

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

Aurelio DURAN GONZALEZ, Maria C.
ESTRADA, Maria Luisa MARTINEZ DE
MUNGUIA, Irma PALACIOS DE
BANUELOS, Lucia MUNIZ DE ANDRADE,
Karina NORIS, Adriana POUPARINA,

Plaintiffs,

v.

U.S. DEPARTMENT OF HOMELAND
SECURITY and Janet NAPOLITANO¹,
Secretary of the Department of Homeland
Security,

Defendants.

Case No. CV 06-1411-MJP

PLAINTIFFS' **FIRST AMENDED**
MOTION FOR PROVISIONAL CLASS
CERTIFICATION, TEMPORARY
RESTRAINING ORDER AND
PRELIMINARY INJUNCTION

CLASS ACTION

Noted for hearing: January 23, 2009

ORAL ARGUMENT REQUESTED

¹ Janet Napolitano has been substituted for her predecessor Michael Chertoff.

PLAINTIFFS' **FIRST AMENDED** MOTION
FOR PROVISIONAL CLASS CERTIFICATION,
TEMPORARY RESTRAINING ORDER AND
PRELIMINARY INJUNCTION

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1 **I. INTRODUCTION**

2 Pursuant to Rule 65(b) of the Federal Rules of Civil Procedure, Plaintiffs move for a
 3 temporary restraining order on behalf of the named Plaintiffs, request that the previously certified
 4 class be amended and provisionally recertified, and request that the Court enjoin Defendants from
 5 applying the Ninth Circuit's decision in *Duran-Gonzales v. Dept. of Homeland Security*, 508 F.3d
 6 1227, 1242 (9th Cir. 2007) to class members who filed I-212 waiver applications on or after the
 7 Ninth Circuit's August 13, 2004 decision in *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir.
 8 2004) and on or before its November 30, 2007 decision in *Duran-Gonzalez*. Plaintiffs request
 9 temporary injunctive relief because the mandate in the *Duran-Gonzalez* decision issues on January
 10 23, 2009, as the petition for rehearing en banc was denied on January 16, 2009. Exhibit B; Fed. R.
 11 App. P. 41(b).

12 Temporary injunctive relief cannot be granted to a class before an order has been entered
 13 determining that class treatment is proper. *National Ctr. for Immigrants Rights v. INS*, 743 F.2d
 14 1365, 1371 (9th Cir. 1984); *Davis v. Romney*, 490 F.2d 1360, 1366 (3d Cir. 1974); *See also*,
 15 *Orantes-Hernandez v. Smith*, 541 F.Supp. 351, 371 (C.D. Cal. 1982) ("The issues presented in this
 16 case are best resolved by an injunctive decree of classwide scope"). While this Court certified
 17 Plaintiffs' proposed class on November 13, 2006, Plaintiffs have concurrently filed a motion for
 18 leave to file an amended complaint and a motion to redefine the class. Thus, Plaintiffs request
 19 provisional class certification of the redefined class in order to allow the Court to provide the
 20 temporary and preliminary injunctive relief required to protect the status quo and to prevent
 21 irreparable harm to proposed class members.

22 Specifically, Plaintiffs respectfully move this Court to do the following:

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1 (1) issue provisional certification of the proposed class of members who are inadmissible
2 under INA § 212(a)(9)(C)(i)(II) and whose I-212 waiver applications were filed within the
3 jurisdiction of the Ninth Circuit in conjunction with applications for adjustment of status
4 under INA § 245(i) and were pending at any time on or after August 13, 2004 and on or
5 before November 30, 2007 and prior to any final reinstatement of removal decision, pending
6 an order from this Court on the motion for preliminary injunction;

7
8 (2) issue an immediate temporary restraining order for the new class, preventing Defendants
9 from (a) denying any pending I-212 applications; and (b) giving legal effect to any denied I-
10 212 application, including treating any denial as a final administrative decision, pending an
11 order from this Court on the motion for preliminary injunction; and

12
13 (3) issue a preliminary injunction for the new class, preventing Defendants from (a) denying
14 any pending I-212 applications; and (b) giving legal effect to any denied I-212 application,
15 including treating any denial as a final administrative decision.

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17 Plaintiffs meet the standard for injunctive relief. First, Plaintiffs raise serious legal questions
18 regarding an issue that has not yet been addressed by any court. Specifically, they raise the question
19 of when a judicial decision based on *National Cable & Telecommunications Ass'n v. Brand X*
20 *Internet Services*, 545 U.S. 967, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005) (“Brand X”), may be
21 applied retroactively to litigants who relied on prior circuit precedent. The Ninth Circuit issued its
22 decision in *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004) on August 13, 2004. That
23 decision held that noncitizens who had previously been deported and who unlawfully reentered the
24 United States were eligible for adjustment of status under INA § 245(i) (8 U.S.C. § 1225(i)) if they
25 filed an I-212 waiver. The *Perez-Gonzalez* decision noted that the Board of Immigration Appeals
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1 (“BIA”) had not yet issued a formal decision addressing the issue. Based on *Perez-Gonzalez*, a
2 subclass of plaintiffs filed applications for adjustment of status with I-212 waivers, believing that
3 they were eligible for lawful permanent residency. However, on January 26, 2006, the BIA issued
4 *Matter of Torres-Garcia*, 23 I. & N. Dec. 866 (BIA 2006), disagreeing with the Ninth Circuit’s
5 decision in *Perez-Gonzalez*. Plaintiffs then filed this class action based on the Department of
6 Homeland Security’s refusal to follow the *Perez-Gonzalez* decision. This Court granted Plaintiffs’
7 request for a preliminary injunction, which Defendants appealed to the Ninth Circuit. On November
8 30, 2007, the Ninth Circuit issued its decision, applying the principles announced under *Brand X* and
9 deferring to the BIA’s decision in *Matter of Torres-Garcia*. *Duran-Gonzales*, 508 F.3d 1227, 1242
10 (9th Cir. 2007). The *Duran-Gonzales* decision concludes that pursuant to the agency’s
11 interpretation, the filing of an I-212 waiver after deportation and a subsequently unlawful entry, will
12 no longer waive the bar to admissibility at 8 U.S.C. § 1182(a)(9)(C)(i)(II) and thus, adjustment of
13 status to lawful permanent residency is no longer available. *See* 508 F.3d at 1242.

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17 The *Duran-Gonzales* decision was not an announcement of the law as it always had been.
18 Rather, it was a reinterpretation of the law based purely on principles of agency deference, as the
19 Ninth Circuit concluded that Congress was ambiguous as to the meaning of the statute at issue—8
20 U.S.C. § 1182(a)(9)(C)(i)(II)—and it found that the BIA’s interpretation of the statute was
21 reasonable, even though it conflicted with the *Perez-Gonzalez* panel’s interpretation.
22

23 Plaintiffs raise serious legal questions as to what extent this second Ninth Circuit decision
24 can be applied retroactively to them, when they relied on the first Ninth Circuit decision in filing
25 their I-212 waiver applications and in affirmatively presenting themselves to the Department of
26 Homeland Security because they were eligible *at that time* for adjustment of status. The *Duran-*
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1 *Gonzales* panel did not address retroactivity concerns and only dissolved this Court's preliminary
2 injunction. No court has addressed the proper test for retroactive application of a circuit decision
3 that has invoked the deference principles of *Brand X*. The test regarding retroactive application of a
4 judicial decision is articulated by *Chevron Oil Co. v. Hudson*, 404 U.S. 97 (1971). The test
5 regarding retroactive application of an administrative adjudicatory decision is articulated by
6 *Montgomery Ward & Co., Inc. v. FTC*, 691 F.2d 1322 (9th Cir.1982). Those plaintiffs within the
7 class definition who filed I-212 applications in reliance on *Perez-Gonzalez* meet both the *Chevron*
8 *Oil* and the *Montgomery Ward* tests so that they should be found to be eligible for adjustment of
9 status. At a minimum they have raised serious legal questions and warrant injunctive relief while the
10 Court considers the merits of their claim.
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13 The denial of injunctive relief will subject Plaintiffs to irreparable harm, and the balance of
14 interests clearly weighs in their favor. If *Duran-Gonzalez* is applied retroactively, Plaintiffs will be
15 unlawfully deprived of the opportunity to have their I-212 waiver applications adjudicated in
16 accordance with the law of the circuit. Consequently, they will lose their employment authorization
17 and more importantly, their opportunity to legalize their status and remain in the country with their
18 U.S. citizen and/or lawful permanent resident family members. Moreover, Plaintiffs then will be
19 subject to having their prior removal orders reinstated under INA § 241(a)(5) (8 U.S.C. § 1231(a)(5))
20 or being placed in removal proceedings under INA § 240 (8 U.S.C. § 1229a), and accordingly, will
21 be at risk of immediate detention, removal from the United States without a the possibility of
22 adjustment of status, and indefinite separation from their family and home. A temporary restraining
23 order and preliminary injunction is clearly warranted.
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1 Undersigned counsel for Plaintiffs has notified Defendants' of the emergency nature of this
2 motion and of their right to respond before this Court. See attached declaration, Exhibit A.

3
4 **II. STANDARD FOR OBTAINING TEMPORARY RESTRAINING ORDER AND**
5 **PRELIMINARY INJUNCTION**

6 Plaintiffs seek a temporary restraining order and preliminary injunctive relief to preserve the
7 status quo and to prevent irreparable harm. The standards for a temporary restraining order and for a
8 preliminary injunction are substantially the same. *Stuhlbarg Int'l Sales Co., Inc. v. John D. Brush &*
9 *Co., Inc.*, 240 F.3d 832, 839 n. 7 (9th Cir. 2001). The standard for granting a preliminary injunction
10 requires the moving party to show either (1) a probability of success on the merits and the possibility
11 of irreparable harm, or (2) that serious legal questions are raised and the balance of hardships tips
12 sharply in the movant's favor. *Dr. Seuss Enters. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1397 n.
13 1 (9th Cir. 1997). *See also Gilder v. PGA Tour, Inc.*, 936 F.2d 417 (9th Cir. 1991); *Artukovic v.*
14 *Rison*, 784 F.2d 1354 (9th Cir. 1986); *Benda v. Grand Lodge of Int'l Assoc. of Machinists and*
15 *Aerospace Workers*, 584 F.2d 308 (9th Cir. 1978). These standards are not separate tests but the
16 "outer reaches of a single continuum." *International Jensen, Inc. v. Metrosound U.S.A.*, 4 F.3d 819,
17 822 (9th Cir. 1993). "A preliminary injunction is not a preliminary adjudication on the merits, but a
18 device for preserving the status quo and preventing the irreparable loss of rights before judgment."
19 *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1234 (9th Cir. 1999).

20 Plaintiffs seek a temporary restraining order and preliminary injunction in order to prevent
21 the Department of Homeland Security from applying *Duran-Gonzales* to the members of the class
22 who filed their I-212 waiver applications in reliance on *Perez-Gonzalez*. On November 30, 2007,
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1 the Ninth Circuit reversed the November 13, 2006 decision of this Court granting a preliminary
 2 injunction. *Duran-Gonzales v. Dept. of Homeland Security*, 508 F.3d at 1242. Plaintiffs filed for en
 3 banc rehearing on February 26, 2008, and hence, the mandate of the Ninth Circuit did not issue and
 4 this Court's preliminary injunction remained in effect. *See* Fed. R. App. P. 41(b). However, on
 5 January 16, 2009, the Ninth Circuit issued a denial of the petition for rehearing and, hence, the
 6 mandate will issue on January 23, 2009. Exh. B; Fed. R. App. P. 41(b) Plaintiffs therefore request
 7 that this Court issue injunctive relief for those members of the class who filed an I-212 waiver on or
 8 between the Ninth Circuit's August 13, 2004 decision in *Perez-Gonzalez v. Ashcroft* and the
 9 November 30, 2007 decision in *Duran-Gonzales*, so that those individuals are able to remain in the
 10 United States while the Court considers whether *Duran-Gonzales* applies retroactively.

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 14 As argued below, Plaintiffs are able to demonstrate serious legal questions. The issue
 15 presented, regarding the proper test of retroactivity to apply when Circuit precedent was effectively
 16 overruled by an agency decision under the *Brand X* doctrine, is an issue of first impression that has
 17 not been addressed by any federal court. Furthermore, Plaintiffs are likely to succeed on the merits,
 18 as Supreme Court and Ninth Circuit case law counsel against the retroactive application of *Duran-*
 19 *Gonzales* and *Matter of Torres-Garcia*. As discussed above, Plaintiffs also are able to demonstrate
 20 irreparable harm, and likewise are able to demonstrate that the balance of hardships tips sharply in
 21 their favor.
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24 III. ARGUMENT

25 A. Plaintiffs Raise Serious Legal Questions Regarding Whether The Ninth Circuit's 26 Decision Can Be Retroactively Applied To Those Who Filed I-212 Waiver 27 Applications In Reliance on Perez-Gonzalez

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2 From August 13, 2004, when *Perez-Gonzalez* was issued, until November 30, 2007, when
3 *Duran-Gonzales* was issued, the law in the Ninth Circuit permitted non-citizens to file I-212 waivers
4 applications in combination with adjustment applications to seek relief from 8 U.S.C. §
5 1182(a)(9)(C)(i)(II)'s inadmissibility bar. Accordingly, many non-citizens sought relief under the
6 *Perez-Gonzalez* framework. Indeed, many non-citizens were granted relief while others, such as the
7 class members here, were effectively denied relief because the agency refused to abide by the *Perez-*
8 *Gonzalez* decision, despite the fact that it was binding Ninth Circuit precedent until it the *Duran-*
9 *Gonzales* panel overturned it.

10
11 Clearly, the *Duran-Gonzales* framework applies to all applications for relief filed after the
12 date of that decision. Broadly stated, the legal question Plaintiffs raise is whether the agency's
13 interpretation as adopted by the *Duran-Gonzales* decision, should be retroactively applied to
14 individuals who filed I-212 waiver applications with their applications for adjustment of status in
15 reliance on *Perez-Gonzalez*. If these new rules are applied retrospectively, then those class members
16 who filed I-212 waiver applications and adjustment applications in reliance on *Perez-Gonzalez* are
17 subject to mandatory denials of relief: reinstatement of removal, summary expulsion from the United
18 States or placement in removal proceedings without the possibility of adjustment of status. 8 U.S.C.
19 § 1231(a)(5); 8 U.S.C. § 1182(a)(9)(C)(i)(II).

20
21 The *Duran-Gonzales* decision left the question of retroactivity undecided. While as a general
22 rule, judicial decisions are retroactive in that they apply both to the parties in the case before the
23 court and to all other pending cases, *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 535
24 (1991), courts may depart from this rule. *Chevron Oil Co. v. Hudson*, 404 U.S. 97 (1971); *see*

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2 generally, Kermit Roosevelt III, *A Little Theory Is A Dangerous Thing: The Myth of Adjudicative*
3 *Retroactivity*, 31 Conn.L.Rev. 1075 (1999) (collecting cases).

4 The *Chevron Oil* test was originally applied on a case by case basis and hence, in one case a
5 new judicial decision could be applied prospectively only based on the facts of the case, while in
6 another, that same new judicial decision could be applied retrospectively. *George*, 119 F.3d at 1399
7 n.9. However, in *Harper v. Va. Dept. of Tax.*, 509 U.S. 86, 97 (1993) and *James B. Beam Distilling*
8 *Co. v. Georgia, supra*, the Supreme Court withdrew from *Chevron Oil's* piecemeal assessment of
9 whether a new judicial decision should be applied prospectively. In *Danforth v. Minnesota*, 128 S.
10 Ct. 1029 (2008), the Supreme Court clarified that pragmatic concerns are a key element of judicial
11 retroactivity and applied a balancing of interests tests. *Id.* at 1040-1041.
12

13
14 The Ninth Circuit recognizes the *Chevron Oil* test and has applied it with a keen eye on
15 protecting fairness and reliance interests. *George v. Camacho*, 119 F.3d 1393, 1396 (1997).
16 Although decided before *Danforth*, *Camacho* applied a modified *Chevron Oil* test which predicted
17 the pragmatic and equitable focus of *Danforth*. *Camacho*, 119 F.3d at 1399 n.9.
18

19 *Chevron Oil* establishes the following three part test: First, the court considers whether a
20 decision establishes a new principle of law. If so, it may be applied prospectively (as opposed to
21 retrospectively). *George v. Camacho*, 119 F.3d at 1401. Second, the court examines whether
22 retrospective application will advance the new holding. *Id.* Third, the Court looks to fundamental
23 principles of fairness. *Id.*
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2 1. **The Chevron Oil Retroactivity Test Does Not Address Changes in**
3 **Judicial Decisions Based on Deference to the Agency**

4 The *Chevron Oil* test provides useful guidance on general principles of judicial retroactivity.
5 However, for determining the remedies available to non-citizens when a prior, binding judicial
6 interpretation is subsequently effectively overruled by an agency interpretation under *Brand X*,
7 additional analysis may be required.² This is so because the “declaratory function” of judicial
8 decisions to announce what the law is and always has been is not present when ambiguous agency
9 administered statutes are implicated. *Cf. Danforth*, 128 S.Ct. at 1035 (explaining judicial
10 “declaratory function”).
11

12 Cases applying the *Chevron Oil* retroactivity test are those which interpret the meaning of a
13 statute or law to declare what the law “is and always has been.” For instance, in *George v.*
14 *Camacho*, the Ninth Circuit overturned prior precedent interpreting the meaning of its own judicial
15 rule and the Federal Rules of Appellate Procedure regarding the filing of notices of appeal from the
16 district courts. *George*, 119 F.3d at 1396. And, in *Glazner v. Glazner*, 347 F.3d 1212, 1215 (11th
17 Cir. 2003), the Eleventh Circuit addressed the statutory wiretapping provisions at 18 U.S.C. §§
18 2510-22 and overruled a prior circuit court decision that had found an interspousal exemption to the
19 statute. The *Glazner* decision overturned prior precedent based on statutory interpretation and the
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25 ² When *Brand X* is invoked, the judicial decision is a place-holder until the agency may offer a
26 definitive ruling. Time, however, does not stop while an agency deliberates. Non-citizens are
27 entitled to order their affairs and take advantage of immigration relief available to them under the
governing legal regime, which is exactly what the proposed subclass did.

1 conclusion that Congress intended that “any person” could be prosecuted for wiretapping and that
2 the “clear and unambiguous” language of the statute did not make an exception for spouses.

3
4 Lastly, in *In re Mersmann*, 505 F.3d 1033, 1038 (10th Cir. 2007), the Tenth Circuit *en banc*
5 overturned prior precedent interpreting the Bankruptcy Code regarding the discharge in bankruptcy
6 of student loan debts. The court had first issued a precedent decision finding that the statute did not
7 require an adversarial hearing in order to discharge student loan debts, but then reconsidered the
8 issue *en banc* after a number of circuit courts disagreed with its first assessment. The court
9 concluded, based on a reading of the Bankruptcy Code, that an adversarial hearing proving “undue
10 hardship” was required in order to discharge a student loan debt. *Id.* at 1048. Again, this reversal
11 was based on a reading of the statute alone and the interpretation of the agency was not afforded
12 deference.
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14
15 *Camacho, Glazner, and Mersmann* all represent the application of the *Chevron Oil* test
16 where a change in judicial interpretation is based on a reading of the rule or statute, and hence an
17 interpretation of the meaning of the law as it always had been. Conversely, *Duran-Gonzales* was a
18 reversal based on deference to the agency under *Brand X*. Unlike the cases above, it is not an
19 interpretation of the law as it “always had been” but merely a *different* interpretation that applies
20 only when Congress was ambiguous as to the meaning of a statute and when the agency’s
21 interpretation is reasonable. *Duran-Gonzales*, 508 F.3d at 1235-6. *Brand X*’s implications to
22 judicial retroactivity analysis have not been addressed by any court. The reliance and fairness
23 factors are particularly pronounced in such situations. It is a complicated, serious legal issue that
24 merits additional briefing from both parties. On this ground alone, the court may temporarily protect
25 the status quo and issue a restraining order and preliminary injunction.
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1 2. **The Ninth Circuit Has Acknowledged that New Rules Should Not**
2 **Necessarily Apply Retroactively to Noncitizens Who Relied on Prior**
3 **Circuit Precedent.**

4 Recent Ninth Circuit cases demonstrate that the Ninth Circuit is reluctant to apply a new rule
5 to noncitizens who relied on prior judicial decisions. In *Zazueta-Carrillo v. Ashcroft*, 322 F.3d 1166,
6 1171 (9th Cir. 2003), the Ninth Circuit announced a new judicial rule and overruled a prior, on-point
7 precedent, *Contreras-Aragon v. INS*, 852 F.2d 1088 (9th Cir. 1988). Under the old judicial rule in
8 *Contreras-Aragon*, the filing of a petition for review with the Ninth Circuit acted to automatically
9 stay the “voluntary departure” period granted by the agency. *Zazueta-Carrillo*, 322 F.3d at 1170
10 (describing old judicial rule). In *Zazueta-Carrillo*, the Ninth Circuit withdrew from that decision,
11 finding that subsequent amendments to the Immigration and Nationality Act and the requirement to
12 defer to administrative decisions undermined the rationale for its prior judicial rule. 322 F.3d at
13 1172-73. *Zazueta-Carillo* established a new rule that the filing of a petition for review no longer
14 acted to automatically stay the voluntary departure period. The Ninth Circuit explained that its
15 decision fundamentally altered the judicial rules governing prospective requests for voluntary
16 departure and also recognized that applying those rules to Mr. Zazueta would be inherently unfair.
17 *Id.* at 1174. The Ninth Circuit articulated the essential rationale behind the judicial retroactivity
18 analysis. It explained:
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23 Our decision today makes clear that *Contreras-Aragon* is no longer the law of this
24 circuit. At the time that *Zazueta-Carrillo* delayed his departure beyond the specified
25 voluntary departure date, however, *Contreras-Aragon* still stood as the announced
26 law of this circuit. *Zazueta-Carrillo* thus acted in the expectation that the pendency of
27 his petition on the merits would result in the delay of the commencement of his
period for voluntary departure. Under the Board's order, that reliance has cost him
dearly.

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2 *Id.* The Ninth Circuit analyzed the particular circumstances of Mr. Zazueta and remanded to the
3 agency with the suggestion for a remedy. *Id.*

4 In *Duran-Gonzales*, the Ninth Circuit did not address whether its new judicial rule would
5 apply to cases that had relied on *Perez-Gonzalez*. The Ninth Circuit has recognized that issues of
6 retroactivity that involve the interplay of agency interpretation may be addressed subsequent to the
7 announcement of the new rule. For example, though the Ninth Circuit in *Zazueta-Carrillo*
8 recognized the inherent unfairness in applying the rule retroactively to the petitioner, ultimately, the
9 court declined to state whether the *Zazueta-Carrillo* rule would apply retroactively.³ In a
10 subsequent case, *Garcia v. Ashcroft*, 368 F.3d 1157, 1160 (9th Cir. 2004), the Ninth Circuit
11 acknowledged that the retroactive application of *Zazueta-Carrillo*'s new rule was an open question.
12 368 F.3d at 1160 (noting, but not deciding, "the question of whether, in light of their reliance on
13 *Contreras-Aragon*, petitioners should be deemed to have overstayed their period of voluntary
14 departure, or whether, if they leave the country, they should be deemed to have voluntarily departed
15 or removed"); accord *Padilla-Padilla v. Gonzales*, 463 F.3d 972, 982 (9th Cir. 2006).⁴

20
21 ³ Notably, in the context of the *Zazueta-Carillo* retroactivity challenges, exhaustion before the
22 BIA was required as a matter of statute because such challenges arose through the filing of petitions
23 for review. 8 U.S.C § 1252(d)(1). However, exhaustion is not required by statute for Plaintiffs, as
24 their cases arise through district court challenges to the actions of the Department of Homeland
25 Security in adjudicating the I-212 waivers and applications for adjustment of status. There is no
26 requirement of exhaustion in such circumstances. *Darby v. Cisneros*, 509 U.S. 137, 154 (1993). *See*
27 *also Duran-Gonzales*, 508 F.3d at 1234 n. 4.

28 ⁴ In *Padilla Padilla*, the court recognized that the agency had interpreted the *Zazueta-Carillo*
decision to apply prospectively only, even though the *Zazueta-Carillo* panel decision failed to reach
such a conclusion. 463 F.3d at 982.

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2 Likewise, the serious legal question of the retroactivity of *Duran-Gonzales*'s holding must
3 now be resolved.

4
5 **3. Assuming that *Chevron Oil* Does Apply, Despite the Invocation of *Brand***
6 ***X*, Then *Chevron Oil* Counsels Against a Retroactive Application of**
7 ***Duran-Gonzales* to Plaintiffs Who Filed I-212 Waivers in Reliance on**
8 ***Perez-Gonzalez*.**

9 Even assuming that *Chevron Oil* is the proper test regarding the retroactivity for the post-
10 *Brand X* judicial decision in *Duran-Gonzales* to members of the class who filed I-212 waivers in
11 reliance on *Perez-Gonzalez*, then Plaintiffs still raise serious legal questions regarding whether
12 *Duran-Gonzales* applies retroactively to that limited class. Here, the guidelines enumerated in
13 *Chevron Oil* counsel against retrospective application.

14 First, the panel's decision establishes a new principle of law. Contrary to *Perez-Gonzalez*,
15 the *Duran-Gonzales* panel, deferring to the Board's decision in *Matter of Torres-Garcia*, found that
16 § 1182(a)(9)(C)(i)(II) requires an adjustment applicant to wait ten years before applying for an Form
17 I-212 waiver and permanent residency. *Duran-Gonzales*, 508 F.3d at 1242. As such, the panel
18 announced a new principle of law.

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20 Second, retroactive application of *Duran-Gonzales* will not advance the new holding.
21 *George v. Camacho*, 119 F.3d at 1401. In relying on *Brand X* and essentially overturning *Perez-*
22 *Gonzalez*, the intent of the *Duran-Gonzales* decision was to afford the agency space to render its
23 own interpretation of an ambiguous statute. 508 F.3d at 1242. *See Brand X*, 545 U.S. at 980
24 (Congress leaves statutory gaps for an agency to fill "in reasonable fashion. Filling these gaps...
25
26

1 involves difficult policy choices that agencies are better equipped to make than courts”). *Duran-*
2 *Gonzales* was not an interpretation of the statute, Congressional intent, or the regulations. Rather, it
3 was a finding that Congress was unclear as to the meaning of § 1182(a)((9)(C)(i) and that the
4 agency’s interpretation of the statute was reasonable. As such, retrospective application of the
5 decision does not advance the new holding, because *Duran-Gonzales* allows for the agency to apply
6 its own interpretation to all future cases. This principle would not be further enhanced by reversing
7 the law for those class members who had already filed applications based on this Court’s prior
8 interpretation in *Perez-Gonzalez*.
9
10

11 Last, it would be fundamentally unfair to apply the decision retrospectively to a circuit wide
12 class of people who applied for lawful permanent residency based on this Court’s clear holding in
13 *Perez-Gonzalez*. *George v. Camacho*, 119 F.3d at 1401. Prior to *Perez-Gonzalez*, it was unclear
14 whether class members were eligible to apply for lawful permanent residency, or whether they
15 would simply be subject to summary expulsion if they affirmatively brought themselves to the
16 attention of the government. 8 U.S.C. § 1231(a)(5). However, after the Ninth Circuit decided
17 *Perez-Gonzalez*, class members, reasonably relying on the court’s decision, took affirmative steps to
18 apply for permanent residency by submitting the Form I-212 waiver application and paying the filing
19 fees, including the additional \$1000 penalty for §1255(i) adjustment. Indeed, not only did they risk
20 substantial monetary sums, but also risked detention and indefinite separation from their U.S. citizen
21 or lawful permanent resident family members who had filed the original petitions on their behalf.
22 *See Holt v. Shalala*, 35 F.3d 376, 381 (9th Cir. 1994) (finding that the plaintiffs’ reasonable reliance
23 on the prior decision rendered retrospective application fundamentally unfair).
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28 PLAINTIFFS’ **FIRST AMENDED** MOTION
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2 Relying on *Perez-Gonzalez*, members of the class have affirmatively presented themselves to
3 the government and now risk summary expulsion and a permanent bar to returning to the United
4 States or placement in removal proceedings without being eligible for adjustment of status. 8 U.S.C.
5 §§ 1182(a)(9)(A); (a)(9)(C).⁵ See *Glazner v. Glazner*, 347 F.3d at 1220 (noting that it would be
6 fundamentally unfair to subject a class of persons to the “strong likelihood of liability” where they
7 faced no likelihood of liability before). See also *Valdez-Sanchez v. Gonzales*, 485 F.3d 1084, 1089-
8 90 (10th Cir. 2007) (finding that it would be fundamentally unfair to apply the reinstatement of
9 removal statute, 8 U.S.C. § 1231(a)(5), to individuals who had applied for lawful residency prior to
10 the change in law); *Arevalo v. Ashcroft*, 344 F.3d 1, 15 (1st Cir. 2003) (same); *Faiz-Mohammad v.*
11 *Ashcroft*, 395 F.3d 799, 810 (7th Cir. 2005) (same).⁶ Hence, Plaintiffs clearly raise serious legal
12 questions as to whether the *Duran-Gonzales* decision should not be applied to members of the class
13 who filed their Form I-212 waivers in reliance on *Perez-Gonzalez* and prior to the *Duran-Gonzales*
14 decision.
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17

18 **B. PLAINTIFFS ALSO RAISE SERIOUS LEGAL QUESTIONS WHETHER**
19 **THE NINTH CIRCUIT’S ADOPTION OF MATTER OF TORRES-GARCIA**
20 **CAN BE APPLIED RETROACTIVELY TO THEM.**

21
22 ⁵ Individuals who are removed a second time are ineligible to return to the U.S. for a period of
23 twenty years. 8 U.S.C. § 1182(a)(9)(A).

24 ⁶ These cases applied a different test on retroactivity because the change in law involved a
25 change in statute as opposed to a judicial decision. *Landgraf v. USI Film Products*, 511 U.S. 244,
26 280 (1994). However, the *Landgraf* test also includes an assessment of whether it would be
27 “fundamentally unfair” to apply a statute retrospectively and, hence, the analysis is similar to the
28 third step of the *Chevron Oil* test. *Id.*

1
2 As discussed, it is unclear whether *Chevron Oil* is the proper test to apply when determining
3 if members of the class who relied on the *Perez-Gonzalez* decision can be precluded from applying
4 for adjustment of status based on *Duran-Gonzales's* deference to the BIA's decision in *Matter of*
5 *Torres-Garcia*. Assuming that *Chevron Oil* does not apply to *Brand-X* decisions, then Plaintiffs
6 raise serious legal questions as to whether the *agency's* interpretation in *Matter of Torres-Garcia* can
7 be retroactively applied to those class members who filed I-212 waivers in reliance on *Perez-*
8 *Gonzalez* and prior to the agency's announcement that it would not follow the Ninth Circuit's
9 decision in *Perez Gonzalez*, or, for that matter, the Ninth Circuit's adoption of the agency's position.
10
11

12
13 In *Montgomery Ward & Co., Inc. v. FTC*, 691 F.2d 1322, 1333 (9th Cir.1982), the Ninth
14 Circuit established five non-exhaustive factors for determining when an agency's retroactive
15 application of an adjudicatory decision is invalid:
16

17 (1) whether the particular case is one of first impression,

18 (2) whether the new rule represents an abrupt departure from well established practice or
19 merely attempts to fill a void in an unsettled area of law,
20

21 (3) the extent to which the party against whom the new rule is applied relied on the former
22 rule,

23 (4) the degree of the burden which a retroactive order imposes on a party, and
24

25 (5) the statutory interest in applying a new rule despite the reliance of a party on the old
26 standard.
27

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2 These factors are meant to “balance [] a regulated party's interest in being able to rely on the
3 terms of a rule as it is written against an agency's interest in retroactive application of an
4 adjudicatory decision.” *Miguel-Miguel v. Gonzales*, 500 F.3d 941, 951 (9th Cir. 2007) *citing Chang*
5 *v. United States*, 327 F.3d 911, 928 (9th Cir. 2003). An agency may “clarify an uncertain area of the
6 law, so long as the retroactive impact of the clarification is not excessive or unwarranted.”
7 *Montgomery Ward & Co., Inc. v. FTC*, 691 F.2d at 1328. *See also Heckler v. Cmty. Health Servs. of*
8 *Crawford County, Inc.*, 467 U.S. 51, 60 n. 12 (1984) (recognizing the principle that “an
9 administrative agency may not apply a new rule retroactively when to do so would unduly intrude
10 upon reasonable reliance interests”).
11
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13
14 In *Chang v. United States*, 327 F.3d 911, 928 (9th Cir.2003), the Ninth Circuit applied these
15 factors to immigrant investors who sought to become lawful permanent residents based on their
16 investments and consequent job creation within the United States. After the legacy Immigration and
17 Naturalization Service (“INS”) had approved the plaintiffs’ initial residency petitions, and they
18 submitted their investments and come to the United States in reliance on the approved petitions, the
19 agency then issued a number of precedent agency decisions. These decisions changed the rules
20 midstream, rendering plaintiffs ineligible for residency based on the very same investments, which
21 legacy INS had previously approved.. The Ninth Circuit applied the *Montgomery Ward* factors to
22 these cases and found that the application of the new agency decisions was impermissibly
23 retroactive. *Chang*, 327 F.3d at 929.
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2 Similarly, in *Miguel-Miguel v. Gonzales*, 500 F.3d 941, 951 (9th Cir. 2007), the Ninth Circuit
3 applied the *Montgomery Ward* five-part test to the Attorney General's decision in *Matter of Y-L-*, 23
4 I. & N. Dec. 270 (Op. Att'y Gen.2002), to determine if the agency decision applied to convictions
5 entered prior to the Attorney General's decision. In *Matter of Y-L-*, the Attorney General issued a
6 decision finding that controlled substance trafficking offenses were presumed to bar eligibility for
7 asylum and withholding of removal, which was a new rule and a departure from past agency
8 decisions. In *Miguel-Miguel*, the Ninth Circuit applied the five-part *Montgomery Ward* test and
9 concluded that the Attorney General decision did not apply to a plea bargain entered prior to the
10 agency's change in position.
11
12

13
14 As in *Chang* and *Miguel-Miguel*, the *Montgomery Ward* factors counsel against retroactive
15 application of the agency's interpretation in *Matter of Torres Garcia*. The first factor is whether the
16 administrative case was one of first impression. This factor "is directed towards maintaining an
17 incentive for litigants to raise novel claims by allowing a litigant who successfully argues for a new
18 rule to get the benefit of that rule." *Miguel-Miguel*, 500 F.3d at 951.⁷ It also ensures that agencies
19 do not issue advisory opinions. *Id.* As in *Miguel-Miguel*, the decision in *Matter of Torres-Garcia*
20 was not an issue of first impression, as the Ninth Circuit had previously addressed the issue in *Perez-*
21 *Gonzalez*, and the agency decision was entirely contrary to the Ninth Circuit's interpretation. Like
22
23

24
25 ⁷ In *Chang*, the issue regarding immigrant investor applications was one of first
26 impression, which counseled in favor of retroactive application. However, the court still found that
27 retroactive application was impermissible after all five *Montgomery Ward* factors were applied. 327
28 F.3d at 928.

1
2 *Miguel-Miguel*, the agency's published decision in *Matter of Torres-Garcia* was an unrelated
3 proceeding, as the issue of retroactive application to applicants who relied on *Perez-Gonzalez* was
4 not relevant since *Matter of Torres-Garcia* arose outside of the Ninth Circuit. Therefore, the first
5 factor favors Plaintiffs.
6

7 The second factor is whether the new rule represents an abrupt departure from well
8 established practice or merely attempts to fill a void in an unsettled area of law. Here, *Matter of*
9 *Torres-Garcia* unquestionably represents a departure from *Perez-Gonzalez*, as the two reach
10 contrary results. The agency was required to follow *Perez-Gonzalez* within the Ninth Circuit, and,
11 hence, *Matter of Torres-Garcia* was an abrupt departure from this practice. *See Matter of K-S-*, 20 I.
12 & N. Dec. 715 (BIA 1993) (requiring the Board to follow circuit precedent in cases arising in that
13 judicial circuit); *Matter of Anselmo*, 20 I. & N. Dec. 25 (BIA 1989) (same). As *Perez-Gonzalez* was
14 the rule in the Ninth Circuit until the Ninth Circuit's adoption of *Matter of Torres-Garcia*, that
15 adoption was an abrupt departure from prior practice. *See Chang*, 327 F.3d at 928 (“[t]he approval
16 of Appellants' own I-526 petitions containing such provisions shows that this practice continued at
17 least until shortly before the publication of the precedent decisions; the rules introduced in those
18 decisions were an abrupt departure”).
19
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21
22

23 The third factor is the extent to which the party against whom the new rule is applied relied
24 on the former rule. In *Miguel-Miguel*, the Ninth Circuit noted that at the time Miguel plead guilty to
25 his controlled substance offense, he had a “realistic chance” of winning at the BIA. *Miguel-Miguel*,
26 500 F.3d at 952. Similarly, when the subclass of plaintiffs filed their I-212 applications after the
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2 *Perez-Gonzalez* decision and prior to the Ninth Circuit's adoption of *Matter of Torres-Garcia*, they
3 also had a "realistic chance" of success before the agency because USCIS and the legacy INS were
4 required to follow *Perez-Gonzalez*.

5
6 The fourth factor is the degree of the burden which a retroactive order imposes on a party.
7 Here it is clear that retroactive application imposes an immense burden on those within the class who
8 filed I-212 waivers in reliance on *Perez-Gonzalez*. If *Duran-Gonzalez's* adoption of *Matter of*
9 *Torres-Garcia* is applied retroactively, those individuals are now subject to denials of their
10 applications for permanent residency and to removal from the United States, including under
11 "reinstatement of removal" which renders them ineligible for any other relief and subject to removal
12 without a hearing before an immigration judge. 8 U.S.C. § 1231(a)(5); 8 C.F.R. § 241.8.

13
14 The fifth factor is the statutory interest in applying a new rule despite the reliance of a party
15 on the old standard. Here, the *Duran-Gonzales* panel found that a prior panel had held that
16 Congress's intent was ambiguous regarding whether individuals who were previously deported and
17 unlawfully reentered could qualify for lawful permanent residency with an I-212 waiver. *Duran-*
18 *Gonzales*, 508 F.3d at 1237 ("[w]e conclude that, despite some language to the contrary, *Perez-*
19 *Gonzalez* was based on a finding of statutory ambiguity that left room for agency discretion").
20 Because Congress was ambiguous regarding its intent, there is no statutory interest in *denying*
21 Plaintiffs permanent residency. In addition, the interests of § 245(i) (8 U.S.C. § 1225(i)) are served
22 because that provision exists for individuals, like Plaintiffs, who have unlawfully entered the United
23 States. Plaintiffs are all eligible for adjustment of status under § 245(i), and paid the filing penalty of
24 \$1,000 for USCIS to accept their applications. *See Chang*, 327 F.3d at 929 ("[f]rom Appellants'

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1 perspective, the INS's approving and receiving the benefits of their investments, only to renege on
2 the promise of LPR status once those benefits were garnered, must seem very unfair”). The last
3 factor therefore also counsels in favor of Plaintiffs.⁸

4
5 At a minimum, Plaintiffs have raised serious legal questions as to whether *Matter of Torres-*
6 *Garcia*, as adopted by *Duran-Gonzalez*, applies retroactively to those members of the class who filed
7 I-212 applications in reliance on *Perez-Gonzalez*.

8
9
10 **C. PLAINTIFFS ARE ABLE TO DEMONSTRATE IRREPARABLE HARM AND
11 THAT THE BALANCE OF HARDSHIPS TIPS IN THEIR FAVOR.**

12 Plaintiffs have demonstrated not only that they present a serious issue, but also that there is
13 more than a probability of success on the merits. Likewise, Plaintiffs will suffer irreparable harm
14 and the balance of hardships tips sharply in their favor. Therefore, it is appropriate for the Court to
15 grant preliminary relief as “a device for preserving the status quo and preventing the irreparable loss
16 of rights before judgment.” *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1234 (9th Cir. 1999).

17
18 If *Matter of Torres-Garcia* were applied to class members who filed their I-212 waiver
19 applications prior to the Ninth Circuit’s decision in *Duran-Gonzales*, such class members would be

20
21 ⁸ The statutory interest also counseled in favor of the government in *Chang*, but the court
22 found that the statutory interest in retroactive application was insufficiently substantial to outweigh
23 the other factors. *Chang*, 327 F.3d at 929. Notably, in *Miguel-Miguel*, this was the only factor
24 which the Ninth Circuit found counseled in favor of the government’s retroactive application of
25 *Matter of Y-L*. *Miguel-Miguel*, 500 F.3d at 952. There, the court concluded that Congress had
26 afforded the Attorney General wide discretion with regard to “particularly serious crime”
27 determinations. However, the court noted that those same interests are served by prospectively
28 applying *Matter of Y-L* and therefore that “[f]orbid[ding] the Attorney General from applying *Y-L*
retroactively in this case therefore does not severely limit his efforts to pursue the statutory
mandate.” *Miguel-Miguel*, 500 F.3d at 952.

1
2 deprived of the opportunity to have their I-212 waiver and adjustment applications adjudicated
3 despite this Circuit's retroactivity case law, which counsels against the retrospective application of
4 this new rule. As this Court already has found in granting the initial requests for temporary
5 restraining order and preliminary injunction, class members not only risk losing their only avenue to
6 legalize their status and remain in the country with their U.S. citizen and/or lawful permanent
7 resident family members, they also risk loss of significant filing fees, immediate detention and
8 indefinite separation from their family members, based on their reliance on the Ninth Circuit's
9 interpretation of the statute.
10

11
12 The harm class members would suffer if the new rule is applied retroactively is not
13 speculative. Prior to initiation of this action, Defendants had refused to follow *Perez-Gonzalez* and
14 some class members had received notice that their applications had been denied. As a result, USCIS
15 revoked their employment authorization. Moreover, if class members' I-212 applications are denied,
16 or if Defendants are not prevented from giving legal effect to the I-212 applications that already have
17 been unlawfully denied, Defendants may then move to reinstate their prior orders of deportation or
18 removal under 8 U.S.C. § 1231(a)(5), or place them in removal proceedings under 8 U.S.C. § 1229a.
19 If Defendants take such actions, class members are at risk of immediate detention, imminent removal
20 from the United States, perhaps without a hearing, and indefinite separation from their family and
21 home. In addition, if Defendants deny the I-212 applications and initiate removal or reinstatement
22 proceedings, this Court may no longer have jurisdiction to review their claims. 8 U.S.C. §
23 1252(b)(9).
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2 Thus, Plaintiffs have demonstrated that they face the strong possibility of irreparable harm
3 absent temporary relief from this Court. There is no hardship to the government in temporarily
4 enjoining the unlawful retroactive application of a new rule, whereas class members would suffer
5 loss of employment, potential incarceration and indefinite separation from their home and family
6 members. Likewise, the balance of hardships tips sharply in their favor.
7

8 **IV. CONCLUSION**
9

10 Plaintiffs have demonstrated that they have raised a serious issue of first impression and that
11 they face irreparable harm and that the balance of hardships sharply tips in their favor. Plaintiffs
12 have satisfied the required criteria for requesting preliminary injunctive and temporary relief.
13

14 Accordingly, this Court should:

15 (1) issue provisional certification of the proposed class of members who are inadmissible
16 under INA § 212(a)(9)(C)(i)(II) and whose I-212 waiver applications were filed within the
17 jurisdiction of the Ninth Circuit in conjunction with applications for adjustment of status
18 under INA § 245(i) and were pending at any time on or after August 13, 2004 and on or
19 before November 30, 2007 and prior to any final reinstatement of removal decision, pending
20 an order from this Court on the motion for preliminary injunction;

21 (2) issue an immediate temporary restraining order for the new class, restraining Defendants
22 from (a) denying any pending I-212 waiver applications; and (b) giving legal effect to any
23 denied I-212 waiver application, including treating any denial as a final administrative
24 decision, pending an order from this Court on Plaintiffs First Amended Application for a
25 Preliminary Injunction; and

26 (3) issue a preliminary injunction for the new class, restraining Defendants from (a) denying
27 any pending I-212 waiver applications; and (b) giving legal effect to any denied I-212 waiver
28 application, including treating any denial as a final administrative decision.

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Dated this 21st day of January 2009.

Respectfully submitted,
NORTHWEST IMMIGRANT RIGHTS PROJECT
AMERICAN IMMIGRATION LAW FOUNDATION
VAN DER HOUT, BRIGAGLIANO & NIGHTINGALE

By: _____ /s/ _____
Stacy Tolchin
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EXHIBIT A

DECLARATION OF STACY TOLCHIN

I, Stacy Tolchin, hereby declare and state:

1. I am an attorney with Van Der Hout, Brigagliano and Nightingale, LLP. I am co-counsel for Plaintiffs in the *Duran-Gonzales v. DHS* litigation with Matt Adams, Trina Realmuto, Beth Werlin, Marc Van Der Hout, and Nadine Wettstein.
2. On January 20, 2009, I sent an electronic mail message to Elizabeth Stevens, counsel for Defendants, notifying her of Plaintiffs' intent to file a request for temporary restraining order and preliminary injunction. I also notified her of the content of Plaintiffs' motion.
3. On January 21, 2009, I telephoned Ms. Stevens and spoke with her regarding the request for temporary restraining order and preliminary injunction. I then sent, via electronic mail, a copy of the motion and stated that Plaintiffs intend to file the motion electronically on that same evening of January 21, 2009. I then called Ms. Stevens to be sure that she received the electronic mail message, which she had.

Executed this 21st day of January 2009 at Los Angeles, CA.

_____/s/_____
 Stacy Tolchin
 California Bar Number 217431

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EXHIBIT B

FILED

UNITED STATES COURT OF APPEALS

JAN 16 2009

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

<p>AURELIO DURAN GONZALES; et al.,</p> <p>Plaintiffs - Appellees,</p> <p>v.</p> <p>DEPARTMENT OF HOMELAND SECURITY; et al.,</p> <p>Defendants - Appellants.</p>

No. 07-35021

D.C. No. CV-06-01411-MJP
Western District of Washington,
Seattle

ORDER

Before: CANBY, HALL and CALLAHAN, Circuit Judges.

The panel voted to deny appellees' petition for rehearing.

The full court has been advised of the Petition for Rehearing En Banc. A judge of the court requested a vote on whether to rehear the case en banc.

However, the en banc call failed to receive a majority of votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The appellees' petition for rehearing and petition for rehearing en banc are **DENIED.**