Final Settlement Agreement Ensures Asylum Seekers Notice of the One-Year Filing Deadline and an Adequate Mechanism to Timely File Applications

Frequently Asked Questions[1]
Updated March 25, 2021

Overview

Under U.S. law, a person must apply for asylum within one year of their last arrival to the United States. 8 U.S.C. § 1158(a)(2)(B). In *Mendez Rojas v. Wolf*, plaintiffs challenged the government's failure to provide adequate notice of this one-year filing deadline to certain asylum seekers who were in the custody of the U.S. Department of Homeland Security (DHS) shortly after their last arrival. The lawsuit also challenged the government's failure to provide a mechanism that allows asylum seekers to file their asylum applications in a timely manner.

On March 29, 2018, the district court issued a permanent injunction, requiring Defendants to 1) provide appropriate notice of the one-year filing deadline, 2) recalculate the deadline from the date of the appropriate notice, and 3) implement a mechanism that ensures asylum seekers have an appropriate opportunity to timely submit their applications for asylum. *Mendez Rojas v. Johnson*, 305 F.Supp.3d 1176 (W.D. Wash. 2018). The parties then entered settlement negotiations as to how the injunction should be implemented. On November 4, 2020, the court adopted the final settlement agreement reached between the parties in the case. Under the terms of the settlement agreement, the government: (1) agreed to provide adequate notice of the one-year filing deadline to asylum seekers going forward; (2) agreed to create a uniform procedural mechanism (UPM) that would allow asylum seekers to timely file their asylum applications in the future; and (3) agreed to provide relief for certain asylum seekers who were harmed because of the government's failure to provide adequate notice of the one-year filing deadline in the past.

Therefore, certain asylum seekers who applied for asylum more than one year after they entered the United States, and certain asylum seekers who have already been in the United States over one year and have not yet applied for asylum, may benefit from the settlement agreement. Even asylum seekers who were denied asylum already may benefit from the settlement agreement. To benefit from the *Mendez Rojas* settlement agreement, an individual must establish he or she is a member of one of the classes of asylum seekers protected by the lawsuit.

---

[1] The information contained in this FAQ is not a substitute for independent legal advice supplied by a lawyer familiar with a client's case. We are grateful for the assistance of Patrick Taurel, of Clark Hill, PLC, for drafting a Notice of Class Membership which is adapted and attached to this FAQ.

A class member must come forward to establish her class membership and request relief under the settlement. **All claims for relief under the *Mendez Rojas* settlement agreement must be submitted on or before April 22, 2022**.[2]

Detailed information about the *Mendez Rojas* litigation and the terms of the final settlement agreement, including eligibility requirements for class membership and the process through which to request relief, may be found below.

Background

On March 29, 2018, the U.S. District Court for the Western District of Washington granted summary judgment on behalf of the classes presented in *Mendez Rojas v. Johnson*, 305 F. Supp. 3d 1176 (W.D. Wash. 2018), holding that the government's failure to provide adequate notice of the one-year filing deadline for asylum applications constitutes a violation of the immigration statue, the Administrative Procedure Act (APA), and class members' due process rights under the Fifth Amendment. In addition, the court held that the government's failure to provide a uniform mechanism through which class members can timely file their asylum applications also violates the immigration statute and the APA.

The government initially appealed the court's decision, but the parties entered into an interim stay agreement pending resolution of settlement negotiations on how to implement the district court's order. Under the terms of the interim stay agreement, Defendants agreed to treat as timely filed all pending and newly filed asylum applications that were adjudicated during the stay filed by class members who did not have final orders of removal. Furthermore, during the pendency of the interim stay agreement, the government agreed to use a broad reading of the class definition, which included individuals who fell within one of the class definitions "regardless of when class members were released from custody, by which component they were detained, the length of their detention, or when the NTA [Notice to Appear] was issued."

After settlement negotiations, the parties reached a final settlement agreement, which was approved by the court on November 4, 2020. **Although similar to the interim stay agreement in many ways, the final settlement agreement incorporates modified class definitions and provides final forms of relief**.

Under the terms of the final settlement agreement, **Defendants will accept as timely filed any asylum application from a class member that was filed or is filed on or before April 22, 2022, where the class member files the appropriate notice of class membership. In order to benefit from the agreement, the class member must take action before April 22.** Detailed information

[2] Although the final settlement agreement lists the date by which asylum applications or claims of class membership must be filed to receive the benefit of the settlement as March 31, 2022, the correct date is **April 22, 2022**. This is because the parties agreed that the deadline would be dependent upon the date by which Defendants *both* issued prospective notice of the one-year filing deadline and implemented the new uniform procedural mechanism. Because there was a delay in implementing the new uniform procedural mechanism, the deadline for class members to file asylum applications under the terms of the final settlement agreement that would be treated as timely filed for purposes of the one-year deadline was extended to April 22, 2022.

about how to benefit from this relief depending on the stage of immigration proceedings may be found below. *See* Questions 6-10.

1. Who is a member of the *Mendez Rojas* classes?

To benefit from the final settlement agreement, an individual must be a member of one of the two classes certified in the case, as modified by the final settlement agreement:

Class A comprises individuals who:

- Were encountered by DHS upon arrival or within fourteen days of unlawful entry;
- Were released by DHS after having been found to have a credible fear of persecution or torture within the meaning of 8 U.S.C. § 1225(b)(1)(B)(ii) and 8 C.F.R. §§ 208.30, 1208.30, 1003.42;
- Did not receive individualized notice of the one-year filing deadline for asylum applications; and
- Either
    - Have not filed an asylum application; or
    - Filed an asylum application more than one year after their last arrival in the United States.

Class A is divided into two sub-classes: i) those who *are not* in removal proceedings; and ii) those who *are* in removal proceedings.

Class B comprises 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 from DHS custody upon issuance of an NTA;
- Did not receive individualized notice of the one-year filing deadline for asylum applications; and
- Either
    - Have not filed an asylum application; or
    - Filed an asylum application more than one year after their arrival in the United States.

Class B is divided into two sub-classes: i) those who *are not* in removal proceedings; and ii) those who *are* in removal proceedings.

2. What is "individualized notice"?

For purposes of the class definitions, only notice provided by an employee of the Defendants constitutes individualized notice. The Defendants in this case include DHS and the Executive Office for Immigration Review (EOIR). Notice provided by a third party, including "Legal Orientation Program" (LOP) presentations provided by subcontractors to EOIR, does not constitute individualized notice.

3. How do I determine if my client "expressed a fear of return to their country of origin"?

While Class A membership is readily ascertainable based on the credible fear proceedings, Class B membership focuses on whether the individual "expressed a fear of return to their country of origin." The expression of fear element of Class B membership captures whether the individual placed DHS on notice that they may be seeking protection from persecution or torture. A class member does not have to use specific words to assert a fear. A determination of whether a client expressed a fear of return will depend on what the individual recalls saying to any DHS official about why she came to the United States. Credible testimony or a signed affidavit attesting to an expression constitutes sufficient evidence of an expression of fear. However, practitioners should be aware that DHS may seek to introduce evidence that the individual did not express a fear. For example, DHS may seek to introduce a Form I-213, Record of Deportable/Inadmissible [Noncitizen], if the Form I-213 affirmatively indicates that the individual did not express a fear. In such cases, practitioners should review the facts to determine whether there is a basis to challenge any reliance on the Form I-213.[3]

4. Are there any limitations to *Mendez Rojas* class membership?

Yes. In addition to establishing the elements of membership in one of the *Mendez Rojas* classes *see* Question 1, *Mendez Rojas* class membership is limited by the following temporal restrictions:

- For potential class members in removal proceedings—Class A(ii) or Class B(ii)—only individuals who were issued NTAs and/or were in removal proceedings **on or after June 30, 2016** qualify for class membership.

- No one who received individualized notice in the form of a revised Form I-862, Notice to Appear, after January 26, 2021, will be considered a class member. The government began issuing revised NTAs with adequate notice of the one-year filing deadline as of June 5, 2020. The government publicly deployed the new uniform procedural mechanism for filing asylum applications on January 26, 2021. Therefore, as of January 26, 2021, the government has complied with its obligations under the final settlement agreement with respect to prospective relief.

  However, if individuals remain unable to timely file asylum applications despite the new uniform procedural mechanism, please contact class counsel at mendezrojas@nwirp.org.

5. What are the benefits of the final settlement agreement?

Relief. **Defendants will accept as timely filed any asylum application from a class member that was filed or is filed on or before April 22, 2022, finding that it complies with the one-**

[3] *See* Collopy, et al., *Challenges and Strategies Beyond Relief* (American Immigration Lawyers Association, Dec. 29, 2015), at 523-25 (Challenging the Form I-213), *available at* https://www.aila.org/File/Related/11120750b.pdf.

year filing deadline. Detailed information about how to benefit from this relief depending on the stage of immigration proceedings may be found below. *See* Questions 6-10.

Prospective notice. **Rolled out on June 5, 2020**, the government revised Form I-862, Notice to Appear, to contain the following language:

> **One Year Asylum Application Deadline**: If you believe you may be eligible for asylum, you must file Form I-589, Application for Asylum and for Withholding of Removal. The Form I-589, Instructions, and information on where to file the Form can be found at www.uscis.gov/i-589. Failure to file Form I-589 within one year of arrival may bar you from eligibility to apply for asylum pursuant to section 208(a)(2)(B) of the Immigration and Nationality Act.

Asylum seekers who receive the revised Form I-862 will be considered to have been adequately notified of the one-year filing deadline.

The government also revised the Form M-444, Information about Credible Fear Interview in Expedited Removal Cases, to contain similar language. However, the failure to receive the revised Form M-444 will not be considered evidence of a failure to adequately notify an asylum seeker of the one-year deadline.

Uniform procedural mechanism (UPM). The new UPM addresses remaining problems[4] that arise when the government fails to file an NTA with the immigration court in a timely manner. As a result of this delay, asylum seekers had trouble, and were often prevented from, filing their asylum applications within the one-year deadline. Because DHS had issued an NTA, USCIS would assert a lack of jurisdiction over the application and refuse to accept an affirmatively filed asylum application. However, if DHS had not yet filed the NTA with the immigration court, the immigration court likewise would assert a lack of jurisdiction and refuse to accept a defensive asylum application. The new UPM seeks to account for the lapse in time between when an NTA is issued and when it is subsequently filed and docketed with the immigration court, to ensure that asylum seekers have a means through which to submit their applications within the one-year deadline.

A detailed, step-by-step description of the new UPM is available on USICS's website at www.uscis.gov/i-589 at "Where to File" and on EOIR's website at https://www.justice.gov/eoir/page/file/1334796/download.

Significantly, the UPM includes a "Grace Period Rule," to account for the time between when an asylum applicant will have used the UPM to determine where to file her asylum application and

---

[4] Shortly after Plaintiffs filed this case, Defendants changed their policy to address a separate filing issue that Plaintiffs challenged—namely, Defendants' prior policy of requiring persons in removal proceedings to wait to file their asylum application in person at their next master hearing, even though many applicants would not have their hearing until after the first year elapsed. On September 14, 2016, EOIR issued OPPM 16-01, changing its practice to begin allowing asylum applications to be filed at the court window or by mail, rather than requiring that they be filed at a hearing.

when the application arrives at the destined location. The passage of time typically impacts asylum seekers whose NTAs are filed with an immigration court after the asylum application has been mailed to USCIS, but before USCIS has processed it. In the past, USCIS would reject these applications, with potential implications for meeting the one-year deadline. Under the Grace Period Rule, if USCIS determines at the time of receiving the asylum application that an NTA has already been filed and docked with the immigration court:

If the NTA has been filed and docketed for 21 calendar days or fewer, USCIS will accept the application, note the date that the application is received by USCIS as the filing date for purposes of making a determination for the one-year deadline, and transfer the filing date and forward the application for adjudication to EOIR.

If the NTA has been filed and docketed for 22 calendar days or more, USCIS will reject the application and return it to the asylum applicant with a rejection notice that informs the applicant that the application must be filed with EOIR, informs the applicant of the one-year filing deadline, and provides the applicant with EOIR's Hotline number and Online Automated Case Information, as well as a link to the EOIR website containing a list of immigration courts.

For this reason, practitioners and asylum applicants are strongly encouraged to file their asylum applications as soon as possible after checking the UPM for where to file.

6. How can class members with cases pending before EOIR or USCIS benefit from the final settlement agreement?

Potential class members bear the burden of establishing their class membership. For class members with cases pending before EOIR or USCIS, practitioners should notify the relevant decision maker of the final settlement agreement in *Mendez Rojas* and their client's class membership. Absent evidence that indicates an individual is *not* a class member, credible testimony or a signed affidavit outlining each element of class membership should constitute sufficient evidence. **Please note that in most cases the class member must submit a written notice claiming class membership.** Accompanying this advisory are sample Notices of Class Membership for cases pending before the Immigration Court, the Board of Immigration Appeals (BIA), and USCIS. *See* Attachments A, B, & C, respectively.

Practitioners must send such notice to the USCIS asylum office, the immigration judge, or the BIA, depending on where their client's case is currently pending, **on or before April 22, 2022**.

> *Immigration Court/BIA*: For cases pending in Immigration Court or before the BIA, **practitioners must submit notice of class membership in writing** (and for the Immigration Court, in accordance with the standard filing deadlines unless otherwise directed by the immigration judge). Only pro se applicants may make the claim orally before the immigration court.
>
> *USCIS*: For cases pending before the Asylum Office, notice of class membership **may be made in writing** to the USCIS asylum office with jurisdiction over the pending asylum application either before or after the asylum interview **or orally** during an asylum interview with a USCIS officer. Unless your client is currently scheduled for an interview, it would

be advisable to submit written notice to the asylum office, rather than waiting for the interview to be scheduled or for an NTA to be filed.

If the individual's immigration record contains relevant evidence that the individual may have received individualized notice of the one-year deadline, the government may submit such evidence to the relevant adjudicator to rebut class membership. Practitioners may contest the existence or sufficiency of this evidence of individualized notice, including the timing of the notice.

7. Can class members who are not yet in proceedings (i.e., who have been issued an NTA that has not yet been filed with an immigration court) benefit from the final settlement agreement?

Yes. The final settlement agreement also applies to class members who are not yet in proceedings. Individuals in this situation must receive the benefit of the final settlement agreement as discussed above and practitioners should notify USCIS of the final settlement agreement in *Mendez Rojas* and their client's class membership when they submit the asylum application. *See* Attachment C. However, practitioners with class members in this situation should use the new uniform procedural mechanism, *see* Question 5, to determine the relevant adjudicator of the asylum claim as of the date of filing, in case the NTA has recently been filed with an immigration court. If the asylum application has already been submitted to USCIS the applicant or their representative must make sure to submit their written or oral notice of class membership before April 22, 2022.

8. Does a class member need to be represented by an attorney to receive the benefit of the final settlement agreement?

No. Class members do not need to be represented by attorneys to receive the benefit of the final settlement agreement, but the same burdens and standards apply to both represented and unrepresented class members, with one exception regarding asserting class membership before the Immigration Court:

> *Immigration Court*: For cases pending before the Immigration Court, potential class members who are unrepresented may submit their notice of class membership **orally during a recorded Immigration Court proceeding, or in writing** to the Immigration Court with jurisdiction over the proceedings.

We recommend potential class members review their case with an attorney to determine if they are a class member and what action is needed to claim class member benefits.

9. Can class members with cases that are administratively closed benefit from the final settlement agreement?

Yes. To benefit from the final settlement agreement, potential class members must move to recalendar their cases **on or before April 22, 2022**. Accompanying this advisory as Attachment D is a sample template motion to recalendar. If the government moves to recalendar the case, the potential class member still must submit notice of class membership and, if applicable, the asylum

application **on or before April 22, 2022** to benefit from the terms of the final settlement agreement.

For administratively closed cases where an asylum application was either never filed with the immigration court or was withdrawn from consideration prior to administrative closure, represented or unrepresented potential class members must submit:

- A written motion to recalendar (*see* Attachment D)
- Notice of class membership (*see* Attachments A or B)
- An asylum application (Form I-589)

The motion and accompanying documents should be filed either with the Immigration Court or with the BIA, depending on which entity the case was last before. Potential class members also should provide an updated mailing address via Form EOIR-33, Change of Address Form. The motion should otherwise be in compliance with existing procedures relating to such motions, including service requirements.

For administratively closed cases where an asylum application was pending at the time the case was administratively closed (and remains pending), represented or unrepresented potential class members must submit:

- A written motion to recalendar (*see* Attachment D)
- Notice of class membership (*see* Attachments A or B)

The motion and accompanying documents should be filed either with the Immigration Court or with the BIA, depending on which entity the case was last before. Potential class members also should provide an updated mailing address via Form EOIR-33, Change of Address Form. The motion should otherwise be in compliance with existing procedures relating to such motions, including service requirements.

10. Can class members with final administrative orders of removal benefit from the final settlement agreement?

Yes. Potential class members issued a final administrative order of removal on or after June 30, 2016, based *wholly or in part* on the one-year deadline, may file one motion to reopen (MTR) their removal proceedings **by or on April 22, 2022**.

A class member may file a single MTR filed pursuant to the *Mendez Rojas* settlement agreement that is *exempt from statutory and regulatory time and number requirements*. Thus, if the class member has already filed a motion to reopen based on a separate argument, they still may file a *Mendez Rojas* class member motion to reopen.

No fee is required for filing an MTR pursuant to the *Mendez Rojas* settlement agreement.

Accompanying this advisory as Attachment E is a sample template motion to reopen. An MTR filed pursuant to the *Mendez Rojas* settlement agreement also should include notice of class membership (*see* Attachments A or B) and the potential class member should provide an updated mailing address via Form EOIR-33, Change of Address Form.

The motion should otherwise be in compliance with existing procedures relating to such motions, including service requirements.

In Absentia Orders: For individuals with *in absentia* orders of removal, *Mendez Rojas* class membership **may not** be used as an independent basis to move to reopen a case. Potential class members may still assert their class membership on or before April 22, 2022, if the case is reopened, but must otherwise meet the statutory requirements for reopening an *in absentia* order under 8 U.S.C. § 1229a(b)(5)(C).

11. I filed a Notice of Class Membership with the relevant adjudicator while the interim settlement agreement was pending. What do I need to do now?

If practitioners have previously submitted written notice of class membership during the interim period to the relevant adjudicator in a client's case, this should be sufficient for purposes of the settlement. However, to ensure that there is no confusion, practitioners may now want to submit an additional notice, verifying that their client has submitted notice of class membership pursuant to the terms of the settlement.

12. I received a determination on my *Mendez Rojas* claim under the interim settlement agreement. Is that determination still valid?

Yes. A prior adjudication acknowledging class membership determination should remain valid.

As noted above, the class definitions were modified as part of the final settlement agreement. However, the modifications should not impact class members whose claims were adjudicated during the interim time period.

But, if the claim was not adjudicated prior to November 4, 2020 (the date the court approved this settlement), then the terms from the final settlement are controlling.

13. I received a letter from USCIS titled Notice of One-Year Filing Deadline for Asylum Applications. What is this?

As part of the final settlement agreement, Defendants agreed to send retrospective notice about the agreement to certain, potential class members and relied upon information in Defendants' custody to do so. This retrospective notice was sent only to potential Class A members whom Defendants were able to identify and for whom they had a non-detained U.S. mailing address on file as of June 5, 2020. For this subset of Class A members, USCIS identified the last known mailing address of the asylum seeker and the last known attorney of record, and sent notice to both. Notice was not sent to members of Class B. Receipt of such a notice indicates that the government has reason to believe the asylum seeker listed *may be* a *Mendez Rojas* class member. Receipt of the notice is not determinative of class membership. Therefore, this notice is both over inclusive and under inclusive. An asylum seeker still must adhere to the other requirements of the final settlement agreement—set out above—and assert class membership by or on April 22, 2022—to benefit from the final settlement agreement.

14. I received a letter from USCIS titled Notice of One-Year Filing Deadline for Asylum Applications for someone I do not represent/have never represented. What should I do?

Defendants have acknowledged they erred in their initial distribution of notices to attorneys relating to both the A numbers of potential class members and the attorney addresses. Specifically, many notices lacked a complete A number or client name and were misdirected to practitioners with no record of representing the individual asylum seeker. Class counsel suggest that practitioners who receive notice for someone you or your organization do not and have not represented send the notice back to the government at the following address with a letter stating so:

USCIS
Asylum Division
5900 Capital Gateway Dr.
Camp Springs, MD 20588-0009

Defendants have agreed to reissue notices to the correct representative addresses with corrected A numbers, with the corresponding name of the potential class member. Consequently, many individuals may receive two separate notices.

* * *

Any class member or their attorney who believes that their case was wrongly denied based on the terms of the final settlement agreement may contact class counsel at mendezrojas@nwirp.org.