

**Federal Court Decision Assists Central Americans Seeking Asylum :
Chaly-Garcia Background & Frequently Asked Questions**

**by Immigrant Law Group LLP¹
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Background of Case

Chaly-Garcia v. United States, No. 05-35715, -- F. 3d --, 2007 WL 4198175 (9th Cir. 2007) is a lawsuit challenging the Department of Homeland Security's (DHS) interpretation of the ABC Agreement. The ABC Agreement is a special settlement between the government and certain Guatemalans and Salvadoran asylum seekers that provides important benefits. An important benefit is the possibility of permanent residence under the NACARA program.

In 1990 lawyers representing numerous churches, organizations, and individuals who had sued the United States government agreed to settle a class-action lawsuit under special terms. This case was settled on behalf of some 300,000 asylum applicants alleging systematic violations of the Refugee Act of 1980 regarding the adjudication of Guatemalan and Salvadoran asylum claims. The agreement was published as *American Baptist Churches v. Thornburgh*, 760 F. Supp 796 (N.D. Cal. 1991) and is called the "ABC Agreement". The ABC Agreement was finally approved on January 31, 1991. *American Baptist Churches*, 760 F. Supp. at 799.

The ABC Agreement provided special rights to the Guatemalan and Salvadoran class members who timely registered for its benefits. Any Guatemalan who was in the United States on or prior to October 1, 1990 and any Salvadoran who was in the United States on or prior to September 19, 1990 was eligible to register for ABC benefits. In addition to other rights, a registered class member would receive a special asylum interview. In 1997, Congress created a new benefit for ABC registered class members: under the NACARA program, ABC registered class members could obtain permanent residence.

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In *Chaly-Garcia*, the Ninth Circuit interpreted the ABC registration rules. Mr. Chaly-Garcia, a citizen of Guatemala who was in the United States since 1987, had filed an asylum application on January 31, 1991. He wanted to take advantage of the “new asylum program for Guatemalans”. The Department of Homeland Security’s Asylum Office was in charge of implementing the ABC Agreement for the government.² The Asylum Office disputed that Mr. Chaly had registered for ABC because he did not complete a “registration card”. This registration card was created by the INS and was not mentioned in the ABC settlement agreement. The government began removal proceedings. Mr. Chaly-Garcia sued the government in federal district court in Oregon. The district court granted summary judgment for the government. Mr. Chaly-Garcia appealed.

The Ninth Circuit issued the decision on November 29, 2007. In the decision the Ninth Circuit held that the registration rules for Guatemalans required a Guatemalan to provide a written notice indicating one of two things: either (1) an intent to apply for a de novo asylum adjudication or (2) an intent to receive the benefits of the ABC Agreement.

The court held that Mr. Chaly-Garcia’s asylum application satisfied the written notice indicating his desire to receive the benefits of the agreement. In particular, the court held that (1) the registration card was optional (2) no particular form of writing was required so long as the intent requirement was satisfied and (3) a class member did not need to make reference to the ABC Agreement in the writing. The court remanded the case with instructions to grant summary judgment in favor of Mr. Chaly-Garcia.

Mr. Chaly-Garcia’s attorneys have prepared this FAQ. The FAQ does not serve as a replacement for individual legal advice provided by an attorney.

Frequently Asked Questions

Q. What does the case mean?

The implications of the case will not be fully understood until the government begins implementing the decision. The government has indicated that it intends to release guidance quickly.

² In 1991, the Immigration and Naturalization Service, the Executive Office of Immigration Review, and others were responsible for implementing the ABC Agreement. When the Department of Homeland Security was created and INS was abolished, DHS assumed all of INS’s obligations and delegated most of the implementation to the DHS Asylum Office. All sub-agencies in DHS such as Immigration Custom Enforcement and Customs and Border Protection are bound by the ABC Agreement, too.

During the last seventeen years, the government has applied an illegal interpretation of the registration rules which incorrectly limited the number of individuals who actually qualify for ABC benefits.

Beginning in 2003, the Asylum Office instituted an ABC backlog reduction program in which thousands of Guatemalan and Salvadoran asylum seekers were interviewed regarding their registration for ABC benefits. Unfortunately, the Asylum Office disqualified many individuals who could not demonstrate that they filed the ABC registration card or whose name did not appear in one of the ABC registration databases. The asylum office, thus, used an incorrect standard because the ABC registration card is not required and the ABC registration databases contain only a limited number of people who registered.

Q. What is the ABC Agreement?

The ABC Agreement is a written agreement in which the United States immigration authorities agreed to provide special benefits to eligible Guatemalans and Salvadoran asylum seekers. The agreement is the result of a lawsuit filed against the government. There are approximately 350,000-400,000 ABC class members.

Q. What are ABC benefits?

There are many ABC benefits. The most important benefits include (1) the right to an asylum interview conducted under the regulations in effect on October 1, 1990, (2) release from detention under certain circumstances, (3) administrative closure of deportation proceedings, and (4) work authorization within 60 days of application (instead of 90 days for other applicants).

An individual who qualifies for ABC benefits can also qualify for permanent residence under the NACARA program. The Immigrant Legal Resource Center publishes a manual about qualifying for permanent residency under the NACARA program, *Winning NACARA Suspension Cases* (2005 ed.) available at www.ilrc.org.

Q. Who qualifies for ABC benefits?

Only registered ABC class members may qualify for ABC benefits. Any Guatemalan in the United States before October 1, 1990 and any Salvadoran in the United States before September 19, 1990 is an ABC class member and was eligible to register for benefits. Some class members, even those who timely registered, are ineligible for ABC benefits because, for example, they have been convicted of an aggravated felony, because they failed to file a timely asylum application, or they were apprehended at time of entry after December 19, 1990.

Q. *How can I register for ABC benefits?*

The registration period is closed; no one can register today for ABC benefits. For Guatemalans, the registration period closed on December 31, 1991. For Salvadorans, the registration period closed on October 31, 1991.

Q. *What is NACARA?*

NACARA is a law that permits ABC registered individuals to file for their permanent residence under a special process. NACARA stands for the Nicaraguan Adjustment and Central American Relief Act. It was enacted on November 19, 1997.

Q. *I filed my asylum application in 1991, will I qualify for ABC benefits or permanent residence under NACARA?*

ABC benefits are available to individuals who are both ABC class members and who registered on time. In *Chaly-Garcia*, the Ninth Circuit addressed only the registration requirements and held that an asylum application filed in 1991 by an ABC class member was sufficient. An individual must meet the requirements of ABC class membership (i.e. entered the US before 10/01/90 for Guatemalans or entered the US before 09/19/1990 for Salvadorans) *and* the registration requirement in order to qualify for NACARA under the ABC registration provision. However, there are other ways to qualify for NACARA such as having filed an asylum application before April 1, 1990. For a complete explanation of NACARA benefits, please refer to the ILRC manual, *Winning NACARA Suspension Cases* (2005 ed.) available at www.ilrc.org

Q. *What is the ABC database?*

The ABC database is a collection of databases maintained by the Asylum Office which is a partial list of some applicants who mailed in a ABC registration card to a post office box in Washington, D.C. The ABC database is consulted by Asylum Officers to verify if an individual registered for ABC benefits. Although the Asylum Office recognizes the numerous limitations in the ABC database, many asylum officers relied on it to disqualify individuals from ABC benefits.

Q. *I had an asylum interview and the asylum office told me my name was not in the ABC database, can I still qualify?*

YES. The ABC database should not be used to deny any ABC benefit. The ABC database contains only a partial list of names of some individuals who submitted a registration card to the Washington DC post office box. It was not intended to capture and did not capture any individual who registered for ABC benefits through an

alternative means such as by filing an asylum application without a registration card, mailing a registration card to a different address, or providing some other written notice.

Q. Can I qualify even if I did not fill out an ABC registration card?

YES. The *Chaly-Garcia* court held that the ABC registration card is not required. It was an optional means to register for benefits, but any other method that would satisfy notice under paragraph 2 of the settlement agreement would also qualify to “register” someone.

Q. When will the decision be final?

The decision is final on January 14, 2008. The court’s mandate should issue shortly thereafter. The case when then return to the District Court in Oregon for judgment to be entered in favor of Mr. Chaly-Garica.

Although the decision is not final for Mr. Chaly-Garcia, it is the law of the Ninth Circuit and all judicial and administrative officials are required to abide by it. The Ninth Circuit covers California, Oregon, Washington, Arizona, Nevada, Idaho, Montana, Alaska, Hawaii, and Guam. Individuals who are presently in removal proceedings who registered for ABC benefits under one of the alternative registration methods should contact the Asylum Office having jurisdiction over the application. The Asylum Office should aid in administratively closing the case. These individuals should also immediately notify the Immigration Judge that they wish to administratively close the case pursuant to Paragraph 19 of the ABC Agreement. If a case is before the Ninth Circuit, counsel could seek mediation and have the case remanded to the Board for administrative closure. Once removal proceedings are administratively closed under paragraph 19 of the ABC Agreement, an individual can file an affirmative NACARA application with the Asylum Office.

It is uncertain at this time if the Asylum Office will follow *Chaly-Garcia* in other circuits.

Q. Can I register for ABC benefits now?

NO. The registration period is closed; no one can register today for ABC benefits. For Guatemalans, the registration period closed on December 31, 1991. For Salvadorans, the registration period closed on October 31, 1991.

Q. What was the ABC registration period for Salvadorans?

For Salvadorans, the registration period was from January 1, 1991 through October 31, 1991. Many Salvadorans satisfied the ABC registration requirement by filing for TPS status.

Q. What was the ABC registration period for Guatemalans?

For Guatemalans, the registration period was from July 1, 1991 through December 31, 1991.

It is important to understand that the government has published extensive guidance that early registrations were acceptable. *See* Office of Asylum and Refugee Affairs, *ABC/NACARA Procedures Manual 9* (Aug 2003). The government made this concession in the *Chaly-Garcia* case. Mr. Chaly-Garcia filed his asylum application several months prior to the July 1, 1991 start-date for Guatemalan registrations. The Ninth Circuit accepted the government's concession that this was a timely filing even though it was early.

Q. I am from Guatemala, does my registration qualify if I filed it before July 1, 1991?

The Ninth Circuit did not decide this question because the Asylum Office conceded that Mr. Chaly-Garcia's early filing was timely. Because the government conceded the issue, it is not a holding of the case. Whether the government will alter this policy or if they can alter it at this late stage is uncertain.

Q. I am from Guatemala, does my registration qualify if I filed it after December 31, 1991?

NO. The registration period closed on October 31, 1991 for Salvadorans and December 31, 1991 for Guatemalans.

However, there is a possibility that some late registrations might be accepted. Under a legal theory called "substantial compliance" or "substantial performance" a federal court could use its equitable powers to permit a late registration. The Ninth Circuit did not consider this issue.

Q. What does my registration need to say in order to qualify for ABC registration?

The Ninth Circuit ruled that there is no particular form required to register for ABC benefits. Likewise, an ABC class member was not required to mail the written notice to any special address, such as the Washington, DC post office box. Consequently, the form of the writing is not as important as the content of the writing. A written notice

needed to demonstrate 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 ABC Agreement. An asylum application filed by a class member after the October 1990 asylum regulations went into effect satisfies the second part of the content requirement.

Q. Did the Chaly-Garcia decision change the ABC registration requirements?

No. The *Chaly-Garcia* decision rejected the Asylum Office's interpretation of the ABC Agreement. The registration requirements have always been the same.

Q. How many people will be eligible for ABC benefits under the Chaly-Garcia decision?

It is unclear. Preliminary statistical information from the government indicates that up to 45,000 individuals may qualify under the less restrictive registration rule.

Q. I am from Guatemala, I had never heard of the ABC Agreement, but I filed for asylum in 1991, will I qualify for ABC benefits?

Maybe. The Court held that an asylum application filed in 1991 would satisfy the registration requirement of the ABC Agreement. However, an individual must also meet other requirements to receive ABC benefits. There are three requirements to qualify for ABC benefits: (1) Guatemalan or Salvadoran nationality, (2) a timely registration, and (3) a timely asylum application. Only citizens from Guatemala and El Salvador can qualify. In addition to the registration requirement, a Salvadoran must have been present in the United States on or before September 19, 1990³ and must have filed for asylum by January 31, 1996⁴. In addition to the registration requirement, a Guatemalan must have been present in the United States on or before October 1, 1990⁵ and must have filed for asylum by January 3, 1995. An individual who was convicted of an aggravated felony is not eligible for ABC benefits.

Q. I am from Guatemala, I had never heard of the ABC Agreement, but I filed for asylum in 1991, will I qualify for NACARA?

Maybe. There are different ways to qualify for NACARA. One of the ways to qualify is by registering for ABC benefits.

³ An individual is not required to have been in the United States *on* this date. Only that he or she was in the United States at some time prior to this date.

⁴ Salvadorans were provided a grace period for filing asylum applications up to February 16, 1996 if the application was mailed to one of the INS Service Centers.

⁵ An individual is not required to have been in the United States *on* this date. Only that he or she was in the United States at some time prior to this date.

Q. Does the decision apply to people from El Salvador?

Yes. However, it is important to keep in mind that the registration requirements for Salvadorans were different than for Guatemalans.

Q. Do I have to be from Guatemala or El Salvador to qualify for ABC benefits?

Yes. Only ABC class members can qualify for ABC benefits. A class member is any Salvadoran in the United States on or before September 19, 1990 and any Guatemalan in the United States on or before October 1, 1990.

Q. Do I have to be from Guatemala or El Salvador to qualify for NACARA?

No. Under NACARA, derivative spouses and children from other countries also can qualify. However, the principal applicant must be from El Salvador or Guatemala.

Q. Can I stop my removal or deportation proceedings if I qualify?

YES. Paragraph 19 of the ABC Agreement requires the government to administratively close removal or deportation proceedings until the Asylum Office adjudicates the asylum application under the ABC procedures. Once an adjudication has taken place, then an individual ceases to have rights under paragraph 19 of the ABC agreement.

Q. The government deported me but I qualify for ABC benefits, can I come back to the United States?

Yes. If an individual was deported in violation of the ABC Agreement, the individual has a right to be heard and may seek relief from a federal court.

Q. Would writings other than an asylum application qualify me for ABC benefits?

The Ninth Circuit held that no particular form was required to register for ABC benefits. Instead, any form could be used so long as it contained information to demonstrate either (1) an intent to apply for a de novo asylum adjudication or (2) an intent to receive the benefits of the ABC Agreement.

Q. When I filed for asylum, I told the officer I wanted to the new program for Guatemalans, but I never filed any papers. Will I qualify?

No. The ABC registration rules required that the registration be in writing.

Q. Who is eligible for NACARA benefits?

An individual in any of these categories may qualify for permanent residence under the NACARA program. NACARA is a complicated statute. It is important that an individual who thinks he or she might be eligible consult with a licensed attorney or an accredited representative working at a recognized and legitimate non-profit organization.

- (1) Guatemalans who entered the United States on or before October 1, 1990 and registered for ABC benefits in 1991 and have not been apprehended at time of entry after December 19, 1990;⁶
- (2) Salvadorans who entered the United States on or before September 19, 1990 and registered for ABC benefits or TPS in 1991 and have not been apprehended at time of entry after December 19, 1990;
- (3) Guatemalans or Salvadorans who filed an asylum application on or before April 1, 1990; OR
- (4) Derivative spouses, children, and in certain cases adult sons and daughters of NACARA eligible persons.

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⁶ The authors of this FAQ disagree with the Department of Homeland Security's interpretation of the "apprehended at time of entry after December 19, 1990" requirement of the NACARA legislation.