No. 09-72603

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Francisco Javier Garfias-Rodriguez
A 079-766-006

Petitioner

v.

Eric Holder, U.S. Attorney General
Respondent

Petition for Review of an Order of Removal by the Board of Immigration Appeals

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Brief of Amicus, American Immigration Lawyers Association, in support of Petitioner

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Not Detained

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Immigration & Nationality Act

Public Laws

Agency Documents

Law Reviews & Treatises

AILA Documents

Other Authorities

INTRODUCTION

"The worse for me! I may have just set myself under a dreadful curse without my knowledge!" cried Oedipus to Jocasta when he began to unravel the path that took him from exile to king to pariah. *See* Sophocles, Oedipus the King 745 (tran. Ian Johnston). His path was marred by the coincidence of ill-fated timing that lead to his ruin.

In a *Brand X*-judicial world, special care must be taken to avoid the arbitrariness of coincidence, particularly in the immigration context. *See National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005). Indeed, a central question in this litigation is the predicament of what to do with the many individuals who sought adjustment of status under a judicial interpretation of a statute enacted two decades ago that permitted them to regularize their status and join the mainstream of our society. Due to the arbitrariness of coincidence, these individuals are now precluded from adjusting their status because the judicial interpretation was later superseded by an administrative agency. Since its enactment in 1994, its

reenactment in both January 1998 and December 2000, the path of the penalty-fee adjustment statute, § 245(i) of the Immigration & Nationality Act, 8 U.S.C. § 1255(i), has been strewn with at least two published BIA interpretations, several Ninth Circuit court decisions, a class action lawsuit, numerous unpublished BIA dispositions and several sub-regulatory USCIS memoranda – none of which are fully in accord with each other, nor, necessarily, with governing legal principles.

Amicus, the American Immigration Lawyers Association, proffers this brief to aide the court in charting the path – both the legal interpretations and the public perception – of the penalty-fee adjustment act from its inception to the present. With this mapping, AILA intends to present a context in which the court can easily discern the equitable line that should be drawn for fairness purposes so that individuals who played by the rules, before the rules reversed, should suffer no harm under the changing interpretative landscape. Every individual who seeks benefits under § 245(i) in the Ninth Circuit prior to the final decision in this case, at a minimum, should be permitted to proceed to an

adjudication of their permanent residence claim without regard to § 212(a)(9)'s immigration status violator provisions. The holdings in *Acosta v. Gonzales*, 439 F.3d 550 (CA9 2006) and *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (CA9 2004) should be affirmed. The court should overrule *Morales-Izquierdo v DHS*, 600 F.3d 1076 (CA9 2010) and *Duran-Gonzales v. Dep't of Homeland Security*, 659 F.3d 930 (CA9 2011) and disapprove of *Matter of Diaz and Lopez*, 25 I&N Dec. 188 (BIA 2010) to the extent that they conflict with the principle of fairness.[1]

STATEMENT OF INTEREST

The American Immigration Lawyers Association ("AILA") is a national association with more than 11,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality

[1] By urging this holding, we do not imply that the court is actually bound to uphold the reasoning in *Briones* at all. The BIA's decision in *Briones* is plagued with interpretative errors. The decision omits key parts of the statute, distorts the statutory history and burnishes the statute with a harshness unintended by Congress. It is an unfaithful interpretation of the statutory language. Anyway, *Acosta* was a plain language interpretation of the statute and thus, there is no room for *Briones*'s contrary interpretation.

law. AILA seeks to advance the administration of law pertaining to immigration, nationality and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before the Department of Homeland Security ("DHS") and before the Executive Office for Immigration Review (immigration courts), as well as before the United States District Courts.

ARGUMENT

I. Before *Acosta*.

Originally enacted in 1994, the penalty-fee adjustment program presently creates two different groups of eligible applicants who, in spite of their uninspected entries and unlawful immigration status, may nevertheless seek permanent residence. *See* § 245(i)(1)(A)(i)-(ii); 8 U.S.C. § 1255(i)(1)(A)(i)-(ii). The first group is comprised of illegal entrants and status violators who filed a qualifying petition before January 14, 1998. *See* Depts of

Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, § 111(a), 111 Stat. 2440, 2458 (enacted Nov. 26, 1997). The second group consists of illegal entrants and status violators who filed a qualifying petition before April 30, 2001 and who were physically present in the United States on December 21, 2000. *See* LIFE Act Amendments of 2000, Div. B, tit. XV, Pub. L. No. 106-554, § 1502(a)(1), 114 Stat. 2763 (enacted Dec. 21, 2000). Notably, there is not an expiration date to penalty-fee eligibility: an applicant who falls within the closed universe of either group may seek penalty-fee adjustment indefinitely. *See* Brief of Amicus AILA in *Matter of Mansour*, File No. A027-637-356 at 5-6 (BIA) (filed Apr. 11, 2011), AILA InfoNet Doc. No. 11041132 (explaining why it is incorrect to speak of § 245(i) as "expiring").[2]

In spite of changes made to the Immigration and Nationality Act in 1996, *see* Illegal Immigration Reform & Immigrant Responsibility Act of 1996, Div. C, § 301(b), Pub. L. No. 104-208,

[2] All documents referenced with an AILA InfoNet citation are publically available at http://search.aila.org by entering the document number.

110 Stat. 3009-546, 3009-577 (eff. Apr. 1, 1997), there was every reason to believe that noncitizens with uninspected entries and unlawful presence remained eligible for penalty fee adjustment. A simple reading of the statute would have confirmed this for most members of the public. The 1996 law's creation of an inadmissibility ground that combined the concepts of unlawful presence and uninspected entries seemed beside the point because, after all, § 245(i) plainly permitted individuals with uninspected entries and who were in unlawful immigration status to seek permanent residence. The only public information the agency circulated was its official form, Supplement A to Form I-485 (rev. 09/30/1994). *See, e.g.,* Administrative Record at 374. Any reasonable reader of the Supplement A would easily conclude that penalty-fee adjustment was available notwithstanding unlawful presence or uninspected entries. *Id.* at Questions 4 & 10 (instructing individuals with uninspected entries and unlawful immigration status to file for penalty-fee adjustment); *cf.* Supplement A to Form I-485 (rev. 01/18/2011) at Question B-2 (instructing applicants who are "in unlawful immigration status

because I entered the United States without inspection or I remained in the United States past the expiration of the period of my lawful admission" to file for penalty-fee adjustment).

There was enormous public interest in § 245(i) benefits and colossal numbers of individuals sought such status before either of the eligibility periods closed. *See*, *e.g.*, Mark Reed, Assoc. Director INS Office of Field Operations, *Section 245(i) Sunset*, Sept. 19, 1997, AILA InfoNet Doc. No. 07092410 (posted Sep. 24, 1997) (suspending normal processing rules for the heavy numbers of filers expected and directing offices to remain open until midnight); William Yates, Deputy Ex. Assoc. Commissioner, INS Office of Field Operations, *Field Guidance for Adjustment of Status applications filed under section 245(i), as amended by the Legal Immigration Family Equity Act Amendments of 2000*, Apr. 6, 2001, AILA InfoNet Doc. No. 01041371 (posted 04/13/2001) (using a postmark rule in addition to later operating hours for sunset filings). The public perception was certainly that by seeking § 245(i) benefits, one would be insulated from § 212(a)(9)'s inadmissibility grounds.

If the agency had some belief to the contrary, they certainly kept it a secret. The agency published no regulations interpreting § 212(a)(9)'s unlawful presence triggers.[3] Nor did the agency publish any regulations interpreting the Congressional command that applicants were *required* to be unlawfully present in the United States to be eligible for penalty-fee adjustment. *See* § 111(a) of the 1998 Appropriations Act ("Notwithstanding the provisions of subsections (a) and (c) of this section, an alien physically present in the United States"); § 1502(a)(1)(D) of the LIFE Act Amendments (requiring physical presence on December 21, 2000). To be sure, the agency circulated a lot of *sub*-regulatory, informal and internal memoranda about unlawful presence. *See*, Jill E. Family, *Administrative Law Through the Lens of Immigration Law,* Widner Law School Legal Studies Research Paper Series No. 12-04 (Feb 22, 2012) at 30-32 (available at http://ssrn.com/abstract=2009436) (describing USCIS's unfortunate habit of using internal guidance documents instead of

[3] It should not go without remarking that even today, 16 years after enactment, we still lurch along without any regulatory guidance on § 212(a)(9).

rulemaking). None of these sub-public documents mentioned that the agency interpreted § 245(i) differently than the way the plain statutory language indicated or its agency public forms instructed.

The Ninth Circuit's decision in *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (Aug 2004) marked the first public discussion of § 245(i)'s interplay with § 212(a)(9)'s inadmissibility grounds. The particular issue in *Perez-Gonzalez* was the effect of § 212(a)(9)(C)(i)(II)'s inadmissibility for individuals who had uninspected entries after a removal order on penalty-fee adjustment cases. Although *Perez-Gonzalez* dealt with a different class of eligible individuals than those in *Acosta*, its reasoning provided rather powerful public reinforcement of the idea that applicants seeking penalty-fee adjustment would be spared the harsh consequences of § 212(a)(9)'s inadmissibility grounds. As a result of *Perez-Gonzalez*, numerous individuals sought penalty-fee adjustment of status.[4]

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[4] *See*, *e.g.*, *Maricela Beltran De Pereyda*, A78 739 836, 2006 WL 3088927 (BIA September 13, 2006) (unpublished) (finding individual eligible for adjustment under *Acosta* and *Perez-Gonzalez*); *Maria Dolores Maravilla de Izquierdo*, A77 148 330, 2005 WL 698334 (BIA February 14, 2005) (unpublished) (finding

Silence reigned at the BIA and USCIS for another two years until Board Member Pauley's decision for the BIA in *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006). The decision in *Torres-Garcia* was aimed directly at the Ninth Circuit's decision in *Perez-Gonzalez*. 23 I&N Dec. at 875-876. With *Torres-Garcia* under its hat, in March 2006, USCIS issued yet another sub-regulatory guidance document directing adjudicators in the Ninth Circuit to disregard *Perez-Gonzalez*. *See* Michael Aytes, USCIS Acting Assoc. Dir. for Operations, *Effect of Perez-Gonzalez v Ashcroft on adjudication of Form I-212 applications filed by aliens who are subject to reinstated removal orders under INA § 241(a)(5)*, (Mar. 31, 2006) AILA InfoNet Doc. No. 06080967 (posted Aug. 9, 2006). And it was this agency position that resulted in the *Duran-Gonzales* class action suit that we discuss *infra*.

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individual eligible for adjustment under *Perez-Gonzalez*); *Juan Zuniga- Tapia*, A79 765 564, 2005 WL 1104573 (BIA January 26, 2005) (unpublished) (same); *Julio Cesar Vazquez-Centeno*, A78 739 650, 2004 WL 2952152 (BIA November 19, 2004) (unpublished) (same).

II. After *Acosta*.

The Ninth Circuit was not the first circuit to address the penalty-fee adjustment program and § 212(a)(9)(C)(i)(I)'s unlawful presence inadmissibility ground but its decision was of enormous significance.[5] *Acosta* clearly established that noncitizens were eligible for penalty-fee permanent residence in spite of their uninspected entries and unlawful presence.

We previously explained the public reaction to *Acosta* and the hardship created by *Garfias*'s reversal. *See* Brief of Amicus, American Immigration Lawyers Association, in support of Petitioner's Petition for Rehearing En Banc, *Garfias-Rodriguez v. Holder*, Docket No. 09-72603 (filed 07/07/2011), AILA InfoNet Doc. No. 11071170 (posted 07/11/11). Here, we wish to put in context the agency and courts' decisions after *Acosta* was decided.

There are two relevant BIA decisions and a USCIS memorandum that came about after *Acosta*. First, the BIA

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[5] The Tenth Circuit favorably addressed the issue in *Padilla-Caldera v. Gonzales*, 426 F.3d 1294 (CA10 Oct. 18, 2005) and then abrogated *Padilla-Caldera* for reasons similar to those expressed in the *Garfias* panel opinion. *See Padilla-Caldera v. Holder*, 637 F.3d 1140, 1152 (10th Cir. 2011).

published *Matter of Briones* and *Matter of Lopez and Diaz*. Board Member Pauley, writing for the BIA in *Briones*, applied a plain language analysis of the statutes and determined that Congress did not exempt penalty-fee applicants from inadmissibility under § 212(a)(9)(C)(i)(I). *Matter of Briones*, 24 I&N Dec. 355, 364-365 (BIA 2007). He, however, refrained from applying *Briones* in the Ninth Circuit. *Id.* at 371 n.9. In *Lopez and Diaz*, the BIA directed that *Briones* be applied in spite of *Acosta*. 25 I&N Dec. 188, 190. Second, the USCIS drafted yet another memorandum, in lieu of rulemaking. This memorandum directed USCIS officers in the Ninth Circuit to disregard *Acosta* when adjudicating penalty-fee adjustment claims. *See* Donald Neufeld, Acting Associate Director for Domestic Operations, Lori Scialabba, Associate Director for Refugee, Asylum and International Operations, and Pearl Chang, Acting Chief of Policy and Strategy, *Consolidation of Guidance Concerning Unlawful Presence for Purposes of Section 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act,* May 6, 2009, AILA InfoNet Doc. No. 09051468 (posted May 14, 2009).

Outside the Ninth Circuit, *Briones* reigned triumphant because every circuit to consider the question directly determined that *Briones* was reasonable under the second-step in *Chevron* and thus entitled to judicial deference. *See Sarango v. Att'y Gen. of U.S.*, 651 F.3d 380, 387 (CA3 2011); *Padilla-Caldera v. Holder*, 637 F.3d 1140, 1152 (CA10 2011); *Renteria-Ledesma v. Holder*, 615 F.3d 903, 908 (CA8 2010); *Ramirez v. Holder*, 609 F.3d 331, 333-34 (CA4 2010); *Gonzalez-Balderas v. Holder*, 597 F.3d 869, 870 (CA7 2010); *Mora v. Mukasey*, 550 F.3d 231, 232 (CA2 2008); *Ramirez-Canales v. Mukasey*, 517 F.3d 904, 908 (CA6 2008). None of these circuits, with the exception of the Tenth Circuit, had precedent like *Perez-Gonzalez* or *Acosta*.

Even though we recognize that the weight of judicial opinion against our position is great, it appears that it was doctrinally incorrect for these circuits to judicially defer to *Briones*. Under the *Chevron* doctrine, it does not matter that a circuit court finds a statute to be ambiguous. Rather, the agency interpreting the statute must actually determine an ambiguity in the statute that it is interpreting before a court can judicially defer. The Supreme

Court has emphasized this principle, *Negusie v. Holder*, 555 U.S. 511, 522 (2009), and the Ninth Circuit appears to recognize it, *Delgado v. Holder*, 648 F.3d 1095, 1103 n.12 (CA9 2011) (en banc). In *Briones*, the BIA erroneously felt compelled by the plain language of the statute in reaching its holding. That is *not* a step-two *Chevron* decision. It is a step-one *Chevron* decision to which no deference is owed to the Board. The other circuits have reached incorrect decisions based on a misunderstanding of the *Chevron* doctrine.

Meanwhile back in the Ninth Circuit, there was parallel litigation in two cases, *Duran Gonzales* and *Morales-Izquierdo* that continued the debate about the meaning of § 245(i). Again, while the issue in both cases more precisely addressed § 212(a)(9)(C)(i)(II)'s effect on penalty-fee applicants, the reasoning in both impacted the *Acosta* holding. First, applicants who had filed for penalty-fee adjustment benefits controlled by *Perez-Gonzalez* (and to a more limited extent, *Acosta*), filed suit seeking class status because the USCIS refused to recognize the Ninth Circuit holdings. *Duran-Gonzales v. Dep't of Homeland Security*,

508 F.3d 1227, 1231 (CA9 2011). A temporary injunction was issued in favor of the plaintiffs, the government appealed and the Ninth Circuit reversed. *Id.* at 1238. The *Duran-Gonzales* opinion was the first time the Ninth Circuit had interpreted the *Brand X* holding and it appears that it was the first such time by any circuit court anywhere. The *Duran-Gonzales* decision cascaded into *Morales-Izquierdo* where the Ninth Circuit rejected fairness principles and applied the *Duran-Gonzales* holding to individuals who sought adjustment relying on *Perez-Gonzalez*. 600 F.3d 1076, 1089-1090. *Morales-Izquierdo* effectively foreclosed the fairness argument.

III. Protecting Fairness Principles.

How does one explain in a rational manner to the spouse of a United States citizen, that at time he filed for penalty-fee adjustment, the rules would have given him permanent residence, but then the rules changed and now he will be deported? As removal proceedings begin for penalty-fee applicants who qualified for benefits under the reasoning in *Acosta* but will be denied because of *Garfias*, *Morales-Izquierdo*, or *Duran-Gonzales*, it is

exceptionally difficult to avoid the Alice-in-Wonderland allusion that rules can be arbitrarily changed without regard for how they actually impact real people. It is probably fair to say that explaining the interpretive pluralism of *Brand X* as a robust judicial doctrine to the person about to be deported does not instill a sense of fairness in the judicial process.

Accordingly, the *en banc* court should overrule *Morales-Izquierdo* and *Duran Gonzales*. It should disapprove of *Matter of Briones* as being contrary to the plain language holding of *Acosta* or entitled to no deference because it does not proffer an administrative interpretation. The en banc court should set forth a holding that protects every noncitizen applicant for penalty-fee adjustment filed in this circuit prior to the final decision issued in this case.

CONCLUSION

For the foregoing reasons, the petition for review should be granted.

CERTIFICATE OF SERVICE

I, Stephen Manning, certify that on April 11, 2012, I electronically filed the **Brief of Amicus, American Immigration Lawyers Association, in support of Petitioner**, with the Clerk of Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Stephen W. Manning

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CERTIFICATE OF COMPLIANCE WITH FORMAT

I, Stephen Manning, certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, and the court's scheduling order, that this brief is double spaced, using 14-point proportional font and contains 2,773 words (not including the table of contents, table of citations, certificate of service, certificate of compliance).

s/ Stephen W. Manning

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