

April 2, 2013: Important Information for *Duran-Gonzales* Class Members

On March 29, 2013, the Ninth Circuit issued a new order and [opinion](#) in the *Duran-Gonzales* class action. The issue on appeal was whether the Ninth Circuit's 2007 adverse [decision](#) should apply retroactively to class members who relied on *Perez-Gonzalez* (i.e., those whose adjustment of status and I-212 waiver applications were pending at any time on or after August 13, 2004 and on or before November 30, 2007).

In the March 29, 2013 order, the court withdrew its [October 25, 2011 decision](#) denying the plaintiffs' appeal. The Court held that the intervening en banc decision in [Garfias-Rodriguez](#), which adopted a new retroactivity test for the instant situation, requires the withdrawal of the earlier decision. The court also vacated the district court's decision denying plaintiffs' retroactivity claims and remanded the case for further proceedings. The court noted that it was expressing "no opinion on the viability of any claims or any class or subclass definitions under the analytical framework announced in *Garfias-Rodriguez*—i.e., whether the *Montgomery Ward* factors can be adjudicated on a class-wide basis."

What will happen next?

As indicated, the Ninth Circuit has remanded the case to the district court for consideration of whether the 2007 *Duran Gonzales* decision should apply retroactively to certain class members whose adjustment of status and I-212 waiver applications were pending on the date of the decision (November 30, 2007). Class counsel intend to re-file plaintiffs' motions to amend the complaint and the class definition. Class counsel also may seek a TRO and a preliminary injunction to prevent DHS from removing certain class members while the class action is pending. **Please contact us immediately at clearinghouse@immcouncil.org if you have a client who is class member and who applied for adjustment of status before November 30, 2007 and faces immediate deportation.**

Contact us.

Class counsel are collecting information about class members who filed their adjustment of status and I-212 waiver applications between August 13, 2004 and November 30, 2007. Please email the following information to us at clearinghouse@immcouncil.org:

- Date applications were filed
- Dates of any decisions on the applications
- Whether DHS has issued a reinstatement order or whether the person was ever placed in removal proceedings
- If there was a reinstatement order or removal order, whether the individual filed a petition for review and if so, what the status of that petition is
- Whether the individual is in DHS custody
- Whether the individual is in the United States

Related Information for Individuals Inadmissible Under INA § 212(a)(9)(C)(i)(I) (*Garfias-Rodriguez*):

Although *Duran Gonzales* involves individuals inadmissible under INA § 212(a)(9)(C)(i)(II) (returned without admission after prior removal order), it serves as a reminder that Ninth Circuit

individuals inadmissible under INA § 212(a)(9)(C)(i)(I) (reentered without admission after more than one year of unlawful presence) also may have retroactivity claims. Many of these individuals applied for adjustment of status under former INA § 245(i) pursuant to *Acosta v. Gonzales*, 439 F.3d 550 (9th Cir. 2006). The court reversed *Acosta* in *Garfias-Rodriguez v. Holder*, 649 F.3d 942 (9th Cir. 2011), holding that individuals inadmissible under INA § 212(a)(9)(C)(i)(I) are not eligible to adjust under INA § 245(i). Although the court subsequently rejected the petitioner’s retroactivity claim in the en banc decision in *Garfias-Rodriguez*, it also rejected the “pure retroactivity” analysis in favor of the case-by-case approach. That means that individuals who relied on *Acosta* may be able to distinguish their cases from the petitioner in *Garfias-Rodriguez* and successfully argue that the new rule should not apply retroactively to them. Notably, the petitioner in *Garfias-Rodriguez* first filed his application before both *Acosta* and *Perez-Gonzalez*, upon which *Acosta* relied, and therefore, the court found that he did not rely on Ninth Circuit precedent when he first sought adjustment of status.

Additional Information.

For more information about the *Duran Gonzales* litigation, see <http://www.legalactioncenter.org/litigation/adjustment-status-under-%C2%A7-245i-noncitizens-previously-removed-duran-gonzalez-class-action>. Class counsel will provide updated information as it is available.