



HQRAIO 120/9.10a

Memorandum

TO: Asylum Office Directors
Asylum Office Deputy Directors
Supervisory Asylum Officers
Quality Assurance/Training Coordinators
Asylum Officers

FROM: Joseph E. Langlois /s/
Chief, Asylum Division

DATE: August 5, 2008

SUBJECT: Making *ABC* Registration Determinations, *Chaly-Garcia v. U.S.*, 508 F.3d 1201 (9th Cir. 2007)

I. BACKGROUND:

On November 29, 2007, the United States Court of Appeals for the Ninth Circuit issued a ruling in *Chaly-Garcia v. U.S.*, 508 F.3d 1201 (9th Cir. 2007) (see Attachment) regarding what may constitute evidence of registration for benefits under the *ABC* settlement agreement (Settlement Agreement), as set forth in *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991) (*ABC*). The Ninth Circuit interpreted the *ABC* registration rules under the Settlement Agreement requiring Guatemalan and Salvadoran nationals to submit a written notice indicating one of two things: (1) an intent to apply for a *de novo* asylum adjudication or (2) an intent to receive the benefits of the Settlement Agreement. The Ninth Circuit found that, "Plaintiff's written asylum application which demonstrated his membership in the *ABC* class, thus requested the benefits of the *ABC* Agreement and was a writing that indicated an intent to receive them."

The purpose of this memorandum is two-fold: (1) to revise current guidance¹ in determining what constitutes evidence of registration for *ABC* benefits by Guatemalan and Salvadoran nationals by

¹ Langlois, Joseph E. Director, Asylum Division, Office of Refugee, Asylum and International Affairs. *Making ABC Registration Determinations*, Memorandum to Asylum Division (Washington, D.C.: 8 June 2006), 5p., <http://z02rscow12:8080/docushare/dsweb/Get/Document-55591/20060608%20ABCRegistrationTraining.pdf>.

applying *Chaly-Garcia* to all cases, and (2) to announce appropriate revisions to the ABC/NACARA Procedures Manual (NPM), in light of this new policy.

II. NEW POLICY FOR DETERMINING ABC REGISTRATION:

Previously, in determining whether Guatemalan and Salvadoran nationals satisfied the registration requirement to receive ABC benefits under the Settlement Agreement, USCIS required evidence of registration, which could be established through credible testimony. Prior to the *Chaly-Garcia* decision, the filing of an affirmative asylum application alone was not viewed as evidence for satisfying the registration requirement. Pursuant to the Ninth Circuit's findings, however, a Guatemalan or Salvadoran national, who affirmatively filed an I-589 application on or after the date the court provisionally approved the Settlement Agreement and prior to the conclusion of the designated registration period, has indicated the intent to receive ABC benefits under the Settlement Agreement and therefore should be considered "registered."

A. Affirmative asylum applications and NACARA applications pending before USCIS.

Under these new guidelines, if an Asylum Officer encounters an affirmative asylum application filed by a Guatemalan national between December 19, 1990 and December 31, 1991, or by a Salvadoran national between December 19, 1990 and October 31, 1991 [hereinafter Intended Registrant], the Asylum Officer must consider that application as evidence for satisfying the registration requirement to receive ABC benefits. Asylum Officers will continue to inquire about ABC registration when Guatemalan or Salvadoran nationals filed an affirmative asylum application beyond the respective registration dates and will continue to accept tangible evidence or credible testimony as evidence of registration for ABC benefits.

Our review of RAPS data indicates that there are approximately 870 Intended Registrants whose I-589 application is pending adjudication by USCIS, and who may or may not have filed an I-881 application with USCIS. For those individuals who have filed an I-881 application, this statistic includes only I-881 applications that remain pending adjudication. The Asylum Offices should proceed with scheduling the asylum interview, and be prepared to conduct a NACARA interview if the Intended Registrant has receipted evidence that he or she filed an I-881 and has a copy of the I-881 or if there is an I-881 already in the A File. If the Intended Registrant has not filed an I-881, the Asylum Offices should explain to the Intended Registrant that he or she may be eligible to file an I-881, and inform the Intended Registrant that the case will be rescheduled the case within a reasonable period of time (generally 60 days) to allow the Intended Registrant to file the I-881.

HQASM will notify the public of the change in policy by posting a Fact Sheet on the USCIS website. The Fact Sheet will note that some Intended Registrants have not yet filed an I-881 application, and may be eligible to do so under the new policy. Asylum Offices should conduct outreach efforts to inform the public that Intended Registrants who have not filed an I-881 may be eligible to apply for NACARA under this new policy. We will inform offices when the Fact Sheet has been posted.

B. Asylum applications and NACARA applications referred to EOIR.

Under these new guidelines, USCIS will reconsider on a case-by-case basis, the ABC registration determination of Intended Registrants whose cases currently are pending before EOIR or the federal courts if proceedings are administratively closed or terminated and jurisdiction is returned to USCIS. Our review of RAPS data indicates that there are approximately 700 such individuals. This statistic represents individuals who were found not eligible to apply for suspension of deportation or special rule cancellation of removal, and therefore, not entitled to a *de novo* ABC asylum interview. Some of these individuals may have been found ineligible to apply because they failed to demonstrate registration for ABC benefits; however, the statistic also includes individuals who were found ineligible to apply for other reasons.

For cases pending before EOIR, USCIS may resume jurisdiction over the case after proceedings have been administratively closed or terminated by EOIR. Generally, USCIS will not agree to reconsider the decision if the case was referred by USCIS for any reason other than a failure to demonstrate timely registration for ABC benefits. The Fact Sheet for Intended Registrants will include information on how to request that the case be returned to USCIS if the case is pending before EOIR or a federal court.

C. Applicants found ineligible for asylum and NACARA, but who have not been issued a NTA.

Under these new guidelines, USCIS will reconsider on a case-by-case basis, the ABC registration determination of Intended Registrants who have been found ineligible for asylum and NACARA, but who have not been issued a Notice to Appear. Our review of RAPS data indicates that there are approximately 150 such individuals. Where an Intended Registrant files a Motion to Reconsider, the Asylum Office shall grant the Motion to Reconsider if there is *prima facie* evidence of ABC eligibility and if the Intended Registrant was found ineligible for ABC benefits solely for failing to demonstrate timely registration for these benefits. The Fact Sheet for Intended Registrants will include information on how to have the case reconsidered by USCIS if the Intended Registrant was not yet referred to EOIR for failure to demonstrate ABC registration.

HQICE has reviewed this new policy.

III. REVISIONS TO NPM:

We have revised the NPM based on this guidance. The revised NPM is effective as of the date of the issuance of this directive, and may be obtained on the Asylum Virtual Library (AVL) at: <http://z02rscow12:8080/docushare/dsweb/View/Collection-11155>.

A. Section X(A)(2).

This section has been updated (see Attachment) to note that individuals may evidence the intent to register for ABC benefits if the applicant affirmatively filed an asylum application between the relevant dates:

- For Guatemalans, an I-589 application affirmatively filed between December 19, 1990 and December 31, 1991; for Salvadorans, an I-589 application affirmatively filed between December 19, 1990 and October 31, 1991.

The new policy for determining ABC registration in light of the *Chaly-Garcia* decision does not change previous guidance indicating that credible testimony may serve as evidence of registration. As such, Asylum Offices are reminded that individuals still may evidence registration for ABC benefits through credible testimony alone. See Langlois, Joseph E. Director, Asylum Division, Office of Refugee, Asylum and International Affairs. *Making ABC Registration Determinations*, Memorandum to Asylum Division (Washington, D.C.: 8 June 2006), 5p., <http://z02rscow12:8080/docushare/dsweb/Get/Document-55591/20060608%20ABCRegistrationTraining.pdf>).

B. Section X(A)(3).

This section has been updated with a footnote (see Attachment) to remind Asylum Officers of threshold eligibility requirements in determining whether an individual is eligible for ABC benefits:

FN14: Asylum Officers must remember that a determination regarding whether an applicant has timely filed an I-589 application to demonstrate **eligibility** to receive ABC benefits is separate and distinct from a determination regarding whether an applicant has timely **registered** for ABC benefits through a filing of an I-589.

C. Sections XI(A)(1) and (2).

These sections have been updated (see Attachment) to reflect the change in NACARA scheduling procedures instituted through the Joseph E. Langlois memo of July 16, 2008, titled, *Revised NACARA Scheduling Requirements*.

D. Appendix C (ABC CHECKLIST).

This section has been updated (see Attachment) to note that individuals may evidence the intent to register for ABC benefits:

2. Did the applicant register for ABC benefits?

_____ Yes, as evidenced by any of the following (check whichever applies):

_____ For Guatemalans, an I-589 application affirmatively filed between December 19, 1990 and December 31, 1991; for Salvadorans, an I-589 application affirmatively filed between December 19, 1990 and October 31, 1991.

E. Appendix Y(1) (NOTICE OF INELIGIBILITY FOR ABC BENEFITS – APPLICANT IN FRONT OF ASYLUM DIVISION).

This section has been updated (see Attachment) to include additional evidence that an individual did not register for ABC benefits:

_____ There is no credible evidence that you registered for ABC benefits by: (1) directly registering for such benefits, (2) applying for TPS (if Salvadoran), (3) affirmatively filing an I-589 application between December 19, 1990 and December 31, 1991 (if Guatemalan), or (4) affirmatively filing an I-589 application between December 19, 1990 and October 31, 1991 (if Salvadoran).

F. Appendix Y(2) (NOTICE OF INELIGIBILITY FOR ABC BENEFITS – APPLICANT NOT IN FRONT OF ASYLUM DIVISION).

This section has been updated (see Attachment) to include additional evidence that an individual did not register for ABC benefits:

_____ There is no credible evidence that you registered for ABC benefits by: (1) directly registering for such benefits, (2) applying for TPS (if Salvadoran), (3) affirmatively filing an I-589 application between December 19, 1990 and December 31, 1991 (if Guatemalan), or (4) affirmatively filing an I-589 application between December 19, 1990 and October 31, 1991 (if Salvadoran).

IV. UPDATES TO AOBTC LESSON PLAN FOR SUSPENSION OF DEPORTATION AND SPECIAL RULE CANCELLATION OF REMOVAL UNDER NACARA.

The AOBTC Lesson Plan is under review and will incorporate this guidance as well as additional updates. Upon completion, the updated AOBTC Lesson Plan will be available to the asylum offices along with its location on the AVL.

V. CASES PLACED ON HOLD BECAUSE OF CHALY-GARCIA DECISION.

Under these new guidelines, the Asylum Offices may resume processing the cases that HQASM requested to be placed on HOLD.²

Please direct any questions to Anthony Moscato, ABC/NACARA Program Manager.

Attachments (7)

² See [20080116 Chaly-Garcia Discussion: Request from HQASM to Put on Hold Potentially Affected Cases](http://z02rscow12:8080/docushare/dsweb/View/Collection-13047) listing in the ABC/NACARA collection of the AVL located at: <http://z02rscow12:8080/docushare/dsweb/View/Collection-13047>.