OOD
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To: All of EOIR
From: James R. McHenry III, Director
Date: November 5, 2020

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GUIDELINES FOR THE IMPLEMENTATION OF THE SETTLEMENT AGREEMENT IN *MENDEZ ROJAS V. WOLF*

PURPOSE:	Provide guidance to adjudicators and administrative staff for the implementation of the settlement agreement in *Mendez Rojas v. Wolf*, No. 2:16-cv-01024-RSM (W.D. Wash. Nov. 4, 2020).
OWNER:	Office of the Director
AUTHORITY:	8 CFR 1003.0(b)(1)
CANCELLATION:	None

On November 4, 2020, the district court for the Western District of Washington approved a settlement agreement in *Mendez Rojas v. Wolf*, No. 2:16-cv-01024-RSM (W.D. Wash. Nov. 4, 2020),[1] a class-action lawsuit pertaining to the one-year filing deadline for asylum applications. *See* Attachment A. The Executive Office for Immigration Review (EOIR) and Department of Homeland Security (DHS) reached this settlement agreement following negotiation with Plaintiffs. The settlement agreement is effective nationwide.

The settlement agreement requires, *inter alia*, that class members file notice of class membership and any accompanying documentation, as set forth in the settlement agreement, on or before March 31, 2022. An individual who establishes *Mendez Rojas* class membership shall be deemed to have timely filed an asylum application. The settlement agreement also provides for processes to effectuate class relief for individuals who have received a final order of removal or whose cases were administratively closed. Additionally, as part of the settlement, EOIR and DHS have implemented a uniform procedural mechanism by which all asylum applicants, regardless of *Mendez Rojas* class membership, can file a Form I-589, Application for Asylum and for Withholding of Removal.

This Policy Memorandum (PM) provides guidance to assist EOIR adjudicators and administrative staff in complying with the requirements of the settlement agreement.

[1] On March 29, 2018, the district court granted Plaintiffs' motion for summary judgment in the case, then titled *Mendez Rojas v. Johnson*, 305 F. Supp. 3d 1176 (W.D. Wash. 2018). The parties thereafter entered into mediation to resolve the claims raised in the litigation.

I. Class Definitions

The settlement agreement defines two categories of class members as follows:

> 1. Class A ("Credible Fear Class"): All individuals who were encountered by DHS upon arrival or within 14 days of unlawful entry; were released by DHS after they have been found to have a credible fear of persecution or torture pursuant to INA § 235(b)(1)(B)(v) and 8 C.F.R. §§ 208.30, 1208.30, 1003.42; and did not receive individualized notice of the one-year deadline to file an asylum application as set forth in INA § 208(a)(2)(B).
>
> 2. Class B ("Other Entrants Class"): All individuals who were encountered by DHS upon arrival or within 14 days of unlawful entry; expressed a fear of return to their country of origin; were released by DHS upon issuance of a Notice to Appear (NTA); and did not receive individualized notice of the one-year deadline to file an asylum application set forth in INA § 208(a)(2)(B).

Each class is comprised of two subclasses. Two of these subclasses, A.II and B.II,[2] are within EOIR's jurisdiction, and two other subclasses, A.I and B.I,[3] are solely within DHS's jurisdiction. The requirements for the classes within EOIR's jurisdiction are as follows:

To be a Class A.II member, an individual:

> (1) must have been encountered by DHS upon arrival or within 14 days of unlawful entry,
> (2) must have been released or will be released from DHS custody,
> (3) must have been found to have a credible fear of persecution,
> (4) did not receive individualized notice of the one-year asylum filing deadline, AND
> (5) must have not yet applied for asylum OR applied for asylum after one year of their last arrival.

To be a Class B.II member, an individual:

> (1) must have been encountered by DHS upon arrival or within 14 days of unlawful entry,
> (2) must have expressed a fear of return to their country of origin,
> (3) must have been released from DHS custody upon issuance of an NTA,
> (4) did not receive individualized notice of the one-year asylum filing deadline, AND
> (5) must have not yet applied for asylum OR applied for asylum after one year of their last arrival.

[2] Class A.II consists of "[a]ll individuals in Class A who are in removal proceedings and who either (a) have not yet applied for asylum or (b) applied for asylum after one year of their last arrival." Class B.II consists of "[a]ll individuals in Class B who are in removal proceedings and who either (a) have not yet applied for asylum or (b) applied for asylum after one year of their last arrival." Settlement Agreement and Release 2-3, Doc. 79-1.

[3] Class A.I consists of "[a]ll individuals in Class A who are not in removal proceedings and who either (a) have not yet applied for asylum or (b) applied for asylum after one year of their last arrival." Class B.I consists of "a]ll individuals in Class B who are not in removal proceedings and who either (a) have not yet applied for asylum or (b) applied for asylum after one year of their last arrival." Settlement Agreement and Release 2-3, Doc. 79-1.

The temporal scope of the classes includes individuals, within the scope of Class A or Class B, who were issued NTAs and/or were in removal proceedings on or after June 30, 2016, subject to all other limitations set forth in the settlement agreement. Anyone already removed from the United States as of June 30, 2016, is excluded from class membership.[4]

II. Burden of Proof for Class Membership and Timing for Raising Claims to Class Membership

Individuals must raise all claims for *Mendez Rojas* class membership to the immigration court or the Board of Immigration Appeals (BIA), as applicable, on or before March 31, 2022.

All requests for class membership consideration by represented aliens in proceedings before the immigration court must be made in writing in accordance with standard filing deadlines before the immigration court (unless otherwise directed by the immigration judge) but in no event after March 31, 2022. Requests for class membership consideration by pro se aliens in proceedings before an immigration court may be made orally during a recorded immigration court proceeding. All requests for class membership consideration to the BIA, whether by a represented or pro se alien, must be in writing.

Under the terms of the settlement agreement, a putative class member bears the burden of proving *Mendez Rojas* class membership. The applicant may meet that burden with sworn oral or written testimony. DHS may rebut an assertion of class membership with evidence that the applicant previously received individualized notice of the one-year deadline or does not otherwise meet the class definition.

In most situations, the putative class member's arguments will likely focus on the sufficiency of the notice of the one-year bar that he or she received, including the timing of the notice, and whether the notice is sufficient to constitute individualized notice. For the purposes of class member determinations, only notice provided directly by a DHS or DOJ employee constitutes the required individualized notice.[5] Accordingly, notice provided by any third party, including an organization operating under the Legal Orientation Program, is not considered individualized notice. On June 5, 2020, DHS implemented a revised NTA across all components, and individuals who have been issued the revised NTA have received individualized notice and are not class members.

Once a putative *Mendez Rojas* class member establishes class membership under the settlement agreement, his or her asylum application must be considered timely filed. Where there is a dispute of fact relating to a prong of the class definition, the immigration judge may choose to hold an evidentiary hearing on that question or adjudicate the matter as part of the asylum merits hearing.

[4] Class members with final removal orders who wish to seek a stay of removal must file the request in accordance with existing procedures.

[5] DHS will provide notice of the one-year asylum filing deadline to certain individuals specified in the settlement agreement. Receipt of such notice is not a definitive determination that the individual is a member of the class. EOIR, however, is not obligated to provide notice of the one-year asylum filing deadline pursuant to the settlement agreement or the district court's order granting Plaintiffs' motion for summary judgment in *Mendez Rojas*.

If a factual dispute regarding class membership arises in the course of an appeal already pending before the BIA, cannot be resolved by the record from the adjudication before the immigration court, and is material to the disposition of the appeal—*i.e*. the alien would be granted asylum but for the application of the one-year bar—the BIA may remand the case to the immigration judge to address the issue of class membership in the first instance, including further development of the record as appropriate.

In no case should questions of class membership affect the overall adjudication of the merits of an alien's asylum application or determination of asylum eligibility, including whether or not the alien merits asylum as a matter of discretion.[6]

The settlement agreement provides special rules for administratively closed cases as well as cases with a final order of removal.

A. Administratively Closed Cases

An individual with an administratively closed case must move to recalendar the case on or before March 31, 2022, in order to pursue class relief, or else forfeit the right to pursue benefits under the settlement agreement. Under the settlement agreement, putative class members are encouraged, but not required, to utilize the draft motion to recalendar and notice of class membership drafted by Plaintiffs.

For cases administratively closed where a Form I-589 was never filed with the immigration court or the Form I-589 was withdrawn from consideration by the immigration court prior to administrative closure, the class member must affirmatively file a written motion to recalendar the case with the immigration court, notify the immigration court of his or her status as a class member, and concurrently file a Form I-589 on or before March 31, 2022. If the case was last before the BIA on appeal, the class member must file the motion to recalendar with the BIA.

For cases administratively closed where a Form I-589 was pending at the time the case was administratively closed, the class member must file a written motion to recalendar and notify the immigration court of their status as a class member on or before March 31, 2022.

In the event that DHS makes the initial motion to recalendar a *Mendez Rojas* class member's case, the putative class member must still file the Form I-589 and assert class membership on or before March 31, 2022.

B. Motions to Reopen

An individual who received a final order of removal on or after June 30, 2016, and was found ineligible for or denied asylum based wholly or in part on the individual's failure to file the Form I-589 within one year of arrival, may file one motion to reopen on the basis of *Mendez Rojas* class membership. This motion to reopen is exempt from any statutory and regulatory time and number

[6] Adjudicators should note that the issue of *Mendez Rojas* class membership is separate and apart from the issue of any applicable exceptions to the one-year filing deadline under INA § 208(a)(2)(D) and 8 C.F.R. § 1208.4(a)(2)(i)(B).

requirements but must otherwise comply with existing procedures relating to such motions. Under the settlement agreement, putative class members are encouraged, but not required, to utilize the draft motion to reopen and notice of class membership drafted by Plaintiffs. Putative class members must file the motion to reopen with the notice of class membership on or before March 31, 2022, or else forfeit the right to pursue benefits under the settlement agreement. Class members with final removal orders who wish to seek a stay of removal must file a stay request in accordance with existing procedures.

Individuals with *in absentia* orders of deportation or removal cannot use *Mendez Rojas* class membership as an independent basis to move to reopen deportation or removal proceedings under the settlement agreement. Rather, they must independently meet the statutory requirements for reopening under INA § 240(b)(5)(C) and the regulatory requirements under 8 C.F.R. § 1003.23(b)(4)(ii), (iii).

III. Form I-589 Filing Mechanism

Under the settlement agreement, DHS and DOJ will adopt and publicize a uniform procedural mechanism for aliens to file a Form I-589 within 60 days of the district court's final approval of the settlement agreement. Specifically, EOIR and DHS's U.S. Citizenship and Immigration Services (USCIS) have updated their websites with information regarding how to determine where to file an asylum application, based on information available on EOIR's Automated Case Information Hotline and EOIR's Online Automated Case Information at https://portal.eoir.justice.gov/InfoSystem. Any alien who wishes to file a Form I-589, regardless of *Mendez-Rojas* class membership, should call the Hotline or access the Online Automated Case Information immediately prior to filing the Form I-589 to determine where to file the application. The process is as follows:

A. Filing with EOIR

If the Hotline or Online Automated Case Information indicates that an NTA has been filed and docketed with EOIR (e.g., if the hotline contains EOIR case information about the alien), the alien should file the Form I-589 with EOIR. If an immigration court receives the Form I-589 and determines that it does not have jurisdiction to receive the alien's application, it should promptly notify the alien and return the Form I-589. If venue is proper in a different immigration court, the rejection notice must specify the address of the correct immigration court where the alien may file the Form I-589.

B. Filing with USCIS

If the Hotline or Online Automated Case Information does not indicate that an NTA has been filed and docketed with EOIR (e.g., if the hotline does not contain EOIR case information about the alien), the alien should file the Form I-589 with USCIS. USCIS will assess whether it has jurisdiction over the adjudication of the Form I-589 by confirming whether or not an NTA has already been filed and docketed with EOIR and, if so, determining how many days have elapsed since the NTA was filed and docketed. If USCIS determines that the case has been docketed before EOIR for 21 calendar days or fewer, USCIS will accept the Form I-589, and the alien's filing date

for the purpose of making a determination under the one-year filing deadline is the date of receipt of the Form I-589 by USCIS. USCIS will then forward the application, along with the filing date, to EOIR for adjudication. If the case has been docketed for 22 calendar days or more, USCIS will reject the filing and return the Form I-589 to the applicant along with instructions on filing the Form I-589 with EOIR and notice of the consequences of failure to file the Form I-589 within one year of arrival.

This PM 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 in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person. Nothing herein should be construed as mandating a particular outcome in any specific case.

Please contact your supervisor if you have any questions.

The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CONCELY DEL CARMEN MENDEZ ROJAS, *et al.*,

Plaintiffs,

v.

CHAD F. WOLF, Acting Secretary of Homeland Security, *et al.*,

Defendants.

Case No: 2:16-cv-01024-RSM

ORDER ON JOINT MOTION FOR FINAL APPROVAL OF SETTLEMENT AGREEMENT

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 2nd Avenue, Suite 400
Seattle, WA 98104
Telephone (206) 957-8611

This matter comes before the Court on the parties' joint motion for final approval of settlement. After having granted preliminary approval to the settlement, Dkt. 80, and after reviewing any comments or objections received from the public after notice was posted pursuant to the Court's order granting preliminary approval to the settlement, and after conducting a fairness hearing on November 4, 2020, the Court hereby approves the settlement agreement submitted by the parties to implement this Court's permanent injunction, Dkt. #64. In approving the settlement implementing the permanent injunction, this Court clarifies that it is adopting the modified definition of class membership, as proposed in the settlement agreement as follows:

Class A ("Credible Fear Class"): All individuals who were encountered by DHS upon arrival or within fourteen days of unlawful entry; were released by DHS after they have been found to have a credible fear of persecution or torture pursuant to 8 U.S.C. § 1225(b)(1)(B)(ii) and 8 C.F.R. §§ 208.30, 1208.30, 1003.42; and did not receive individualized notice of the one-year deadline to file an asylum application as set forth in 8 U.S.C. § 1158(a)(2)(B).

A.I.: All individuals in Class A who *are not* in removal proceedings and who either (a) have not yet applied for asylum or (b) applied for asylum after one year of their last arrival.

A.II.: All individuals in Class A who *are* in removal proceedings and who either (a) have not yet applied for asylum or (b) applied for asylum after one year of their last arrival.

Class B ("Other Entrants Class"): All individuals who were encountered by DHS upon arrival or within fourteen days of unlawful entry; expressed a fear of return to their country of origin; were released by DHS upon issuance of an NTA; and did not receive individualized notice of the one-year deadline to file an asylum application set forth in 8 U.S.C. § 1158(a)(2)(B).

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B.I.: All individuals in Class B who *are not* in removal proceedings and who either (a) have not yet applied for asylum or (b) applied for asylum after one year of their last arrival.

B.II.: All individuals in Class B who *are* in removal proceedings and who either (a) have not yet applied for asylum or (b) applied for asylum after one year of their last arrival.

The Court hereby approves of the terms of the settlement agreement and the amended class definitions.

It is so ORDERED.

Dated this 4th day of November, 2020.

RICARDO S. MARTINEZ
CHIEF UNITED STATES DISTRICT JUDGE

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