsistent with the foregoing opinion.

David B. Holmes
FOR THE BOARD

FN1. Section 241(a)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1231(a)(5) provides:

If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after the reentry.

2007 WL 1129205 (BIA)
END OF DOCUMENT



2006 WL 5914582 (INS)

Page 1

2006 WL 5914582 (INS)

U.S. Department of Justice
Immigration and Naturalization Service
Office of Administrative Appeals
California Service Center

IN RE: Applicant: [IDENTIFYING INFORMATION REDACTED BY AGENCY]
APPLICATION: Application for Permission to Reapply for Admission into the United States after Deportation or Removal under section 212(a)(9)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(iii)
On Behalf of Applicant: [IDENTIFYING INFORMATION REDACTED BY AGENCY]

File No.
[IDENTIFYING INFORMATION REDACTED BY AGENCY]

December 1, 2006

DISCUSSION: The Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) was denied by the Director, California Service Center and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Mexico who, on November 3, 1998, at the San Ysidro, California, Port of Entry, orally represented himself to be a citizen of the United States in order to gain admission into the United States. The applicant was found to be inadmissible pursuant to section 212(a)(6)(C)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(ii), as an alien who falsely represents himself to be a citizen of the United States for any purpose or benefit under the Act, and section 212(a)(7)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(7)(A)(i)(I), for being an immigrant not in possession of a valid immigrant visa or other valid entry document. Consequently, on November 4, 1998, the applicant was expeditiously removed from the United States pursuant to section 235(b)(1) of the Act, 8 U.S.C. § 1225(b)(1). The record reflects that the applicant reentered the United States shortly after his removal, without a lawful admission or parole and without permission to reapply for admission, in violation of section 276 the Act, 8 U.S.C. § 1326 (a felony). The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed by his U.S. citizen spouse. The applicant is inadmissible under section 212(a)(9)(A)(i) of the Act, 8 U.S.C. § 1182(a)(9)(A)(i). He seeks permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(iii), in order to remain in the United States and reside with his U.S. citizen spouse and children.

The Director determined that section 241(a)(5) of the Act, 8 U.S.C. 1231(a)(5) applies in this matter and the applicant is not eligible to apply for any relief under the Act. In addition, the Director determined that the applicant is inadmissible under section 212(a)(9)(B) of the Act, 8 U.S.C. § 1182(a)(9)(B), for having been unlawfully present in the United States for a period of one year or more. The Director denied the Form I-212 accordingly. *See Director's Decision* dated December 16, 2005.

The proceeding in the present case is for an application for permission to reapply for admission into the United

States after deportation or removal and, therefore, the AAO will not discuss the applicant's potential grounds of inadmissibility under section 212(a)(9)(B) of the Act. This proceeding is limited to the issue of whether or not the applicant meets the requirements necessary for the ground of inadmissibility under section 212(a)(9)(A)(i) of the Act to be waived.

Section 241(a) of the Act states in pertinent part:

(5) reinstatement of removal orders against aliens illegally reentering.-if the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after the reentry.

On appeal, counsel submits a brief in which he states that because the applicant filed the Form I-212 before the Service reinstated his removal order under section 241(a)(5) of the Act, the Director failed to apply the proper factors of consideration required by *Matter of Tin*, 14 I&N Dec. 371 (Reg. Comm. 1973) in matters of discretion. Counsel refers to the decision in *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004). Counsel states that based on *Perez-Gonzalez*, an individual who was removed and reentered without inspection is eligible to file a Form I-212, and have it adjudicated, as long as he filed the Form I-212 before his removal order was reinstated. In addition, counsel states that the applicant is eligible to adjust status pursuant to section 245(i) of the Act, as an individual who is physically present in the United States after entering without inspection, is the beneficiary of a Form I-130 filed before April 30, 2001, and has paid a \$1,000 fine. Additionally, counsel alleges that nothing in the statutory provisions regarding adjustment of status suggest that previously removed aliens are barred from 245(i) relief. *Perez-Gonzalez* at 27. Finally, counsel states that the Director improperly deemed the applicant ineligible for the waiver and should have considered the extreme hardship to his U.S. citizen spouse and children, and requests that the decision be overturned.

In its August 14, 2004, decision, *Perez-Gonzalez v. Ashcroft*, the Ninth Circuit Court of Appeals ruled that a Mexican national who returned to the United States following a deportation and had his deportation order reinstated may nonetheless obtain adjustment of status if his Form I-212 is granted. The Ninth Circuit Court of Appeals stated in *Perez-Gonzalez* that: "Given the fact that *Perez-Gonzalez* applied for the waiver *before* his deportation order was reinstated, he was not yet subject to its terms and, therefore, was not barred from applying for relief." The Court further stated: "Prior administrative decisions of the Bureau of Immigration Appeals confirm the fact that permission to reapply is available on a *nunc pro tunc* basis, in which the petitioner receives permission to reapply for admission after he or she has already reentered the country." Finally the Court stated: "... if the alien has applied for permission to reapply in the context of an application to adjust status, the INS is required to consider whether to exercise its discretion in the alien's favor before it can proceed with reinstatement proceedings..."

The record of proceedings does not reveal that the applicant's prior removal order was reinstated at the time he filed the Form I-212. Since this case arises in the Ninth Circuit, *Perez-Gonzalez* is controlling. The AAO finds that the Director erred in denying the Form I-212 based on the fact that section 241(a)(5) of the Act is applicable in this case. The applicant is not currently subject to section 241(a)(5) of the Act and he is eligible to file a Form I-212.

The AAO finds that although the applicant is not subject to section 241(a)(5) of the Act, he is clearly inadmissible under section 212(a)(9)(A) of the Act and, therefore, must receive permission to reapply for admission.

As noted above, the proceeding in the present case is for a Form I-212 and, therefore, the AAO will not discuss the applicant's possible eligibility for adjustment of status under section 245(i) of the Act. However, the AAO notes that applicants for adjustment of status under section 245(i) of the Act, as with all applicants for adjustment of status,

must be admissible to the United States. *Section 245(i)(2)(A) of the Act*. There are exceptions for applicants under 245(i) of the Act, but admissibility under section 212(a)(9)(A) is not one.

Section 212(a)(9)(A) of the Act states in pertinent part:

(A) Certain aliens previously removed.-

(i) Arriving aliens.- Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under section 240 initiated upon the alien's arrival in the United States and who again seeks admission within five years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

...

(iii) Exception.- Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Attorney General [now the Secretary of Homeland Security, "Secretary"] has consented to the alien's reapplying for admission.

A review of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) amendments to the Act and prior statutes and case law regarding permission to reapply for admission, reflects that Congress has; (1) increased the bar to admissibility and the waiting period from 5 to 10 years in most instances and to 20 years in others; (2) has added a bar to admissibility for aliens who are unlawfully present in the United States; (3) has imposed a permanent bar to admission for aliens who have been ordered removed and who subsequently enter or attempt to enter the United States without being lawfully admitted. It is concluded that Congress has placed a high priority on deterring aliens from overstaying their authorized period of stay and/or from being present in the United States without a lawful admission or parole.

The AAO conducts the final administrative review and enters the ultimate decision for CIS on all immigration matters that fall within its jurisdiction. The AAO reviews each case *de novo* as to all questions of law, fact, discretion, or any other issue that may arise in an appeal that falls under its jurisdiction. Because the AAO engages in *de novo* review, the AAO may deny an application or petition that fails to comply with the technical requirements of the law, without remand, even if the district or service center director does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

Before the AAO can weigh the discretionary factors in this case, it must first determine whether the applicant is eligible to apply for the relief requested. To recapitulate, on November 3, 1998, the applicant represented himself to be a citizen of the United States in order to gain admission into the United States. A false representation of U.S. citizenship may be either an oral representation or one supported by an authentic or fraudulent document. In the present case, the applicant made an oral representation of U.S. citizenship in order to gain admission into the United States. Therefore, the applicant is inadmissible pursuant to section 212(a)(6)(C)(ii) of the Act.

Section 212(a)(6)(C) of the Act states in pertinent part:

(ii) Falsely claiming citizenship -

(I) In general- Any alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit under this Act (including section 274A) or any other Federal or State law is inadmissible.

(II) Exception- In the case of an alien making a representation described in subclause (I), if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen

(whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of making such representation that he or she was a citizen, the alien shall not be considered to be inadmissible under any provision of this subsection based on such representation.

The applicant in the instant case does not qualify for the exception under section 212(a)(6)(C)(ii)(II) of the Act.

Matter of Martinez-Torres, 10 I&N Dec. 776 (reg. Comm. 1964) held that an application for permission to reapply for admission is denied, in the exercise of discretion, to an alien who is mandatorily inadmissible to the United States under another section of the Act, and no purpose would be served in granting the application.

The applicant is subject to the provisions of section 212(a)(6)(C)(ii) of the Act. No waiver is available to an alien who has made a false claim to United States citizenship. Therefore, no purpose would be served in the favorable exercise of discretion in adjudicating the application to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act. Accordingly, as the applicant is not admissible to the United States, the appeal will be dismissed.

ORDER: The appeal is dismissed.

Robert P. Wiemann
Chief
Administrative Appeals Office

2006 WL 5914582 (INS)
END OF DOCUMENT



2005 WL 1104573 (BIA)

Page 1

C

2005 WL 1104573 (BIA)

**** THIS IS AN UNPUBLISHED DECISION THAT CANNOT BE CITED ****

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

IN RE: JUAN ZUNIGA-TAPIA

File: A79 765 564 - Portland

January 26, 2005

IN REMOVAL PROCEEDINGS
MOTION

ON BEHALF OF RESPONDENT:

Jessica Boell, Esquire

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] - Present without being admitted or paroled

APPLICATION: Reconsideration

ORDER:

PER CURIAM. In a decision dated December 3, 2004, the Board dismissed the respondent's appeal from an Immigration Judge's decision finding the respondent ineligible for adjustment of status under section 245(i) of the Immigration and Nationality Act, 8 U.S.C. § 1255(i) due to his inadmissibility under section 212(a)(9)(C) of the Act, 8 U.S.C. § 1182(a)(9)(C), as an alien who has been unlawfully present in the United States for more than 1 year and who enters or attempts to enter the United States without being admitted. The Immigration Judge found that the respondent's subsequent arrivals and departures after April, 1997, rendered him inadmissible under section 212(a)(9)(C) of the Immigration and Nationality Act. The respondent has now filed motions to remand and reconsider our decision based on *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004), wherein the court held that an alien who entered the United States without inspection in December 1995 after having been deported a month earlier and who visited Mexico in 1999 and again entered the United States without inspection in December 1999 could seek a Form I-212 waiver and, if approved, would be eligible to adjust his status pursuant to section 245(i) of the Act. As pointed out in his motions, the respondent in the instant case, never having been deported or removed and therefore not in need of a waiver, is even more favorably situated than the alien in *Perez-Gonzalez v. Ashcroft*, *supra*. We agree with the respondent that his inadmissibility under section 212(a)(9)(C) of the Act would not render him ineligible for adjustment of status under section 245(i) of the Act pursuant to the reasoning of the Ninth Circuit

in *Perez-Gonzalez*. We note that the Department of Homeland Security has not filed a response to the respondent's motions. Accordingly, the motion to reconsider is *granted*, our decision of December 3, 2004, is vacated, and the record is remanded to the Immigration Court for further proceedings consistent with this decision.

<Signature>

FOR THE BOARD

2005 WL 1104573 (BIA)
END OF DOCUMENT



2004 WL 3187213 (BIA)

Page 1

2004 WL 3187213 (BIA)

** THIS IS AN UNPUBLISHED DECISION THAT CANNOT BE CITED **

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

IN RE: ELIDIO MADERA

File: A78 740 417 - Portland, Oregon

December 20, 2004

IN REMOVAL PROCEEDINGS
MOTION

ON BEHALF OF RESPONDENT:

Raul R. Labrador, Esquire

APPLICATION: Reopening

This case was last before us on June 4, 2004, when we affirmed without opinion an Immigration Judge's decision to deny the respondent's adjustment of status application because he had been unlawfully present in the United States for more than one year after having entered without permission and therefore was inadmissible pursuant to section 212(a)(9)(C)(i)(1) of the Immigration and Nationality Act. The respondent has filed a motion to reopen, which will be granted.

A party seeking to reopen deportation proceedings must state the new facts he intends to establish, supported by affidavits or other evidentiary material. 8 C.F.R. §§ 1003.2(c), 1003.23(b)(3)(2004); INS v. Jong Ha Wang, 450 U.S. 139 (1981); Matter of Leon-Orosco and Rodriguez-Colas, 19 I&N Dec. 136 (BIA 1984; A.G. 1984); Matter of Reyes, 18 I&N Dec. 249 (BIA 1982). A motion to reopen will not be granted unless it establishes a prima facie case of statutory and discretionary eligibility for the underlying substantive relief sought. See INS v. Doherty, 502 U.S. 314 (1992); INS v. Abudu, 485 U.S. 94 (1988); Matter of Coelho, 20 I&N Dec. 464 (BIA 1992).

By way of background, the respondent, who is a native and citizen of Mexico, first arrived in the United States without inspection in May 1995, and he departed in November 1999. He attempted to reenter without inspection in January 2000, but was allowed to voluntarily depart on the same day by the Border Patrol. However, he reentered the United States later that same day in January 2000 without being admitted or paroled. He married an United States citizen, who filed an immediate relative visa petition, which was approved in 2001. The respondent then filed an adjustment of status application with the Immigration and Naturalization Service (INS), which was denied in 2002 because he was inadmissible under section 212(a)(9)(C)(i)(1) of the Act. The INS maintained that the respondent could apply for a waiver after he had resided outside of the United States for 10 years.

In the instant motion, counsel has requested reopening pursuant to a recent case in the Ninth Circuit Court of Appeals, the circuit in which the respondent's case arises. In *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004), the Court of Appeals held that an alien who was similarly situated to the respondent and who was inadmissible under several subsections of the Act, including section 212(a)(9)(C)(i)(I) of the Act, was eligible to seek adjustment of status and could request a waiver while living in the United States. Counsel maintains that the respondent's case is controlled by this Ninth Circuit precedent, and he asks that the respondent's case be remanded to the Immigration Judge to permit the respondent to apply for adjustment.

Upon review, it appears that the respondent is eligible to seek adjustment of status under *Perez-Gonzalez v. Ashcroft*, *supra*. Therefore, we will grant the respondent's motion to reopen, and the case will be remanded to the Immigration Judge for further proceedings consistent with this opinion.

Accordingly, the following orders will be entered.

ORDER: The motion to reopen is granted.

FURTHER ORDER: The case is remanded to the Immigration Judge for further proceedings consistent with this opinion.

<Signature>

FOR THE BOARD

2004 WL 3187213 (BIA)
END OF DOCUMENT



2004 WL 2952152 (BIA)

Page 1

C

2004 WL 2952152 (BIA)

**** THIS IS AN UNPUBLISHED DECISION THAT CANNOT BE CITED ****

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

IN RE: JULIO CESAR VAZQUEZ-CENTENO

File: A78 739 650 - Portland

November 19, 2004

IN REMOVAL PROCEEDINGS
MOTION

ON BEHALF OF RESPONDENT:

Stephen W. Manning, Esquire

ORDER:

In a decision dated August 10, 2004, the Board of Immigration Appeals dismissed the respondent's appeal from an Immigration Judge's decision finding the respondent ineligible for adjustment of status under section 245(i) of the Immigration and Nationality Act, 8 U.S.C. § 1255(i), due to his inadmissibility under section 212(a)(9)(C) of the Act, 8 U.S.C. § 1182(a)(9)(C), as an alien who has been unlawfully present in the United States for more than 1 year and who enters or attempts to enter the United States without being admitted. The record reflects that the respondent entered the United States without inspection in February 1997, left the United States in November 1999, and then reentered the United States, again without inspection, in February 2000. The respondent has now filed a motion to reconsider our decision based on a subsequent decision of the United States Court of Appeals for the Ninth Circuit, in whose jurisdiction this case rests. In *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (BIA 2004), the court held that an alien who entered the United States without inspection in December 1995 after having been deported a month earlier and who visited Mexico in 1999 and again entered the United States without inspection in December 1999 could seek a Form I-212 waiver and, if approved, would be eligible to adjust his status pursuant to section 245(i) of the Act. As pointed out in his motion, the respondent in the instant case, never having been deported or removed and therefore not in need of a waiver, is even more favorably situated than the alien in *Perez-Gonzalez v. Ashcroft, supra*. We agree with the respondent that his inadmissibility under section 212(a)(9)(C) of the Act would not render him ineligible for adjustment of status under section 245(i) of the Act under the reasoning of the Ninth Circuit in *Perez-Gonzalez*. We note that the Department of Homeland Security has not filed a response to the respondent's motion to reconsider. Accordingly, the motion to reconsider is granted, our decision of August 10, 2004, is vacated, and the record is remanded to the Immigration Court for further proceedings consistent with this decision.

<Signature>

FOR THE BOARD

2004 WL 2952152 (BIA)
END OF DOCUMENT