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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 Michael CHERTOFF, Secretary
of the Department of Homeland Security,

Defendants.

No.:

**COMPLAINT FOR INJUNCTIVE AND
DECLARATORY RELIEF**

CLASS ACTION

I. PRELIMINARY STATEMENT

1. This is a class action on behalf of people who have been denied the opportunity to apply for lawful permanent resident (LPR) status as a result of Defendants' refusal to comply with the precedent decision of the Ninth Circuit in *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004). The Ninth Circuit has determined that individuals in Plaintiffs' position are eligible to apply for "adjustment" to LPR status. Defendants' willful refusal to comply with this governing precedent causes irreparable harm to Plaintiffs who are deprived of their only avenue to remain in the United States with their U.S. citizen and/or lawful permanent resident family members. Instead, Plaintiffs are threatened not only with the loss of both employment authorization and the opportunity to obtain lawful permanent resident status, but also with detention, summary removal, and separation from their homes and family.

1 2. Plaintiffs are seeking declaratory, injunctive, and mandamus relief arising out of the unlawful
2 actions of the Department of Homeland Security (DHS), through its subcomponent, U.S. Citizenship
3 and Immigration Services (USCIS). Defendants have ordered immigration officers, including those
4 within the jurisdiction of the Ninth Circuit, to deny applications for “Permission to Reapply for
5 Admission After Deportation or Removal” filed on form I-212 (hereinafter I-212 waiver
6 application), because ten years have not elapsed since their last departure. This violates the Ninth
7 Circuit’s decision in *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004).

8
9 3. DHS’ failure to adhere to precedent violates Ninth Circuit case law, the Immigration and
10 Nationality Act (INA), the Administrative Procedure Act (APA), the Fifth Amendment of the United
11 States Constitution, and binding federal regulations which govern administrative adjudication and
12 review procedures.

13
14 4. Plaintiffs are applicants for adjustment of status within the jurisdiction of the Ninth Circuit
15 Court of Appeals who are *prima facie* eligible to apply for adjustment of status under § 245(i) of the
16 Immigration and Nationality Act (INA), 8 U.S.C. § 1255(i) in conjunction with an I-212 waiver
17 application. Plaintiffs seek declaratory and injunctive relief on behalf of themselves and others
18 similarly situated requiring DHS to stop the unlawful denials of I-212 waiver applications, and
19 ordering Defendants to readjudicate the previously denied I-212 waiver applications in accordance
20 with the law.
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23 24 **II. JURISDICTION AND VENUE**

25 5. Jurisdiction is conferred on this Court pursuant to 28 U.S.C. §§ 1331 and 1651, as a civil
26 action arising under the Constitution and laws of the United States; 5 U.S.C. § 701 *et seq.*, as an
27 action to compel agency action unlawfully withheld or unreasonably delayed; and 28 U.S.C. § 1361,
28

1 as an action to compel an officer or employee of the United States to perform a duty owed to
2 Plaintiffs. Declaratory judgment is sought pursuant to 28 U.S.C. §§ 2201-02.

3 6. Venue is proper in this judicial district pursuant to 28 U.S.C. §§ 1391(b) and (e)(1), (2), (4)
4 because Defendants are a U.S agency and head officer of a U.S agency; Defendant has a residence in
5 this district; because “a substantial part of the events or omissions giving rise to the claim occurred”
6 in the jurisdiction of this district; because some Plaintiffs reside in this district; and because no real
7 property is involved in this action.
8

9 10 11 **III. PARTIES**

12 7. Plaintiff Aurelio Duran Gonzalez is a citizen of Mexico who currently resides in Tukwila,
13 Washington. On March 24, 2006, Mr. Duran Gonzalez filed an I-212 waiver application in
14 conjunction with an application for adjustment of status under INA § 245(i) with the Seattle USCIS
15 office. To date, USCIS has not yet adjudicated Mr. Duran Gonzalez’s I-212 waiver application.
16 Pursuant to Defendants’ unlawful directive, USCIS will deny his I-212 waiver application and his
17 application for adjustment of status because ten years have not elapsed since the date of his last
18 departure from the United States.
19

20 8. Plaintiff Maria C. Estrada is a citizen of Mexico who currently resides in Lynden,
21 Washington. On April 1, 2005, Ms. Estrada filed an I-212 waiver application in conjunction with an
22 application for adjustment of status under INA § 245(i) with the Seattle USCIS office. On
23 September 15, 2005, USCIS denied Ms. Estrada’s I-212 waiver application (and adjustment of status
24 application). The USCIS denied the I-212 waiver application, finding her ineligible for the waiver
25 solely because 10 years had not elapsed since the date of Mrs. Estrada’s last departure from the
26 United States.
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1 9. Plaintiff Maria Luisa Martinez de Munguia is a citizen of Mexico who currently resides in
2 Tieton, Washington. On May 5, 2006 Ms. Martinez de Munguia filed an I-212 waiver application in
3 conjunction with an application for adjustment of status under INA § 245(i) with the Yakima USCIS
4 office. To date, USCIS has not yet adjudicated Ms. Martinez de Munguia's I-212 waiver
5 application. Pursuant to Defendants' unlawful directive, USCIS will deny her I-212 waiver
6 application and her application for adjustment of status because ten years have not elapsed since the
7 date of her last departure from the United States.
8

9 10. Plaintiff Irma Palacios de Banuelos is a citizen of Mexico who currently resides in Galt,
10 California. On February 3, 2006, Ms. Palacios de Banuelos filed an I-212 waiver application in
11 conjunction with an application for adjustment of status under INA § 245(i) with the Sacramento
12 USCIS office. On June 20, 2006, USCIS denied Ms. Palacios de Banuelos' I-212 waiver application
13 (and adjustment of status application). The USCIS denied the I-212 waiver application, finding her
14 ineligible for the waiver solely because 10 years had not elapsed since the date of Mrs. Palacios de
15 Banuelos' last departure from the United States.
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18 11. Plaintiff Lucia Muniz de Andrade is a citizen of Mexico who currently resides in Stockton,
19 California. On March 28, 2006, Ms. Muniz de Andrade filed an I-212 waiver application in
20 conjunction with an application for adjustment of status under INA § 245(i) with the Sacramento
21 USCIS office. On August 15, 2006, USCIS denied Ms. Muniz de Andrade's I-212 waiver
22 application (and adjustment of status application). The USCIS denied the I-212 waiver application,
23 finding her ineligible for the waiver solely because 10 years had not elapsed since the date of the Ms.
24 Muniz de Andrade's last departure from the United States.
25

26 12. Plaintiff Karina Noris is a citizen of Mexico who currently resides in San Bernardino,
27 California. On June 15, 2005, Ms. Noris filed an I-212 waiver application in conjunction with an
28

1 application for adjustment of status under INA § 245(i) with the Los Angeles USCIS office. To
2 date, USCIS has not yet adjudicated Ms. Noris' I-212 waiver application. Pursuant to Defendants'
3 unlawful directive, USCIS will deny her I-212 waiver application and her application for adjustment
4 of status because ten years have not elapsed since the date of her last departure from the United
5 States.
6

7 13. Plaintiff Adriana Pouparina is a citizen of Mexico who currently resides in South Gate,
8 California. On March 28, 2005, Ms. Pouparina filed an I-212 waiver application in conjunction with
9 an application for adjustment of status under INA § 245(i) with the Los Angeles USCIS office. To
10 date, USCIS has not yet adjudicated Ms. Pouparina's I-212 waiver application. Pursuant to
11 Defendants' unlawful directive, USCIS will deny her I-212 waiver application and her application
12 for adjustment of status because ten years have not elapsed since the date of her last departure from
13 the United States.
14

15 14. Defendant the Department of Homeland Security is an executive agency of the United States.
16 As of March 1, 2003, DHS is the agency responsible for implementing the Immigration and
17 Nationality Act. Within DHS, USCIS (formerly part of the Immigration and Naturalization Service)
18 is responsible for adjudicating affirmatively filed I-212 waiver applications and affirmatively filed
19 adjustment of status applications. Within DHS, Immigration and Customs Enforcement (ICE) is
20 responsible for initiating removal proceedings and executing removal orders.
21

22 15. Defendant Michael Chertoff is the Secretary of the Department of Homeland Security and as
23 such is charged with responsibility for the administration and enforcement of the Immigration and
24 Nationality Act and all other laws relating to the immigration of noncitizens. He is sued in his official
25 capacity.
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1 **IV. LEGAL AND FACTUAL BACKGROUND**

2 16. On August 13, 2004, the U.S. Court of Appeals for the Ninth Circuit held that § 245(i)
3 adjustment applicants who are inadmissible under INA § 212(a)(9)(C)(i)(II), 8 U.S.C. §
4 1182(a)(9)(C)(i)(II) (for having reentered unlawfully after a prior deportation or removal order) are
5 eligible to have their I-212 waiver applications adjudicated by USCIS if the application was filed
6 before ICE reinstated their prior removal order under INA § 241(a)(5), 8 U.S.C. § 1231(a)(5). *See*
7 *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004).

8
9 17. Under the Ninth Circuit’s decision in *Perez-Gonzalez*, reinstatement of removal may not be
10 initiated unless and until there is final administrative denial of the I-212 waiver and corresponding
11 application for adjustment of status. The government filed a motion to reconsider and a petition for
12 rehearing in *Perez-Gonzalez*. The Ninth Circuit denied both. The government did not file a petition
13 for writ of certiorari to the U.S Supreme Court. Accordingly, *Perez-Gonzalez* is binding on all cases
14 filed within the Ninth Circuit Court of Appeals.

15
16 18. On March 31, 2006, USCIS issued an Interoffice Memorandum providing field guidance for
17 the adjudication of I-212 waiver applications in light of *Perez-Gonzalez*. Memorandum from
18 Michael Aytes, USCIS Acting Associate Director for Operations, and Dea Carpenter, Acting Chief
19 Counsel, to the field, dated March 31, 2006, entitled “Effect of *Perez-Gonzalez v. Ashcroft* on
20 adjudication of Form I-212 applications filed by aliens who are subject to reinstated removal orders
21 under INA § 241(a)(5),” hereinafter “*Perez-Gonzalez* Memo.” By instructing USCIS officers to
22 deny any I-212 waiver application where “10 years have not elapsed since the date of the alien’s last
23 departure from the United States” (Memo, p. 2), the guidance in the *Perez-Gonzalez* Memo
24 completely flouts the holding of the Court in *Perez-Gonzalez* for I-212 applications filed in the Ninth
25 Circuit.
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1 19. Mr. Perez-Gonzalez had been deported on November 30, 1994 and unlawfully reentered
2 twice, in December 1995 and again in December 1999. He filed his I-212 waiver application in July
3 2002. *Perez-Gonzalez*, 379 F.3d at 785. It was clear that 10 years had not elapsed since the date of
4 Mr. Perez-Gonzales' "last departure." At the end of the decision in *Perez Gonzalez*, the court
5 specifically found Mr. Perez-Gonzalez eligible to apply for adjustment of status along with his I-212
6 waiver application and "remand[ed the case] to the USCIS for a discretionary determination on
7 appropriate legal grounds." *Perez Gonzalez*, 379 F.3d at 796.

8
9 20. The instructions of the *Perez-Gonzalez* Memo to deny I-212 waiver applications where 10
10 years have not elapsed since the date of the person's last departure squarely conflicts with the facts,
11 statutory interpretations, and ultimate holding of the Ninth Circuit in *Perez-Gonzalez*. That is, the
12 memo's interpretation of INA §212(a)(9)(C)(i)(II) to preclude I-212 eligibility until after departure
13 and the expiration of 10 years abroad is inconsistent with the *Perez-Gonzalez* Court's interpretation
14 of that provision, which does not similarly preclude I-212 waiver eligibility.

15
16 21. Plaintiffs who have already been issued final administrative denials of their I-212 waiver
17 applications by USCIS consistent with the policy outlined in the *Perez-Gonzalez* Memo are subject
18 to having their prior removal orders reinstated under INA § 241(a)(5) and, accordingly, are at risk of
19 imminent removal from the United States without a hearing. They have been unlawfully deprived of
20 the opportunity to have their I-212 waiver applications adjudicated in accordance with the law of the
21 circuit and, thus, have been unlawfully deprived of the opportunity to legalize their status and remain
22 in the country with their U.S. citizen and/or lawful permanent resident family members.

23
24 22. Plaintiffs whose I-212 waiver applications have not yet been adjudicated are at risk of being
25 unlawfully deprived of the opportunity to have their I-212 waiver applications adjudicated in
26 accordance with the law of the circuit and, thus, are at risk of being unlawfully deprived of the
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1 opportunity to legalize their status and remain in the country with their U.S. citizen and/or lawful
2 permanent resident family members. When USCIS, pursuant with their policy, issues a final
3 administrative denial of the Plaintiffs' I-212 waiver applications, Plaintiffs will be at risk of having
4 their prior removal orders reinstated under INA § 241(a)(5) and, accordingly, will be at risk of
5 imminent removal from the United States without a hearing.
6

7 8 **V. CLASS ALLEGATIONS**

9
10 23. Plaintiffs bring this action on behalf of themselves and all others who are similarly situated,
11 pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(2). The class, as proposed, consists of:

12 (a) individuals who have filed an I-212 waiver application within the jurisdiction of
13 the Ninth Circuit, in conjunction with their application for adjustment of status under
14 INA § 245(i), prior to any final reinstatement determination, where USCIS denied the
15 I-212 application because 10 years had not elapsed since the date of the applicant's
16 last departure from the United States (hereinafter the Denied Class); and

17 (b) Individuals who have filed or will file an I-212 waiver application within the
18 jurisdiction of the Ninth Circuit, in conjunction with their application for adjustment
19 of status under INA § 245(i), prior to any final reinstatement determination, where
20 USCIS has not yet adjudicated the application but where USCIS will deny their I-212
21 application pursuant to Defendants' policy because 10 years had not elapsed since the
22 date of the applicant's last departure from the United States (hereinafter Future
23 Denials Class).

24 24. The requirements of Federal Rules of Civil Procedure 23(a) and 23(b)(2) are met in that the
25 class is so numerous that joinder of all the members is impracticable. The precise number of
26 potential class members is not currently identifiable by Plaintiffs. However, on information and
27 belief there are hundreds of persons who have either submitted I-212 waiver applications which have
28 been denied or will be denied for the same reasons as were Plaintiffs' or who wish to submit I-212
waiver applications but have not done so for fear of having their applications denied for the same
reason as were Plaintiffs'.

1 25. There are questions of law and fact common to the proposed class that predominate over any
2 questions affecting only the individual named Plaintiffs and class members, including: (1) whether
3 Defendants' policy and actions in failing to comply with *Perez-Gonzalez* violates Plaintiffs' rights
4 under the INA, the APA and the Constitution to have their applications adjudicated in accordance
5 with the law.
6

7 26. The claims of the named Plaintiffs are typical of the claims of the proposed class. The
8 named Plaintiffs, like all class members, have had their I-212 waiver applications denied or expect to
9 have them denied based on Defendants' determination that they are ineligible for such a waiver
10 because 10 years have not elapsed since their last departure. This is contrary to the Ninth Circuit's
11 decision in *Perez-Gonzales*.
12

13 27. The named Plaintiffs will fairly and adequately protect the interests of the proposed class
14 because they seek relief on behalf of the class as a whole and have no interest antagonistic to other
15 members of the class.
16

17 28. The named Plaintiffs also are represented by competent counsel with extensive experience in
18 immigration law and federal court litigation and who are willing and able to protect the interests of
19 the class.
20

21 29. Finally, Defendants have acted on grounds generally applicable to the class, thereby making
22 appropriate final declaratory and injunctive relief with respect to the class as a whole.
23

24 VI. CAUSES OF ACTION

25 FIRST CAUSE OF ACTION

26 (Failure to Adhere to Precedent)
27

28 30. Plaintiffs repeat, allege, and incorporate paragraphs 1 through 29 as if fully set forth herein.

1 31. Defendants' failure to adhere to precedent case law violates Ninth Circuit case law, INA §
2 242, the APA, and Plaintiffs' constitutional rights to receive due process. USCIS has determined
3 that it will categorically deny all I-212 waiver applications, and is in fact denying such applications,
4 if 10 years have not elapsed since the applicant's last departure from the United States. Defendants'
5 actions directly conflict with the holding of *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir.
6 2004).

7 8 9 10 **SECOND CAUSE OF ACTION**

11 (Violation of INA §§ 212(a)(9)(C), 245(i), 8 U.S.C. § 1182(a)(9)(C), 1255(i) and 8 C.F.R. § 212.2)

12 32. Plaintiffs repeat, allege, and incorporate paragraphs 1 through 29 as if fully set forth herein.

13 33. Defendants violate Plaintiffs' statutory right to apply for relief which Congress has provided
14 under the INA, depriving Plaintiffs of their opportunity to obtain adjustment of status to lawful
15 permanent residence and live lawfully in the United States under INA § 245(i) and its accompanying
16 waiver of inadmissibility under INA § 212(a)(9)(C) as implemented by 8 C.F.R. § 212.2.
17

18 19 **THIRD CAUSE OF ACTION**

20 (Violation of 5 U.S.C. §§ 702, 706 (APA Claims))

21
22 34. Plaintiffs repeat, allege, and incorporate paragraphs 1 through 29 as if fully set forth herein.

23 35. Plaintiffs have suffered a "legal wrong" or have been "adversely affected or aggrieved" by
24 agency actions. 5 U.S.C. § 702. Plaintiffs are persons aggrieved by agency action, for which there
25 is no other adequate remedy in a court. 5 U.S.C. § 704.

26 36. Defendants' unlawful refusal to comply with the law in adjudicating Plaintiffs' I-212 waiver
27 applications may cause irreparable harm, depriving Plaintiffs of their opportunity to obtain
28

1 adjustment of status to lawful permanent residence and live lawfully in the United States. Plaintiffs
2 are therefore entitled to injunctive relief to “compel agency action unlawfully withheld or
3 unreasonably delayed.” 5 U.S.C. §§ 555(b), 706(1).
4

5 37. The denial of the applications in reliance on a non-binding agency interpretation, and
6 contrary to the Defendants’ regulations exceeds the Defendants statutory authority. 5 U.S.C. §
7 706(c)(2).
8

9 **FOURTH CAUSE OF ACTION**

10 (Relief under the Mandamus Act)

11
12 38. Plaintiffs repeat, allege, and incorporate paragraphs 1 through 29 as if fully set forth herein.

13 39. Plaintiffs have a claim for mandamus relief under 28 U.S.C. § 1361 which provides the
14 authority to compel the agency to perform a duty owed to the Plaintiffs. Defendants have failed, and
15 will continue to fail, to adjudicate I-212 waiver applications along with applications for adjustment
16 of status in accord with the governing statute, regulations, and case law.
17

18
19 **VII. PRAYER FOR RELIEF**

20 WHEREFORE, Plaintiffs’ respectfully request that this Court:

- 21 1. Assume jurisdiction over the matter;
22 2. Certify this case as a class action, as proposed herein;
23 3. Declare DHS’ policy to deny I-212 waiver applications because 10 years have not
24 elapsed since the applicant’s last departure from the United States unlawful as it fails to comply with
25 *Perez-Gonzalez*;
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1 4. Preliminarily and then permanently enjoin DHS from denying any I-212 waiver
2 application because 10 years have not elapsed since the applicant's last departure from the United
3 States, in violation of *Perez-Gonzalez*;

4 5. Order Defendants to adjudicate I-212 waiver applications and adjustment of status
5 applications in compliance with *Perez-Gonzalez*;

6 6. Order Defendants to readjudicate the I-212 waiver applications of the denied class in
7 compliance with *Perez-Gonzalez*;

8 7. Award reasonable attorneys' fees and costs pursuant to the Equal Access to Justice
9 Act, 28 U.S.C. § 2412(d), 5 U.S.C. § 504, or any other applicable law; and

10 8. Grant any and all further relief as this Court deems just and appropriate.

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14 Dated this _____ day of _____ 2006

15
16
17 Respectfully submitted,
18
19 NORTHWEST IMMIGRANT RIGHTS PROJECT
20 AMERICAN IMMIGRATION LAW FOUNDATION
21 VAN DER HOUT, BRIGAGLIANO & NIGHTINGALE

22
23 _____
24 By: Matt Adams

25 Matt Adams
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Attorneys for Plaintiffs

1 **PROOF OF SERVICE BY PERSON**

2 I, the undersigned, say:

3 I am over the age of eighteen years and not a party to the within action or proceedings; my business
4 address is: Northwest Immigrant Rights Project, 615 Second Ave., Ste. 400, Seattle, Washington
5 98104.

6 On September 28, 2006 I caused to be served the within:

7 **Complaint for Declaratory & Injunctive Relief**, along with attached
8 Motion for Class Certification, &
9 Motion for Temporary Restraining Order and Preliminary Injunctive Relief,

10 On the office listed below by delivering in person a true copy, thereof, to:

11 Assistant U.S. Attorney's Office
12 700 Stewart St., Ste. 5220
13 Seattle, WA 98101-3903

14 And to the office listed below by depositing a true copy, thereof, enclosed in a sealed
15 envelope with postage fully pre-paid, to:

16 Michael Chertoff
17 Secretary, DHS
18 Office of the General Counsel
19 US Dept of Homeland Security
20 Washington DC 20258

21 Executed on September 28, 2006 at San Francisco, California. I declare under penalty of
22 perjury that the foregoing is true and correct.

23 Angelica Chazaro
24 Declarant