U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director (MS 2000)
Washington, DC 20529-2000

U.S. Citizenship and Immigration Services

January 31, 2015 **PM- 602-0108**

Policy Memorandum

SUBJECT: Implementation of the Settlement Agreement in *Duran Gonzalez v. Department of Homeland Security*—Adjudication of Requests for U.S. Citizenship and Immigration Services (USCIS) Motions to Reopen Certain Consent to Reapply and Adjustment of Status Applications Filed in the Ninth Circuit Between August 13, 2004, and November 30, 2007

Purpose

This policy memorandum (PM) ensures the consistent implementation of the Settlement Agreement based on *Duran Gonzalez, et al. v. Department of Homeland Security, et al.*,[1] and amends all earlier memoranda on this subject, including the May 19, 2009, memorandum.[2] This guidance only applies to certain consent to reapply and adjustment of status applications filed in the Ninth Circuit between August 13, 2004, and November 30, 2007.

Scope

This PM is binding on all USCIS employees adjudicating requests to reopen on USCIS' own motion certain consent to reapply and adjustment of status applications filed in the Ninth Circuit[3] between August 13, 2004 and November 30, 2007, as outlined in the Settlement Agreement.

Authorities

- Immigration and Nationality Act (INA) 212(a)(9)(C)(i)(II)
- INA 241(a)(5)
- INA 245(a)
- INA 245(c)
- INA 245(i)
- 8 CFR 103.5(a)(5)

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[1] Civil Action No. C06-1411-MJP in the United States District Court for the Western District of Washington.
[2] See May 19, 2009, memorandum, *Adjudicating Forms 1-212 for Aliens Inadmissible Under Section 212(a)(9)(C) or Subject to Reinstatement Under Section 241(a)(5) of the Immigration and Nationality Act in light of Gonzalez v. DHS, 508 F.3d 1227 (9th Cir. 2007).*
[3] The Ninth Circuit has appellate jurisdiction over Federal cases arising in Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington, as well as Guam and the Commonwealth of the Northern Mariana Islands (CNMI). The INA, however, generally was not in force in the CNMI during the period covered by the Settlement Agreement. See Consolidated Natural Resources Act of 2008, Pub. L. 110-229, § 702(a), 122 Stat. 754, 854 (2008) (providing for extension of the INA to the CNMI).

Background

Adjustment of Status and Consent to Reapply

The law permits certain foreign nationals to adjust status to lawful permanent residence while in the United States rather than having to obtain immigrant visas abroad.[4] A foreign national who entered the United States without being inspected and admitted or paroled, or who is not in lawful immigration status, is generally ineligible to adjust. There is an exception for a foreign national who is the beneficiary or derivative beneficiary of an immigrant visa petition or permanent labor certification application filed on or before April 30, 2001.[5] A foreign national seeking to adjust under this exception must still be admissible to the United States.[6]

A foreign national who enters or attempts to reenter the United States without admission or parole after prior removal is inadmissible for unlawful reentry after prior removal.[7] The foreign national cannot be readmitted to the United States until the foreign national departs and remains abroad for 10 years from the date of the last departure and then obtains the Department of Homeland Security's (DHS's) consent to reapply to return to the United States.[8]

Litigation History and the Settlement Agreement

On August 13, 2004, the U.S. Court of Appeals for the Ninth Circuit decided in *Perez-Gonzalez*[9] that a foreign national inadmissible for unlawful reentry after prior removal and seeking adjustment of status under the exception[10] may obtain consent to reapply. The foreign national must have filed the adjustment application before Immigration and Customs Enforcement (ICE) reinstated the prior removal order.

On January 26, 2006, the Board of Immigration Appeals (BIA) decided in *Matter of Torres-Garcia* that a foreign national inadmissible for unlawful reentry after prior removal could not obtain consent to reapply in the United States even if the foreign national sought adjustment under the exception.[11] This holding was contrary to the decision in *Perez-Gonzalez.*

Based on the ruling in *Perez-Gonzalez*, USCIS issued guidance on March 31, 2006, outlining how officers should adjudicate consent to reapply applications filed within the Ninth Circuit. On November 13, 2006, a U.S. district court issued an injunction[12] in which it ruled that USCIS

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[4] See INA 245(a).

[5] See INA 245(a), INA 245(c), and INA 245(i). A foreign national applies for adjustment of status under the exception by filing USCIS Form I-485, Application to Register Permanent Residence or Adjust Status, and Form I-485 Supplement A, Adjustment of Status Under INA 245(i).

[6] See INA 245(i)(2)(A). U.S. immigration law incorporates grounds of inadmissibility, which are based on a foreign national's acts, conditions, and conduct that prevent a foreign national from obtaining lawful status in the United States, including adjustment of status. Grounds of inadmissibility are listed in INA 212(a).

[7] See INA 212(a)(9)(C)(i)(II).

[8] See INA 212(a)(9)(C)(ii). A foreign national applies for consent to reapply by filing USCIS Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal. Consent to reapply is also called "permission to reapply."

[9] See *Perez-Gonzalez v. Ashcroft,* 379 F.3d 783 (9th Cir. 2004).

[10] See INA 245(i).

[11] See *Matter of Torres-Garcia,* 23 I&N Dec. 866 (BIA 2006).

[12] An injunction prevents an entity or a person from taking an action while the court is considering a particular issue.

could not follow its March 2006 guidance.[13] As a result, USCIS placed all affected cases on hold.

On November 30, 2007, the Ninth Circuit Court invalidated *Perez-Gonzalez* and also lifted the injunction so that USCIS could adjudicate the cases placed on hold.[14] USCIS denied all cases because these applicants were ineligible for consent to reapply under *Torres-Garcia* and, therefore, also ineligible for adjustment of status under the exception.

The *Duran Gonzalez* plaintiffs continued to challenge that result and argued that *Matter of Torres-Garcia* should only apply to cases filed after November 30, 2007, and not retroactively to all cases ever filed. The court agreed that it may not apply retroactively to certain cases and the Settlement Agreement is based on that decision.[15]

Implementation of the Settlement Agreement
The Settlement Agreement allows for certain foreign nationals to request that USCIS reopen on its own motion[16] certain applications for consent to reapply and adjustment of status. If the foreign national meets the requirements for reopening, USCIS will readjudicate the consent to reapply and adjustment applications under the guidelines of the Settlement Agreement.[17]

A. <u>Eligibility for Motion to Reopen</u>
Under the Settlement Agreement, USCIS must reopen a foreign national's consent to reapply and adjustment of status application[18] on USCIS' own motion[19] if:

- The foreign national is a Class member;
- The foreign national is either a Subclass A or Subclass C member;[20] and
- The foreign national filed and USCIS received the written request to reopen on USCIS' own motion the foreign national's case **on or before January 21, 2016**.[21]

The foreign national should file the requests with the same USCIS office or service center where the consent to reapply application was originally filed. The foreign national may supplement the

[13] See *Duran Gonzalez v. DHS*, 239 F.R.D. 620 (W.D. Wash. 2006).
[14] See *Duran Gonzales v. DHS*, 508 F.3d 1227 (9th Cir. 2007) (*Duran Gonzales I*). The Ninth Circuit misspelled the plaintiffs' names in all of its *Duran Gonzales* decisions. The proper spelling of the plaintiffs' names is *Duran Gonzalez*. See the Settlement Agreement.
[15] See *Duran Gonzales v. DHS*, 712 F.3d 1271 (9th Cir. 2013) (*Duran Gonzales III*). See the Settlement Agreement.
[16] See 8 CFR 103.5(a)(5) (Service motion).
[17] As with any immigration benefits adjudication, the USCIS officer must follow standard procedures to review and vet a case for fraud and national security or public safety concerns. If a USCIS officer suspects fraud or has national security or public safety concerns in the process of adjudicating a case, the officer should make the appropriate referral to USCIS' Fraud Detection and National Security directorate in accordance with standard procedures.
[18] If reopened, the officer should also reopen any application that was filed in connection with the adjustment of status application even if it was filed after November 30, 2007.
[19] See 8 CFR 103.5(a)(5) (Service Motion). A Class member does not need to pay a filing fee for the request.
[20] The Settlement Agreement divides the Class members into three subclasses. This guidance only applies to Subclass A and Subclass C. ICE implements benefits for Subclass B Members.
[21] The Settlement Agreement specifies that the request must be filed within 18 months of the effective date of the Settlement Agreement. The Settlement Agreement was effective on July 21, 2014.

request with additional information or evidence. **USCIS will reject a request received after January 21, 2016.**

A request received after January 21, 2016, will be untimely even if a postmark or similar evidence suggests it was sent on or before that date.

1. Class Membership
To be a Class member, the foreign national must meet all of the following requirements:

Class Membership Requirements	
1	The foreign national is the primary beneficiary or derivative beneficiary of an immigrant visa petition or permanent labor certification application filed on or before April 30, 2001. If the immigration visa petition or permanent labor certification application was filed after January 14, 1998, the foreign national must also demonstrate that: • The primary beneficiary was physically present in the United States on December 21, 2000; or • If a derivative beneficiary, either the derivative beneficiary or the primary beneficiary, was physically present in the United States on December 21, 2000.
2	The foreign national is inadmissible under INA 212(a)(9)(C)(i)(II) for unlawful reentry after a prior removal[22] that took place at any time because between April 1, 1997, and November 30, 2007, the foreign national entered or attempted to reenter the United States without being admitted or paroled.
3	The foreign national properly filed[23] an adjustment of status application (Form I-485 and Form I-485 Supplement A) between August 13, 2004, and November 30, 2007.
4	When filing the adjustment application (Form I-485 and Form I-485 Supplement A), the foreign national resided in the Ninth Circuit (other than the CNMI).[24]
5	The foreign national properly filed a consent to reapply application (Form I-212) between August 13, 2004, and November 30, 2007.
6	The foreign national is currently not in removal proceedings under INA 240 or does not currently have a petition for review of a removal order pending before the Ninth Circuit.

[22] The term "removal" includes any exclusion or deportation under the INA provisions in effect before April 1, 1997. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208. Division C, Section 309(d), 110 Stat. 3009, 3009-627 (1996).
[23] See 8 CFR 103.2(a)(7). An adjustment of status or consent to reapply application is properly filed when USCIS receives the required form from an applicant who has completed and signed the form and has submitted it to USCIS together with the required filing fee.
[24] Although the Ninth Circuit has long had jurisdiction over appeals from the U.S. District Court for the District of the Northern Mariana Islands, the INA did not come into force in the CNMI until November 2009 under the Consolidated Natural Resources Act of 2008, Pub. L. 110-229, § 702(a), 122 Stat. 754, 854 (2008). For purposes of U.S. immigration law, the CNMI was not "in the Ninth Circuit" during the period covered by the Settlement Agreement.

7	USCIS or the Executive Office for Immigration Review (EOIR) either: • Denied the foreign national's applications for consent to reapply and adjustment on or after August 13, 2004; or • Has not yet adjudicated these forms.
8	The foreign national did not enter or attempt to reenter the United States without being admitted or paroled after November 30, 2007.

It is the foreign national's burden to prove Class membership and to provide the necessary evidence. If the foreign national does not meet the burden, the officer must deny the request for a USCIS motion to reopen without issuing a Request for Evidence (RFE) or Notice of Intent to Deny (NOID). If the foreign national meets the burden, the foreign national is a Class member and the officer must proceed to determine Subclass membership.

2. Subclass Membership
USCIS must grant the request to reopen on USCIS' own motion the adjustment and consent to reapply applications if the Class member is also a Subclass A or Subclass C member.

a) Subclass A Membership
To be a Subclass A member, the Class member must meet all of the following requirements:

Subclass A Membership Requirements	
1	The Class member has been physically present in the United States since the filing of the adjustment application (Form I-485 and Form I-485 Supplement A) and the consent to reapply application.
2	DHS did not initiate removal proceedings[25] after the filing of the adjustment (Form I-485 and Form I-485 Supplement A) and the consent to reapply applications (Form I-212).

The Class member has the burden to prove Subclass A membership. If there is not sufficient evidence to determine Subclass membership, officers must grant a motion to reopen and provide the alleged Subclass A member with 30 days to submit a brief and supporting evidence.[26]
If the Class member does not meet the requirements of Subclass A, the request for USCIS to reopen must be denied. The Class member cannot appeal this decision.

If there is sufficient evidence and the Class member meets the requirements of Subclass A, the officer must grant the request and reopen the adjustment (Form I-485 and Form I-485 Supplement A) and consent to reapply (Form I-212) applications on USCIS' own motion.[27]

[25] See INA 240. Removal proceedings are initiated when the charging document (Notice to Appear (NTA)) is filed with the immigration court. See 8 CFR 1003.14.
[26] See 8 CFR 103.5(a)(5) (Service motion).
[27] If the consent to reapply and adjustment application is reopened, the officer should also reopen any application that was filed in connection with the adjustment of status application even if it was filed after November 30, 2007.

b) Subclass C Membership
To be a Subclass C member, the Class member must meet all of the following requirements:

Subclass C Membership Requirements	
1	The Class member departed the United States after filing the adjustment (Form I-485 and Form I-485 Supplement A) and the consent to reapply applications (Form I-212).
2	The Class member has remained abroad since that departure.
3	The Class member either: (a) Had an immigrant visa application with the Department of State (DOS) pending **on July 21, 2014**; (b) **Filed an immigrant visa application with DOS on or before July 21, 2015**; or (c) Filed and USCIS received a Form I-824, Application for Action on an Approved Application or Petition,[28] with the appropriate fee **on or before July 21, 2015**.[29]

The Settlement Agreement requires that a Subclass C member file the request for USCIS to reopen on its own motion "no later than eighteen months from the effective date," but after the consular officer has made an inadmissibility determination.[30] Strict application of this latter requirement could prevent a Subclass C member from making the request and getting a new decision on the Form I-212; processing delays may make it impossible for a Subclass C member to meet the January 21, 2016, deadline.[31]

For this reason, USCIS will adjudicate a Subclass C member's request for USCIS to reopen the Form I-212 adjudication as long as the Subclass C member's request to reopen is accompanied by evidence that the Subclass C member's immigrant visa application was pending on July 21, 2014, or that the Subclass C member has filed a visa application or Form I-824 on or before July 21, 2015. This accommodation means only that the Subclass C member does not have to wait until a consular officer has found the Subclass C member inadmissible for unlawful

[28] If the visa petition approval has not already been forwarded to the National Visa Center (NVC), the applicant must file a Form I-824 to request that USCIS forward the petition. When completing the form, the applicant should mark "Part 2d" on Form I-824 ("Part 2, Reason for Request, "I am requesting … (d) USCIS to send my approved immigrant visa petition to the National Visa Center").
[29] To be eligible for relief, the Settlement Agreement specifies that a Subclass C member either: (a) must have applied for an immigrant visa within the past year; or (b) must initiate the immigrant visa process within 12 months of the effective date of the Settlement Agreement. The Settlement Agreement was effective on July 21, 2014. Since a Subclass C member will have first sought adjustment, however, it will be necessary to send the approved visa petition before the Subclass C member can actually apply for an immigrant visa. For this reason, if USCIS has not already forwarded the approved visa petition to NVC, USCIS will consider the filing of a Form I-824 on or before July 21, 2015, as sufficient to initiate the immigrant visa process.
[30] Settlement Agreement, p. 10, paragraph 4(C)(2).
[31] For example, although a Subclass C member's application may timely file an immigrant visa application or a Form I-824 by July 21, 2015, ordinary case processing times may make it unlikely that the visa application process would reach the consular interview stage by January 21, 2016.

reentry.[32] The Subclass C member still has to file the request to reopen on USCIS' own motion on or before January 21, 2016.

The Class member has the burden to prove Subclass C membership. If there is not sufficient evidence to determine Subclass C membership, the officer must deny the request to reopen. The officer should not issue an RFE or a NOID. The Class member cannot appeal a denial of the request.

If there is sufficient evidence and the Class member meets the requirement of Subclass C, the officer must grant the request to reopen the Class member's consent to reapply (Form I-212) application on USCIS' own motion.[33]

B. Consent to Reapply Adjudication

Once the case is reopened, the officer should adjudicate the consent to reapply application. The substantive adjudication of the consent to reapply application is the same for Subclass A members and Subclass C members.

A Subclass A member may have a reinstated removal order. The law prohibits a grant of consent to reapply to an applicant with a reinstated removal order.[34] Therefore, the Settlement Agreement requires that ICE cancel the reinstatement within 30 days of receiving written notice that the Subclass A member filed a request with USCIS. If the Subclass A member has a reinstated removal order, the officer should contact ICE so that ICE can cancel the reinstatement.[35] Once the reinstated removal order is canceled, the officer can adjudicate the consent to reapply application.

Depending on when the Class member filed the adjustment and consent to reapply applications, the consent to reapply is adjudicated under *Perez-Gonzalez* or *Matter of Torres-Garcia*. Which case law applies depends on whether the applicant's reliance on *Perez-Gonzalez* after the BIA issued *Matter of Torres-Garcia* was reasonable. To make the determination whether the Class member's reliance was reasonable, the Settlement Agreement divides the Class members into two categories:

- Those with cases[36] filed between August 13, 2004, and January 26, 2006; and
- Those with cases filed between January 27, 2006, and November 30, 2007.

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[32] See INA section 212(a)(9)(C)(i)(II).

[33] See 8 CFR 103.5(a)(5) (Service motion). If the consent to reapply is reopened, the officer should also reopen any application that was filed in connection with the adjustment of status application even if it was filed after November 30, 2007.

[34] See INA 241(a)(5). Subclass C members are outside the United States; even if a Subclass C member ever had a reinstated removal order, the departure executed it. The Subclass C member is no longer subject to a reinstated removal order.

[35] Under the Settlement Agreement, either the Class member or USCIS can notify ICE of the Class member's request. It may be that ICE already cancelled the reinstatement because the Class member or the legal representative had notified ICE. If the officer sees in the systems that ICE has cancelled the reinstatement, the officer does not have to reach out to ICE.

[36] Form I-485, Form I-485 Supplement A, and Form I-212.

1. Cases filed between August 13, 2004, and January 26, 2006
If a Class member filed all applications (Form I-485, Form I-485 Supplement A, and Form I-212) between August 13, 2004, and January 26, 2006, the Settlement Agreement stipulates that the Class member could reasonably rely on *Perez-Gonzalez*. Because reasonable reliance is presumed, the Class member does not have to argue and submit evidence demonstrating reasonable reliance. Therefore, the officer must adjudicate consent to reapply under the law of *Perez-Gonzalez*.[37]

When adjudicating the consent to reapply application under *Perez-Gonzalez*, the officer must:
- Adjudicate the application as if the prior denial had not occurred (*de novo*);[38]
- Disregard the lack of the 10-year absence from the United States and the applicant's physical presence in the United States when determining eligibility;[39] and
- Not consider the unlawful return as a negative factor when determining whether consent to reapply is warranted as a matter of discretion.[40]

A Class member may be inadmissible on grounds other than unlawful reentry after prior removal. If a waiver or other form of relief is legally available, the officer should issue an RFE inviting the Class member to file the appropriate application for relief, such as a waiver.[41] If the Class member previously filed an application for relief such as a waiver, the officer may amend the application in the file according to current practice, as needed. If no relief is available, or the application for relief cannot be approved, the officer should deny the consent to reapply application as a matter of discretion because approving the consent to reapply application would serve no purpose.[42]

If the consent to reapply application is approvable and the applicant is a Subclass A member, the officer must then adjudicate the adjustment of status application. If the applicant is a Subclass C member and eligible for consent to reapply, the officer must approve the application and notify DOS at the NVC of the approval.

If the applicant is not eligible for consent to reapply, the officer must deny the application. The decision should include standard language about the possibility of an administrative appeal. If the applicant is a Subclass A member, the officer must then adjudicate the adjustment of status application. If the applicant is a Subclass C member, the officer must notify DOS at the NVC of the denial.

The officer must also provide notice of the decision to the Class member and any legal

[37] The Settlement Agreement presumes that reliance on *Perez-Gonzalez* was reasonable. The foreign national is not required to explain why the reliance was reasonable.
[38] The prior ineligibility is no longer relevant to the extent that it would conflict with *Perez-Gonzalez*.
[39] These requirements are in INA 212(a)(9)(C)(ii). But *Perez-Gonzalez* held that an INA 245(i) application overcomes these requirements. Therefore, the officer must ignore them.
[40] Any remaining negative discretionary factor may still weigh against a favorable exercise of discretion.
[41] The Class member must pay the filing fee unless the Class member requests and receives a fee waiver.
[42] See *Matter of J-F-D-*, 10 I&N Dec. 694 (Reg. Comm. 1963). Approving the consent to reapply application would serve no purpose as granting the consent to reapply application would not make the applicant admissible.

representative.

2. Cases filed between January 27, 2006, and November 30, 2007
If the Class member filed all applications (Form I-485, Form I-485 Supplement A, and Form I-212) between January 27, 2006, and November 30, 2007, consent to reapply must be adjudicated either under the law of *Perez-Gonzalez* or *Matter of Torres-Garcia*.

Which case law applies depends on whether the Class member can successfully argue that he or she reasonably relied on *Perez-Gonzalez* although the BIA had already issued *Matter of Torres-Garcia*. The arguments must be supported by evidence.

If the arguments and evidence establish that under the circumstances…	**Then, the law stated in…**
Relying on *Perez-Gonzalez* was reasonable.	*Perez-Gonzalez* applies. Adjudicate consent under *Perez-Gonzalez*.
Relying on *Perez-Gonzalez* was unreasonable.	*Matter of Torres-Garcia* applies. Deny the consent to reapply application because the Class member does not qualify for consent to reapply under *Matter of Torres-Garcia*.

The Class member has the burden to establish that the reliance was reasonable. If the evidence is insufficient to support the claim, the officer should issue an RFE according to current USCIS policy.

a) Reasonable reliance
The Ninth Circuit judgment and the Settlement Agreement provided guidelines on how to evaluate a Class member's arguments that the reliance on *Perez-Gonzalez* was reasonable:

- Evidence submitted to establish that the Class member relied on the District Court's November 13, 2006, order prohibiting USCIS from applying its March 2006 *Perez-Gonzalez* guidance is relevant.
- The Class member's evidence must support a finding that a reasonable person would have relied on *Perez-Gonzalez*.[43]
- The below listed arguments do not support reasonable reliance. If the Class member makes these arguments, the officer should not consider them when weighing all arguments.
  - The provisions providing for inadmissibility on account of unlawful reentry after prior removal and the adjustment of status exception are ambiguous. When looking at the law, it is not readily apparent whether an applicant is eligible for the benefits.
  - The applicant relied on *Perez-Gonzalez* because it took the BIA and the Ninth Circuit 6 years to determine which case law applies.

[43] It is difficult to specify what reliance arguments might be persuasive. One possibility might be an argument, supported by evidence, that the Class member intended to apply before *Matter of Torres-Garcia* but could not do it because of serious illness or another extraordinary circumstance that was beyond the foreign national's control.

- The applicant admitted to being unlawfully present after a prior removal and the applicant also paid the $1,000 penalty fee.
- The applicant did not believe that *Perez-Gonzalez* could be invalidated.

The officer must consider and weigh each argument and piece of evidence independently and in the context of the specific facts of the case. If the officer is uncertain how to evaluate, the officer should contact local counsel or the Office of the Chief Counsel.

If the applicant did not provide evidence sufficient to make a determination, the officer may issue an RFE or a NOID according to current USCIS policy.

When an officer denies the consent to reapply application, the decision must substantively address all arguments and evidence the Class member presented and why they were not persuasive.

b) <u>If reasonable reliance is established</u>
If the officer finds that reliance on *Perez-Gonzalez* was reasonable, then the officer must adjudicate the consent to reapply application under *Perez-Gonzalez*.

When adjudicating the consent to reapply application under *Perez-Gonzalez*, the officer must:
- Adjudicate the application as if the prior denial had not occurred (*de novo*);[44]
- Disregard the statutory 10-year absence requirement and the applicant's physical presence in the United States when determining eligibility;[45] and
- Not consider the unlawful return as a negative factor when determining whether consent to reapply is warranted as a matter of discretion.[46]

A Class member may be inadmissible for reasons other than unlawful reentry after prior removal. If a waiver or other form of relief is legally available, the officer should issue an RFE inviting the Class member to file the appropriate application for relief, such as a waiver.[47] If the Class member has previously filed an application for relief, the officer may amend the application in the file according to current practice, as needed. If no relief is available, or the application cannot be approved, the officer should deny the consent to reapply application as a matter of discretion because the approval of consent to reapply would not serve a purpose.[48]

If the consent to reapply application is approvable and the applicant is a Subclass A member, the officer must then adjudicate the adjustment of status application. If the applicant is a Subclass C member and eligible for consent to reapply, the officer must approve the application and notify DOS at the NVC of the approval.

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[44] The prior ineligibility is no longer relevant to the extent that it would conflict with *Perez-Gonzalez*.
[45] These requirements are in INA 212(a)(9)(C)(ii). But *Perez-Gonzalez* held that an INA 245(i) application overcomes them. This is why the officer must ignore these requirements.
[46] Any remaining negative discretionary factor may still weigh against a favorable exercise of discretion.
[47] The Class member must pay the standard filing fee unless the Class member requests, and receives, a fee waiver.
[48] See *Matter of J-F-D-*, 10 I&N Dec. 694 (Reg. Comm. 1963). Approving the consent to reapply application would serve no purpose as granting the consent to reapply application would not make the applicant admissible.

If the applicant is not eligible for consent to reapply, the officer must deny the application. The decision should include standard language about the possibility of an administrative appeal. If the applicant is a Subclass A member, the officer must then adjudicate the adjustment of status application. If the applicant is a Subclass C member, the officer must notify DOS at the NVC of the denial.

The officer must also provide notice of the decision to the Class member and any legal representative.

c) If reasonable reliance is not established
If a Class member does not demonstrate reasonable reliance, *Matter of Torres-Garcia* applies. The officer must deny consent to reapply because the applicant is ineligible for consent to reapply under *Matter of Torres-Garcia*.

The decision must include standard language addressing the opportunity for the Class member to administratively appeal the consent to reapply denial. The officer must notify the Class member and any legal representative of the decision. If the applicant is a Subclass A member, the officer must adjudicate the adjustment of status application. If the applicant is a Subclass C member, the officer must also notify DOS at the NVC of the decision.

C. Adjustment of Status Adjudication
USCIS can only adjudicate adjustment of status applications that were filed by Subclass A members.[49]

If the case involves a Subclass A member, the officer must readjudicate the adjustment of status application filed under the exception.[50] The officer should adjudicate the adjustment of status application according to current USCIS guidance.
If the consent to reapply application is approvable, the officer should adjudicate the adjustment application as if the prior denial had not occurred (de novo). If the Class member is eligible for adjustment of status, then the officer may approve the adjustment and the consent to reapply applications.

If the consent to reapply application is not approvable, the Subclass A Class member is statutorily ineligible for adjustment of status because the Class member is inadmissible for unlawful reentry after prior removal.[51] The officer should deny both the consent to reapply and the adjustment of status applications.

If the Class member is ineligible for adjustment of status, the officer must deny the application for adjustment based on the statutory ineligibility.[52] The officer should also deny the application

[49] Subclass C members already departed the United States and USCIS can no longer adjudicate Subclass C members' adjustment applications.
[50] See INA 245(a) and INA 245(i).
[51] Under INA 245(a), INA 245(i), and INA 212(a)(9)(C)(i)(II).
[52] Under INA 245(a), INA 245(c), and INA 245(i).

for consent to reapply as a matter of discretion because to approve the consent to reapply would not serve a purpose.[53]

The officer should notify the Class member and any legal representative of the decision. The officer should follow current USCIS guidance on the issuance of a NTA in the case of a denial.

Use
This PM is intended solely for the guidance of USCIS personnel in the performance of their official duties. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

Contact Information
Questions or suggestions regarding this PM should be addressed through appropriate channels to the Office of the Chief Counsel and the Office of Policy and Strategy.

Appendix
Step-by-Step Determinations

[53] See *Matter of J-F-D-*, 10 I&N Dec. 694 (Reg. Comm. 1963). Approving the consent to reapply application would serve no purpose as granting the consent to reapply application would not make the applicant eligible for the benefit.

APPENDIX

Step-by-Step Determinations

1. Class Membership

STEP	Determine if…	If yes…	If no…
1	The foreign national filed and USCIS received the request to reopen the adjustment and consent to reapply application **by January 21, 2016**.	Go to **Step 2**.	Deny the request to reopen.
2	The foreign national is inadmissible INA 212(a)(9)(C)(i)(II) for unlawful reentry after prior removal[54] because the foreign national entered or attempted to reenter without being inspected and admitted or paroled : • Between April 1, 1997, and Nov. 30, 2007; and • After having previously been deported or removed from the United States.	Go to **Step 3**.	Deny the request to reopen.
3	The foreign national is the primary or derivative beneficiary of an immigrant visa petition or permanent labor certification application filed on or before April 30, 2001.	Go to **Step 4**.	Deny the request to reopen.
4	The foreign national is the primary beneficiary or the derivative beneficiary of an immigrant visa petition or permanent labor certification application after January 14, 1998.	Go to **Step 5**.	Proceed to **Step 9**.
5	The foreign national is a primary beneficiary.	Go to **Step 6**.	Proceed to **Step 7**.
6	The foreign national was physically	Go to **Step 9**.	Deny the request to

[54] See INA 212(a)(9)(C)(i)(II).

STEP	Determine if…	If yes…	If no…
	present in the United States on December 21, 2000.		reopen.
7	The foreign national is a derivative beneficiary.	Go to **Step 8**.	Deny the request to reopen.
8	Either the foreign national was present in the United States on December 21, 2000, or if the foreign national's primary beneficiary was physically present in the United States on December 21, 2000.	Go to **Step 9**.	Deny the request to reopen.
9	The foreign national properly filed an adjustment application (Form I-485 and Form I-485 Supplement A) while residing in the Ninth Circuit between August 13, 2004, and November 30, 2007.	Go to **Step 10**.	Deny the request to reopen.
10	The foreign national properly filed a consent to reapply application (Form I-212) between August 13, 2004 and November 30, 2007.	Go to **Step 11**.	Deny the request to reopen.
11	The foreign national has not yet received a decision on the applications for adjustment of status and consent to reapply.	Go to **Step 13**.	Go to **Step 12**.
12	The foreign national received a denial of the adjustment of status and consent to reapply applications from USCIS or EOIR on or after August 13, 2004.	Go to **Step 13**.	Deny the request to reopen.
13	The foreign national is currently in removal proceedings.	Deny the request to reopen.	Go to **Step 14**.
14	The foreign national has a pending petition for review of a removal order that resulted from proceedings[55] before the Ninth Circuit Court of Appeals.	Deny the request to reopen.	**The foreign national is a Class member.** **Determine Subclass membership next.**

[55] Under INA 240.

2. <u>Subclass Membership</u>

STEP	Determine if…	If yes…	If no…
1	The Class member is physically present in the United States.	Go to **Step 2**.	Go to **Step 5**.
2	The Class member provided evidence of physical presence in the United States since filing the applications for adjustment (Form I-485 and Form I-485 Supplement A) and consent to reapply (Form I-212).	Go to **Step 4**.	Reopen on USCIS' own motion under 8 CFR 103.5(a)(5) and request the information. Go to **Step 3**.
3	The Class member has established with the response to the service motion that the Class member has been physically present in the United States since filing the applications for adjustment (Form I-485 and Form I-485 Supplement A) and consent to reapply (Form I-212).	Go to **Step 4**.	Deny the request to reopen.
4	The Class member was put into removal proceedings after filing the application for adjustment (Form I 485 and Form I-485 Supplement A) and consent to reapply (Form I-212).	Deny the request to reopen.	**The Class member is a Subclass A member. The case must be reopened.** **Next, adjudicate the consent to reapply and adjustment of status applications.**
5	The Class member departed the United States after filing the applications for adjustment (Form I-485 and Form I-485 Supplement A) and consent to reapply (Form I-212).	Go to **Step 6**.	Deny the request to reopen.
6	The Class member has remained abroad since that last departure.	Go to **Step 7**.	Deny the request to reopen.
7	The Class member either: (a) Had an immigrant visa application with DOS pending **on**	**The foreign national is a Subclass C member. The case**	Deny the request to reopen.

STEP	Determine if…	If yes…	If no…
	July 21, 2014; or (b) Filed an immigrant visa application with DOS **on or before July 21, 2015**; or (c) Filed and USCIS received a Form I-824, Application for Action on an Approved Application or Petition,[56] with the appropriate fee **on or before July 21, 2015**.[57]	**must be reopened**. **Next, adjudicate the consent to reapply application.**	

3. <u>Consent to Reapply and Adjustment of Status Adjudication for Subclass A Members</u>

STEP	Determine if…	If yes…	If no…
1	The Class member filed the applications for adjustment (Form I-485 and Form I-485 Supplement A) and consent to reapply (Form I-212) **between August 13, 2004, and January 26, 2006**.	Go to **Step 4**.	Go to **Step 2**.
2	The Class member filed the applications for adjustment (Form I-485 and Form I-485 Supplement A) and consent to reapply (Form I-212) **between**	Go to **Step 3**.	N/A[58]

[56] If the visa petition approval has not already been forwarded to NVC, the applicant must file a Form I-824 to request that USCIS forward the petition. When completing the form, the Subclass C member should mark "Part 2d" on Form I-824 (Part 2, Reason for Request, "I am requesting … (d) USCIS to send my approved immigrant visa petition to the National Visa Center.")

[57] To be eligible for relief, the Settlement Agreement specifies that a Subclass C member either: (a) must have applied for an immigrant visa within the past year; or (b) must initiate the immigrant visa process within 12 months of the effective date of the Settlement Agreement. The Settlement Agreement was effective on July 21, 2014. Since a Subclass C member will have first sought adjustment, however, it will be necessary to send the approved visa petition before the Subclass C member can actually apply for an immigrant visa. For this reason, if USCIS has not already forwarded the approved visa petition to NVC, USCIS will consider the filing of a Form I-824 on or before July 21, 2015, as sufficient to initiate the immigrant visa process.

[58] The Class is limited to those having filed cases between August 13, 2004, and November 30, 2007. The chart addressing Class membership already asked whether the foreign national filed the case during this period. If the case was filed after November 30, 2007, the foreign national is not a Class member.

STEP	Determine if…	If yes…	If no…
	January 27, 2006, and November 30, 2007.		
3	The Class member submitted evidence, either with the initial request or in response to an RFE, that supports a finding of reasonable reliance on *Perez-Gonzalez*.	Go to **Step 4**.	Deny the consent to reapply application based on *Matter of Torres-Garcia*. Deny the adjustment application for lack of eligibility because the applicant is inadmissible for unlawful reentry.
4	The Class member has a reinstated removal order.	Notify ICE of the request and wait until ICE cancels the reinstatement. Go to **Step 5**.	**Go to Step 5**.
5	The Class member is inadmissible on grounds other than unlawful reentry after prior removal.	Go to **Step 6**.	Go to **Step 8**.
6	The Class member has a waiver or other form of relief available to overcome the other ground(s) of inadmissibility.	Issue an RFE/NOID if the Class member has not yet filed the appropriate application for relief, such as a waiver.[59] Go to **Step 7**.	Deny the consent to reapply application as a matter of discretion because granting it would not render the Class member admissible. Deny the adjustment of status application for lack of statutory eligibility.
7	The waiver or other form of relief is approvable.	Go to **Step 8**.	Deny the waiver or other form of relief for lack of eligibility. Deny consent to reapply as a matter of discretion because granting it would not render the Class member admissible.

[59] The Class member must pay the standard filing fee unless the Class member requested and is granted a fee waiver.

STEP	Determine if…	If yes…	If no…
			Deny the adjustment of status application for lack of statutory eligibility.
8	The Class member's consent to reapply application is approvable.[60]	Go to **Step 9**.	Deny the waiver or other form of relief as a matter of discretion because granting it would not render the Class member admissible. Deny the consent to reapply application. Deny the adjustment of status application for lack of statutory eligibility.
9	The Class member's adjustment of status application filed under the exception is approvable.	Approve the waiver or other form of relief. Approve the consent to reapply application. Approve the adjustment of status application.	Deny the waiver or other form of relief as a matter of discretion because granting it would not make the Class member eligible for the benefit. Deny the consent to reapply application as a matter of discretion because granting it would not make the Class member eligible for the benefit. Deny the adjustment of status application for lack of statutory eligibility.

[60] The Settlement Agreement specifies that the application must be adjudicated according to *Perez-Gonzalez*. The officer must: 1) disregard the lack of the 10-year physical absence requirement; 2) disregard the Class member's presence in the United States; and 3) not count the unlawful reentry as a negative factor when determining whether consent to reapply is warranted as a matter of discretion.

4. <u>Consent to Reapply Adjudication for Subclass C Members</u>

STEP	Determine if…	If yes…	If no…
1	The Class member filed the applications for adjustment (Form I-485 and Form I-485 Supplement A) and consent to reapply (Form I-212) **between August 13, 2004, and January 26, 2006**.	Go to **Step 4**.	Go to **Step 2**.
2	The Class member filed the application for adjustment (Form I-485 and Form I-485 Supplement A) and consent to reapply (Form I-212) **between January 27, 2006 and November 30, 2007**.	Go to **Step 3**.	N/A[61]
3	The Class member submitted evidence either in the initial request or in response to an RFE that supports a finding of reasonable reliance on *Perez-Gonzalez.*	Go to **Step 4**.	Deny consent to reapply application based on *Matter of Torres-Garcia*. Notify DOS at the NVC of the consent to reapply denial.
4	The Class member is inadmissible on grounds other than unlawful reentry after prior removal.	Go to **Step 5**.	Go to **Step 7**.
5	The Class member has a waiver or other form of relief available to overcome the other ground(s) of inadmissibility.	Issue an RFE/NOID if the Class member has not yet filed the appropriate application for relief, such as a waiver.[62] Go to **Step 6**.	Deny the consent to reapply application as a matter of discretion because granting it would not render the Class member admissible. Notify DOS at the NVC of the denial.
6	The waiver or other form of relief is approvable.	Go to **Step 7**.	Deny the waiver or other form of relief for lack of

[61] The Class is limited to those having filed cases between August 13, 2004, and November 30, 2007. The Chart addressing Class membership already asked whether the foreign national filed the case during this period. If the case was filed after November 30, 2007, the foreign national is not a Class member.
[62] The Class member must pay the standard filing fee unless the Class member requested and is granted a fee waiver.

STEP	Determine if…	If yes…	If no…
			eligibility. Deny the consent to reapply application as a matter of discretion because granting it would not render the Class member admissible. Notify DOS at the NVC of the denials.
7	The Class member's consent to reapply application is approvable.[63]	Approve the waiver or other form of relief. Approve the consent to reapply application. Notify DOS at the NVC of the approvals.	Deny the consent to reapply application for lack of eligibility. Deny the waiver or other form of relief (if applicable) as a matter of discretion because granting it would not render the Class member admissible. Notify DOS at the NVC of the denials.

[63] The Settlement Agreement specifies that the application must be adjudicated according to *Perez-Gonzalez*. The officer must: 1) disregard the lack of the 10-year physical absence requirement; 2) disregard the Class member's presence in the United States; and 3) not count the unlawful reentry as a negative discretionary factor.