

### **Practice Advisory for *Alfaro Garcia v. Johnson***

The U.S. District Court for the Northern District of California recently approved a Settlement Agreement in *Alfaro Garcia v. Johnson*, a class action lawsuit filed on behalf of thousands of immigrants fleeing persecution who have faced months of detention while they await “reasonable fear” determinations. The Settlement Agreement will ensure that the government processes “reasonable fear” determinations expeditiously and end its practice of needlessly detaining asylum seekers for prolonged periods while they await determinations in their cases. This advisory provides background on the *Alfaro Garcia* suit and an overview of the provisions of the Settlement Agreement.

#### ***Background on the “Reasonable Fear” Process***

Every year, thousands of immigrants come to the United States fleeing persecution. By statute and treaty, the United States cannot remove a person, including noncitizens subject to removal orders, to a country that would subject that person to persecution on the basis of race, religion, nationality, membership in a particular social group, or political opinion, or to torture.

U.S. law guarantees noncitizens identified for summary removal an opportunity to seek protection if they express a fear of returning to their countries of origin. For noncitizens who are subject to either “reinstatement” of a prior removal order or an “administrative” removal order based on their criminal and immigration history – and who would otherwise be subject to fast-track removal without a hearing before an immigration judge – this process begins with a “reasonable fear” determination. Because U.S. Immigration and Customs Enforcement (“ICE”) considers these individuals subject to mandatory detention, these individuals are typically in ICE custody at the time they express a fear of return. In such circumstances, ICE must refer these cases to the U.S. Citizenship and Immigration Services (“USCIS”). A USCIS asylum officer then conducts a “reasonable fear” interview with the individual to determine whether there is a reasonable possibility that the noncitizen would be subject to persecution or torture were he or she to return to the country designated for removal. If USCIS determines that the noncitizen’s fear is “reasonable,” the noncitizen is referred to the immigration court for a full hearing on his or her protection-based claims. Critically, therefore, an asylum seeker cannot proceed with his or her claims until USCIS completes the “reasonable fear” screening.

U.S. law mandates that the government complete a reasonable fear determination within 10 days of a case referral to an asylum officer. *See* 8 C.F.R. § 208.31(b). The government, however, has consistently failed to abide by this regulation in thousands of cases. In recent years, delays have escalated to 3-6 months on average and as long as a year in certain places along the border. Because the government typically detains these individuals for the entire time it takes to process their claims for relief, these individuals have been forced to needlessly languish in detention for months at significant emotional, physical, and financial cost to them and their families.

## ***Overview of Alfaro Garcia v. Johnson Class Action Lawsuit***

In April of 2014, the ACLU of Southern California, the National Immigrant Justice Center, the ACLU of Northern California, and Reed Smith LLP filed a nationwide class action [lawsuit](#) on behalf of noncitizens who are subject to the reasonable fear process and have not received a determination within 10 days, as mandated by regulation. Plaintiffs alleged that the government's delays violated 8 C.F.R. § 208.31(b) and the Administrative Procedure Act, 5 U.S.C. § 555(b), by unreasonably delaying their cases.

The parties ultimately resolved the case by entering into a Settlement Agreement that ensures that the government will process "reasonable fear" determinations more quickly, provide greater transparency into the processing of cases, and alter its policies and procedures to accomplish these goals. On October 27, 2015, the District Court granted final approval of the Settlement Agreement.

### ***Who Falls Within the Alfaro Garcia Class?***

The certified class for the Settlement Agreement is defined as: "All persons who, during the term of the Settlement Agreement: (a) are or will be subject to a reinstated order of removal under 8 U.S.C. § 1231(a)(5) or an administrative removal order under 8 U.S.C. § 1228(b); (b) have expressed, or in the future express, a fear of returning to his or her country of removal; (c) are detained in the custody of the Department of Homeland Security ("DHS"); and (d) have not received, or do not receive, an initial reasonable fear determination by USCIS under 8 C.F.R. § 208.31 within ten (10) days of referral to USCIS; but (e) the Settlement Class does not include any person who would otherwise be in the class if such individual receives his or her reasonable fear determination." "Reinstatement" of removal applies to individuals who "reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal." "Administrative removal" under 8 U.S.C. § 1228(b) applies to individuals convicted of an aggravated felony who are not lawfully admitted for permanent residence or who had permanent residence on a conditional basis at the time proceedings were commenced.

The Settlement Agreement clarifies that the class only includes individuals who are detained while they go through the "reasonable fear" process. The proposed Settlement Class therefore does not include the small number of individuals who are not detained while they go through the "reasonable fear" process.

The class is limited to individuals seeking protection from removal through the "reasonable fear" process and does not include individuals seeking asylum in the United States through other procedures. Such individuals include: (1) first-time entrants apprehended at a port of entry and subject to "credible fear" screening, *see* 8 C.F.R. § 208.30; (2) individuals who have submitted "affirmative" applications for asylum with USCIS, *see* 8 C.F.R. § 208.2(a); and (3) individuals who have submitted "defensive" applications for asylum in removal proceedings, but who are not subject to reinstatement of removal or administrative removal order.

While the number of individuals in the class fluctuates daily, government statistics document that the class will include several thousand people each year. In FY 2014, approximately 9,000 people were subject to the reasonable fear process. Because the number of asylum seekers

has steadily grown in recent years, we expect that the class will likely include comparable or greater numbers this year.

### ***What Does the Settlement Agreement Provide?***

The Settlement Agreement includes a comprehensive set of provisions to ensure the timely processing of class members' claims.

First, the Agreement provides that ICE must promptly refer class members to USCIS for their reasonable fear determinations. Specifically, ICE agrees to complete referrals for reasonable fear determinations to USCIS "immediately, as practicable." Within a year of the Settlement Agreement, ICE shall make referrals within an average of five days from the date ICE assumes custody, the date of issuance of either the reinstated order of removal or an administrative order of removal, or the date on which an individual expresses a fear of return, whichever is latest. After a year, the parties will establish a shorter benchmark for referrals.

Second, the Agreement requires USCIS to expeditiously conduct "reasonable fear" determinations. Specifically, USCIS has agreed to complete reasonable fear determinations within an average of ten court days and a maximum of twenty days from the date the agency receives the referral from ICE. This period can be extended if an individual (or his or his attorney) requests additional time to prepare for the interview, refuses to participate in the interview, or refuses to accept service of the determination. It can also be extended for "exceptional circumstances," but the Agreement specifically provides that such circumstances do not include "unusual but reasonably foreseeable circumstances."

### ***Compliance and Monitoring***

The Settlement Agreement also includes several measures to ensure that the government complies with its terms. First, to protect class members from prolonged detention in any individual case, USCIS must notify the Director of the Asylum Division and Plaintiffs' Counsel regarding the delay, along with a remedial plan, in any case in which USCIS fails to make a reasonable fear determination within 20 days.

Second, the government must produce monthly reports to Plaintiffs' Counsel with data on referrals to USCIS and reasonable fear determinations, and permit Plaintiffs' Counsel to access a sample of class members' files. If the government achieves certain benchmarks that demonstrate its compliance with the substantive terms of the Agreement, the reporting requirements are lessened over time.

Third, ICE has agreed to modify its databases to track relevant data, as well to revise its trainings and manuals to reflect the substantive terms of the Agreement.

The District Court will retain jurisdiction for enforcement purposes for five years, although the period can be shortened to three years if the government achieves certain benchmarks.

### ***Dispute Resolution***

The Settlement provides that in cases where an individual's determination has taken 26 days or longer (not including requests for more time to prepare or to secure counsel, or delays based on exceptional circumstances), the individual can directly seek individualized relief without having to exhaust the Alternative Dispute Resolution procedures contained in the Settlement Agreement. Otherwise, the Settlement incorporates Alternative Dispute Resolution procedures to be followed in the event that Plaintiffs believe in good faith that the government has failed to implement the terms of the Agreement. In the event that Plaintiffs are forced to seek the Court's intervention to compel the government's compliance with the Agreement, the Court will have the power to award such relief and issue such judgments as it deems proper and appropriate.

### ***Who Should I Contact With Questions About the Settlement Agreement?***

If you have questions about the Settlement Agreement, please contact Plaintiffs' Counsel at [AlfaroGarciaSettlement@aclusocal.org](mailto:AlfaroGarciaSettlement@aclusocal.org) or via mail at: *Alfaro-Garcia* Settlement, 1313 West 8th Street, Los Angeles, CA 90017.