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AMICUS PRACTICE POINTER:

HOW TO SUCCESSFULLY ADVOCATE FOR § 245(I) ADJUSTMENT OF STATUS AFTER THE NINTH CIRCUIT'S HOLDING IN *GARFIAS-RODRIGUEZ*

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I. INTRODUCTION

In *Garfias-Rodriguez v. Holder*, the Ninth Circuit set forth a multi-factor test to determine whether the Board of Immigration Appeals' decision in *Matter of Briones*[2] applies retroactively to noncitizens who are inadmissible under INA § 212(a)(9)(C)(i)(I) and who file to adjust status.[3] The *Garfias-Rodriguez* court held that the multi-factor test must be applied on a case-by-case basis.[4]

This practice pointer explains the holding in *Garfias-Rodriguez* and describes in detail the multi-factor test for determining the retroactivity of the *Briones* holding. It is intended to assist attorneys in understanding and applying the test. It describes the three groups of noncitizens most likely to qualify for adjustment under *Garfias-Rodriguez* and potential arguments for each group.

The practice pointer is divided into three substantive parts. Part II outlines the litigation of the penalty-fee adjustment cases and describes applicants who are most likely to be impacted by the litigation. Part III dissects the Ninth Circuit's holding in *Garfias-Rodriguez* and details the retroactivity analysis from the

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[2] *Matter of Briones*, 24 I&N Dec. 355 (2007).
[3] *Garfias-Rodriguez v. Holder*, 702 F.3d 504, 518–20 (9th Cir. 2012) (en banc).
[4] *Id.* at 519–20.

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foundational case called *Montgomery Ward*.[5] Part IV presents potential arguments under the *Garfias-Rodriguez/Montgomery Ward* retroactivity test before the Ninth Circuit, the BIA, the Immigration Courts and the USCIS.[6]

II. BACKGROUND

A. History of the Litigation

For the past decade, noncitizens with checkered immigration histories have been whipsawed between competing decisions at the BIA and the Ninth and Tenth Circuits. Essentially, the BIA picked a fight with the Ninth and Tenth Circuits and won.

The fight was over the interplay between two statutory provisions in the Immigration and Nationality Act (INA): INA § 245(i) and INA § 212(a)(9)(C)(i). Congress enacted INA § 245(i) in 1994 to allow noncitizens who entered the U.S. without inspection to adjust their status without leaving the country by paying a $1000 penalty fee, provided they are admissible to the United States and an immigrant visa is immediately available at the time the application is filed.[7] The provision was amended and extended twice, first in 1997[8] and then in 2000 by the Legal Immigration and Family Equity (LIFE) Act.[9] By the time of its final extension in 2000, Congress had created two applicant groups eligible for penalty-fee adjustment.[10] The first group was noncitizens who had filed a qualifying petition

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[5] *Montgomery Ward & Co., Inc. v. F.T.C.*, 691 F.2d 1322, 1333–34 (9th Cir. 1982). The Ninth Circuit adopted the holding from *Retail, Wholesale & Dep't Store Union v. NLRB* (*Retail Union*) 466 F.2d 380 (D.C. Cir. 1972).

[6] This practice pointer addresses noncitizens who may be inadmissible because they are subject to the "permanent bar" at INA § 212(a)(9)(C)(i)(I). It does not address noncitizens who may be inadmissible under INA § 212(a)(9)(C)(i)(II). Noncitizens who reentered the United States after a prior removal order and sought adjustment of status under the Ninth Circuit's decision *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004), may be eligible for relief as class members of the *Duran-Gonzales* litigation. *See Gonzales v DHS*, 712 F.3d 1271 (9th Cir. 2013). Updates on the *Duran-Gonzales* litigation may be found at the Legal Action Center at the American Immigration Council's web site http://www.legalactioncenter.org.

[7] 8 U.S.C. § 1255(i).

[8] *See* Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, § 111(a)-(b), 111 Stat. 2440, 2468 (enacted Nov. 26, 1997).

[9] *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783, 787–88 (9th Cir. 2004); *See* Legal Immigration Family Equity (LIFE) Act Amendments of 2000, Div. B, Pub. L. No. 106-554, § 1502(a)(1), 114 Stat. 2763, 2763A-423 (enacted Dec. 21, 2000).

[10] These groups include both principal and derivative beneficiaries. *Matter of Legaspi*, 25 I&N Dec. 328 (BIA 2010), *Matter of Ilic*, 25 I&N Dec. 717, 719 (BIA 2012) (explaining the

prior on or before January 14, 1998.[11] The second group was noncitizens who had filed a qualifying petition on or before April 30, 2001 and were physically present in the United States on December 21, 2000.[12]

However, Congress added three "unlawful presence" bars in 1996 as part of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).[13] One of the bars, INA § 212(a)(9)(C)(i), makes a noncitizen permanently inadmissible for two different, but related reasons. Section 212(a)(9)(C)(i)(I) renders a noncitizen permanently inadmissible if he or she "has been unlawfully present in the united States for an aggregate period of more than 1 year . . . and . . . enters or attempts to renter the United States without being admitted or paroled".[14] This means that noncitizens who accumulate an aggregate of more than one year of unlawful presence and then attempt to reenter or reenter the U.S. without being admitted become permanently inadmissible. Likewise, section 212(a)(9)(C)(i)(II) renders a noncitizen permanently inadmissible who "has been ordered removed . . . and who enters or attempts to reenter the United States without being admitted."[15] This means that noncitizens who are ordered removed from the United States and then attempt to reenter or reenter without being admitted are permanently inadmissible.

The definition of unlawful presence is codified at INA § 212(a)(9)(B)(ii). A noncitizen is unlawfully present if she overstays a temporary visa or if she is present in the U.S. without being admitted or paroled.[16] The INA does not address the effect of the unlawful presence bars on the adjustment of status provision at section 245(i)—leaving the courts and BIA to clarify the interplay between the two.

The Ninth Circuit was the first to address this issue. In 2004 it held in *Perez-Gonzalez v. Ashcroft* that INA § 212(a)(9)(C)(i)(II) did not preclude a noncitizen from adjusting status under INA § 245(i).[17] Mr. Perez-Gonzalez was subject to INA § 212(a)(9)(C)(i)(II) because he was removed from the U.S. and reentered without being admitted or paroled. He married a United States Citizen in 1997, and in 2002

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two categories of grandfathered noncitizens); *Matter of Estrada*, 26 I&N Dec. 180, 184 (BIA 2013) (concluding that after-acquired spouses and children do not qualify as grandfathered aliens for purposes of section 245(i) adjustment).

[11] 8 U.S.C. § 1255(i)(1)(B)(i).

[12] *Id.* § 1255(i)(1)(B)(ii).

[13] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546, tit. III, § 301 (effective April 1, 1997).

[14] 8 U.S.C. § 1182(a)(9)(C)(i)(I).

[15] *Id.* § 1182(a)(9)(C)(i)(II).

[16] *Id.* § 1182(a)(9)(B)(ii).

[17] *Perez-Gonzalez*, 379 F.3d at 792–95.

filed to adjust status under section 245(i).[18] In July of that same year he filed form I-212 for permission to reapply for admission to the U.S. after deportation or removal.[19] The Ninth Circuit held that Mr. Perez-Gonzalez could apply for the I-212 waiver from within the U.S and if permission to reapply were granted, section 212(a)(9)(C)(i)(II) would not bar him from applying to adjust status under section 245(i).[20] Just over a year later, the Tenth Circuit found that the companion provision, INA § 212(a)(9)(C)(i)(I), also did not preclude a noncitizen from adjusting status under section 245(i).[21] The BIA disagreed with the *Perez-Gonzalez* decision and, sixteen months later, issued *Matter of Torres-Garcia*. In *Torres-Garcia* the BIA found that noncitizens who were inadmissible under section 212(a)(9)(C)(i)(II) are not eligible to adjust status under section 245(i) and must wait ten years outside the United States before seeking a I-212 waiver to seek admission to the US.[22]

Later, in *Acosta v. Gonzales*, the Ninth Circuit extended its reasoning in *Perez-Gonzalez* to INA § 212(a)(9)(C)(i)(I). In *Acosta*, the court held that noncitizens inadmissible under that section remained eligible for adjustment of status under section 245(i).[23] The *Acosta* court did not take note of the of the BIA's decision in *Torres-Garcia*, which had been issued one month before. Then, twenty-one months after *Acosta*, in *Matter of Briones*, the BIA again issued an opinion contrary to those of the Ninth and Tenth Circuits. In that opinion, the BIA concluded that noncitizens who are inadmissible under section 212(a)(9)(C)(i)(I) are not eligible to adjust status under section 245(i), absent a waiver of inadmissibility.[24]

Most recently, in *Garfias-Rodriguez*, the Ninth Circuit overruled *Acosta* and deferred to the BIA's decision in *Briones* by holding that noncitizens who are inadmissible under INA § 212(a)(9)(C)(i)(I) are not eligible to adjust status under INA § 245(i).[25] The Ninth Circuit adopted a multi-factor test—to be applied on a

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[18] *Id.* at 785.
[19] *Id.*
[20] *Id.* at 789, 794. The Tenth Circuit found otherwise. In *Berrum-Garcia v. Comfort*, the Tenth Circuit found that noncitizens who are subject to § 212(a)(9)(C)(i)(II) are ineligible to apply for I-212 waiver and for adjustment of status under § 245(i). *Berrum-Garcias v. Comfort*, 390 F.3d 1158, 1168 (10th Cir. 2004).
[21] *Padilla-Caldera v. Gonzales*, 426 F.3d 1294, 1296 (10th Cir. 2005).
[22] *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006).
[23] *Acosta v. Gonzales*, 439 F.3d 550, 556 (9th Cir. 2006).
[24] *Briones*, 24 I&N Dec. at 370–71.
[25] *Garfias-Rodriguez*, 702 F.3d at 512. The Second, Third, Fourth, Sixth, Seventh, Eighth and Tenth Circuits have also found that *Briones* was reasonable under the second-step in *Chevron* and thus is entitled to judicial deference. *See Mora v. Mukasey*, 550 F.3d 231, 239 (2d Cir. 2008); *Ramirez v. Holder*, 609 F.3d 331, 337 (4th Cir. 2010); *Ramirez-Canales v. Mukasey*, 517 F.3d 904, 910 (6th Cir. 2008); *Gonzalez-Baldera v.* Holder, 597 F.3d 869, 870

case-by-case basis—for determining whether *Briones* applies retroactively to applicants who relied on *Acosta*. The test originates from the *Montgomery Ward* balancing test the Ninth Circuit previously adopted for determining whether to retroactively apply a new administrative policy that is announced and implemented through an adjudication (as opposed to rule-making).[26] The *Montgomery Ward* test includes the following five factors:

1) Whether the particular case is one of first impression;
2) Whether the new rule represents an abrupt departure from well-established practice or merely attempts to fill a void in an unsettled area of law;
3) The extent to which the party against whom the new rule is applied relied on the former rule;
4) The degree of the burden which a retroactive order imposes on a party; and
5) The statutory interest in applying a new rule despite the reliance of a party on the old standard.[27]

The *Garfias-Rodriguez* court adopted only the latter four of the five *Montgomery Ward* factors, because the court found that the first, whether the issue is one of first impression, is not well suited for immigration cases.[28]

B. Questions Remaining

What does the holding in *Garfias-Rodriguez* mean for those noncitizens who sought adjustment of status while the Ninth Circuit's holding in *Acosta* was good law? How does the anti-retroactivity doctrine apply when an agency changes its rule? This practice pointer addresses these questions and describes procedural tools that might be available to strengthen the factual record and, thus, make asserting reliance arguments easier. In the end, Mr. Garfias's claim failed because (in the Ninth Circuit's view) his administrative record was underdeveloped as to evidence of reliance.

Because the legal test in the Ninth Circuit requires a case-by-case analysis, the arguments presented here are not exclusive or exhaustive, may overlap with other arguments, and their relative strength will depend on the strength of the

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(7th Cir. 2010); *Renteria-Ledesma v. Holder*, 615 F.3d 903, 908 (8th Cir. 2010); *Sarango v. Att'y Gen. of U.S.*, 651 F.3d 380, 387 (3d Cir. 2011); *Padilla-Caldera v. Holder*, 637 F.3d 1140, 1152 (10th Cir. 2011);

[26] *Montgomery Ward*, 691 F.2d at 1333–34.

[27] *Id.* at 1333.

[28] *Garfias-Rodriguez*, 702 F.3d at 520.

factual record developed before the USCIS or immigration courts. To emphasize: an individualized analysis is always required.

C. Retroactivity Analysis: The Basics

Retroactivity doctrines differ based on whether it is a law, an agency rule or a judicial decision that should be applied retroactively. It may seem that these doctrines go from unclear to bewildering. The doctrines are not easy to apply, courts regularly mismatch them,[29] and, in some instances, the different doctrines applicability even leave the Supreme Court divided.[30] While this practice pointer does not seek to resolve these issues, some background on the basics of retroactivity analysis is necessary in order to fully understand the core issues litigants face post-*Garfias-Rodriguez*.

Generally, in agency retroactivity analyses there are two agency adjudications: the first decision that governed the interpretation of the law when the activity took place and the second decision that came along later. While *Garfias-Rodriguez* did not involve two agency decisions (instead, it involved one judicial decision and one later decided agency adjudication), the court treated the retroactivity issue as if *Acosta* and *Briones* were two agency decisions. The question courts face in these situations is: should the later in time decision be applied to the earlier in time activity? Supreme Court precedent regarding retroactivity issues that arise when a change in agency policy is announced through adjudication is scant. The Court decided the principal case providing some guidance on the issue, *SEC v. Chenery* (*Chenery II*), in 1947, and the guidance was minimal. In *Chenery II*, the Court explained that held that "retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles. If that mischief is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by law."[31] The Court gave no indication how to balance these potentially conflicting interests. As a result, federal courts of appeal have developed multi-factor balancing tests pursuant to *Chenery II*—such as *Retail Union*[32] and *Montgomery Ward*.[33]

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[29] *Garfias-Rodriguez*, 702 F.3d at 522 (citing Supreme Court jurisprudence (*Landgraf v. USI Film Productions*) regarding retroactivity as applied to statutes when explaining why Mr. Garfias-Rodriguez's disclosure of his immigration status was not a relevant reliance interest).

[30] *See, e.g.*, *American Trucking Ass'ns v. Smith*, 496 U.S. 167 (1990); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991).

[31] *SEC v. Chenery*, 332 U.S. 194, 203 (1947).

[32] *Retail Union*, 466 F.2d at 390.

Under the *Retail Union* and *Montgomery Ward* tests, the essential inquiry centers around the extent of reasonable reliance on the agency's first decision.

To do the analysis, there are two temporal points that must be marked chronologically: the relevant retroactivity event and the law change. The first mark—finding the "relevant retroactivity event"—is a fancy (though accurate) way of asking: what is the action that an individual took that should be protected from the effects of a new rule? Clearly, only when the relevant event occurs before the law change can there be a question of retroactivity. We discuss where to locate the first mark in Part V of this practice pointer.

In the penalty-fee adjustment litigation context, the second mark – when the law changed – is not a bright line. During the *Garfias-Rodriguez* litigation, there were two contenders: the date *Briones* was published or the date *Diaz and Lopez*[34] was published.[35] In *Garfias-Rodriguez*, the Ninth Circuit did not settle on the end mark for *all* applicants. It did however unmistakably indicate that the date of *Briones*'s publication will likely mark (in the court's view) the terminus for reasonable reliance. That is, anyone who initially filed after *Briones* may have a difficult time persuading the court of appeals that his or her reliance was well-

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[33] The anti-retroactivity principle is a canon of statutory construction. The federal courts use it when interpreting a federal statute to make certain that Congress has clearly spoken on the temporal reach of a statute. *Vartelas v. Holder*, 132 S. Ct. 1479. 1486–87 (U.S. 2012). Although the underlying fairness concerns are similar to agency retroactivity analysis, the actual case-by-case analysis is doctrinally distinct. It is also distinct from retroactivity analysis related to judicial opinions. Retroactivity doctrine as applied to judicial decisions is perhaps the most confusing area. Generally speaking, a federal court announcing a new rule of law has two options regarding how to apply the rule to others: full retroactivity (applies the new rule against the instant parties and all future parties) and pure prospectivity (applies the new rule neither to the instant parties nor to any other party who engaged in the conduct at issue prior to the court's decision). Courts use the *Chevron Oil* test to decide if equitable considerations in some circumstances warrant prospective application of a new rule of law. The *Chevron Oil* pure prospectivity test however, has been called into question and its validity has left the Supreme Court divided for decades. Retroactivity doctrine as applied to statutes is governed by *Landgraf v. USI Film Productions*, 511 U.S. 244 (1994). Although similar in the broad outline, the anti-retroactivity canon stemming from *Landgraf* operates distinctly and differently than the analysis for applying agency rules to pre-rule activity.

[34] In *Matter of Diaz and Lopez*, 25 I&N Dec. 188 (BIA 2010) the BIA found it was no longer bound by *Acosta* under *Brand X* and applied *Briones* to noncitizens in the Ninth Circuit.

[35] Actually, there was a third contender: the date on which *Garfias-Rodriguez* was finally decided. In its brief, AILA argued that the *Garfias-Rodriguez* decision should represent the end-point. Because the Ninth Circuit rejected this position, it is not considered in this practice pointer.

founded.[36] Therefore, for purposes here, we use *Briones* as the end point – that is when the "new" rule was announced. Under a retroactivity analysis, the question is which of the applicants who sought adjustment of status before *Briones* should be protected from its harsher interpretation of the statute?

III. *GARFIAS-RODRIGUEZ* DISSECTED

Q: What are the facts of *Garfias-Rodriguez*?

A: Francisco Javier Garfias-Rodriguez, a native and citizen of Mexico entered the United States without inspection in 1996.[37] He briefly departed twice, once in 1999 to visit his sick mother and again in 2001 to attend her funeral.[38] In April of 2002 he married a U.S. citizen, and applied to adjust status shortly thereafter, in June of 2002.[39] In 2004, the United States Citizenship and Immigration Services issued Mr. Garfias-Rodriguez a Notice to Appear, charging him with removability under INA § 212(a)(9)(C)(i)(I) as an alien who "has been unlawfully present in the united States for an aggregate period of more than 1 year . . . and who enters or attempts to renter the United States without being admitted or paroled."[40]

Q: How did Mr. Garfias-Rodriguez's case get before the Ninth Circuit en banc?

A: In 2004, the Immigration Judge denied Mr. Garfias-Rodriguez's adjustment application holding that he was inadmissible under section 212 and thus ineligible for adjustment under section 245(i).[41] In 2006, the BIA sustained Mr. Garfias-Rodriguez's appeal, noted the Ninth Circuit's decision in *Acosta*, and remanded to the IJ.[42] On remand to the IJ, Mr. Garfias-Rodriguez renewed his adjustment application, but the IJ denied it again. On this occasion, the IJ concluded that the application did not meet the statutory requirement because it was filed after April 30, 2001. Mr. Garfias-Rodriguez appealed again. The BIA dismissed his appeal in

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[36] This does not suggest that a noncitizen cannot demonstrate reasonable reliance after *Briones*.
[37] *Garfias-Rodriguez*, 702 F.3d at 507.
[38] *Id.*
[39] *Id.*
[40] *Id.* 507–08. USCIS also charged Mr. Garfias with removability under INA § 212(a)(6)(A)(i) as "[a]n alien present in the United States without being admitted or paroled."
[41] *Id.* at 508.
[42] *Id.*

2009, explaining that the BIA could apply *Briones* to cases arising in the Ninth Circuit because the Ninth Circuit had abrogated *Perez-Gonzalez* under *Brand X*.[43]

Mr. Garfias-Rodriguez filed a petition for review with the Ninth Circuit, claiming that *Briones* should not be entitled *Chevron* deference nor should it be applied retroactively to his case.[44] A Ninth Circuit panel rejected his petition for review; the Ninth Circuit thereafter granted Mr. Garfias-Rodriguez's petition for rehearing en banc.[45] AILA and the National Immigrant Justice Center filed briefs in support of rehearing and on the merits.[46]

Q: What did the Supreme Court hold in *Brand X* and how did that decision affect the *Garfias-Rodriguez* court's analysis?

A: In *National Cable & Telecommunications Association v. Brand X Internet Services* (*Brand X*), the Supreme Court held that "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."[47] In other words, the "Court instructed federal courts to defer to reasonable agency interpretations of ambiguous statutes, even when those interpretations conflict with the prior holding of a federal circuit court."[48]

Pursuant to those instructions, the *Garfias-Rodriguez* court found it must defer to the BIA's decision in *Briones*.[49] The *Garfias-Rodriguez* court explained that the BIA's interpretation in *Briones* was a permissible reading of the statute.[50] In doing so, the court concluded that noncitizens who are inadmissible under section 212(a)(9)(C)(i)(I) are not eligible for adjustment of status under section 245(i) and explicitly overruled *Acosta* to the extent it holds otherwise.[51]

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[43] *Id.* at 508.
[44] *Id.* (citing *Garfias-Rodriguez v. Holder*, 649 F.3d 942 (9th Cir. 2011)).
[45] *Id.* at 508–09.
[46] The amicus briefs are available at http://www.aila.org/content/default.aspx?bc=9418%7C11708%7C36120.
[47] *National Cable & Telecommunications Association v. Brand X Internet Services* (*Brand X*), 545 U.S. 967, 982 (2005).
[48] *Garfias-Rodriguez*, 702 F.3d at 507.
[49] *Id.*
[50] *Id.* at 513–14.
[51] *Id.* at 514.

The court then set forth to determine whether the *Briones* decision should be retroactively applied to Mr. Garfias-Rodriguez—an issue that the Supreme Court did not address in *Brand X*.

Q: The *Garfias-Rodriguez* decision indicates that the retroactivity question was not decided by the BIA. Why then did the *Garfias-Rodriguez* court consider the retroactivity issue in the first instance instead of remanding to the BIA?

A: In *Garfias-Rodriguez*, the Ninth Circuit did not remand the retroactivity issue to the BIA. Instead, the court considered it in the first instance because the parties did not seek remand and the court determined that no further record development was necessary.[52]

Since Mr. Garfias-Rodriguez never raised his retroactivity claim to the BIA, there was a substantial jurisdictional question the court needed to address. The court clarified that it will hear the issue in the first instance and exercise subject matter jurisdiction, "if the issue is fairly raised by the parties."[53]

It is important to understand that if an issue has been "fairly raised" it is amenable to federal court review: this is the requirement that noncitizens administratively exhaust their remedies. In contrast, to be "fairly raised" *is not* a factor in addressing whether remand to the BIA is appropriate. This practice pointer makes this distinction because after reviewing several briefs filed by the Office of Immigration Litigation, it appears that OIL has made the assertion that to be "fairly raised" at the BIA level means that remand for factual development post-*Garfias-Rodriguez* is unnecessary. OIL's assertion conflates subject matter jurisdiction requirements with remand requirements.

Garfias-Rodriguez involved unique circumstances allowing the court to address retroactivity in the first instance because the parties had fairly raised the issue. Although subject matter jurisdiction is a necessary condition for the court to hear the retroactivity issue, it is mostly irrelevant for deciding if a case should be remanded to the BIA for additional proceedings in light of the developments and the new legal holding in *Garfias-Rodriguez*.

Q: What is the ordinary remand rule and, when applying *Garfias-Rodriguez*, what factors should be weighed to determine if remand to the BIA is warranted?

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[52] *Id.* at 515.
[53] *Id.* at 520.

A: The ordinary remand rule requires courts of appeals to remand a matter to an agency for additional investigation and explanation—rather than conducting a *de novo* inquiry itself.[54] This allows the agency to bring its expertise to bear, evaluate the evidence and make an initial determination.[55] This way, "through informed discussion and analysis, [the agency can] help a court later determine whether its decision exceeds the leeway that the law provides."[56]

The ordinary remand rule originates from the administrative exhaustion doctrine. The purpose is to allow an administrative agency to perform functions within its special expertise—"to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies."[57] In the Ninth Circuit, exhaustion of administrative remedies with respect to retroactivity issues is not required unless 1) record development is necessary; or 2) the agency has special expertise to conduct the retroactivity analysis.[58]

Often, remand to the BIA will be the best strategically viable option for individuals whose penalty fee adjustment claims are pending before the Ninth Circuit. This is especially true because the Ninth Circuit had not decided that the *Montgomery Ward* retroactivity test would be used when most noncitizens' applications for adjustment were still before the USCIS, IJ, or BIA. Therefore they did not develop their records in light of the legal rule because the legal rule had not been announced. Without notice of the court's usage of the *Montgomery Ward* retroactivity test, the applicants would not have addressed the factors before the IJ. For example, individual reliance interests would not have been included in the record. Thus, in those situations it is appropriate to seek remand for further factual development.

Additionally, even though exhaustion of administrative remedies is not required with respect to retroactivity because the BIA does not necessarily have special expertise to conduct the retroactivity analysis, it can still benefit the Ninth Circuit to be able to know the BIA's perspective (or even the IJ's) on the issue. This is so because it will improve the quality of review in the event the case reaches the Ninth Circuit.

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[54] *I.N.S. v. Orlando Ventura*, 537 U.S. 12, 16 (2002).
[55] *Id.* at 16–17.
[56] *Id.* at 17.
[57] *Chang v. U.S.*, 327 F.3d 911, 925 (9th Cir. 2003) (quoting *Parisi v. Davidson*, 405 U.S. 34, 37 (1972)).
[58] *Garfias-Rodriguez*, 702 F.3d at 514 (quoting *Chang*, 327 F.3d at 925).

The BIA and IJ can engage in retroactivity analysis. They can determine whether or not to apply *Matter of Briones* to the case before them based on either (1) the holding in *Garfias-Rodriguez* or (2) the power of an administrative agency to use equitable principles to protect the rule of law. Even though they often times forget it, the BIA's delegated role is to do justice, not to mindlessly deport people.[59]

Q: Why did the Ninth Circuit adopt the *Montgomery Ward* test to determine if *Briones* should be applied retroactively?

A: The Ninth Circuit held that when, pursuant to *Brand X*, it overturns its own precedent following a contrary statutory interpretation by an agency, it will use the *Montgomery Ward* test to analyze whether the agency's statutory interpretation applies retroactively to individuals who relied on the Ninth Circuit's prior decision.[60]

The *Montgomery Ward* test is identical to the D.C. Circuit's balancing test developed in *Retail, Wholesale & Dep't Store Union v. NLRB* (*Retail Union*).[61] It is not a great fit for the role the Ninth Circuit would have it perform. The D.C. Circuit developed the test to determine when to retroactively apply a new agency interpretation announced through adjudication—not to address retroactivity issues stemming from *Brand X*.[62]

In deciding whether to adopt the *Montgomery Ward* test for *Brand X* retroactivity cases, the Ninth Circuit needed to determine who changed the law—the BIA or the court itself.[63] If the court changed the law, the multi-factor test set forth in *Chevron Oil v. Huson* would apply;[64] if the agency changed the law—the

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[59] The authors of this practice pointer strongly suggest that the BIA be reminded of this point as often as possible.
[60] *Garfias-Rodriguez*, 702 F.3d. at 520.
[61] *Montgomery Ward*, 691 F.2d at 1333.
[62] *Retail Union*, 466 F.2d at 390.
[63] *Garfias-Rodriguez*, 702 F.3d at 514.
[64] *Chevron Oil* address whether a judicial decision overruled by the same court that issued the decision should be applied retroactively. The factors to consider are: 1) whether the decision "establish[es] a new principle of law, either by overruling clear past precedent on which litigant may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed"; 2) a weighing of "the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation"; and 3) "the inequity imposed by retroactive application." *Chevron Oil v. Huson*, 404 U.S. 97, 106–07 (1971).

Montgomery Ward test applied.[65] Ultimately, the *Garfias-Rodriguez* court was not sure who changed the law, finding that when the courts "defer to an agency's interpretation of the law, it is not clear . . . whether we or the agency effectively brought about the change in the law."[66] Instead, the *Garfias-Rodriguez* court determined that *Montgomery Ward* was the better test because it "allows us to take into account the intricacies of a *Brand X* problem, which are typically absent in a case where we have overruled our own decisions."[67]

Q: Is there a better test than *Montomery Ward* that adequately accounts for the *Brand X* retroactivity issue?

A: For circuits that have not addressed this issue, we argue that neither *Montgomery Ward/Retail Union* nor *Chevron Oil* are appropriate for situations where courts of appeals, pursuant to *Brand X*, overrule their own precedent in deference to the BIA. *Montgomery Ward* is not appropriate because it applies when agencies announce their own interpretations of ambiguous statutes that conflict with their prior interpretations. Here, however, the BIA's *only* binding interpretation was *Briones*. Since the BIA did not issue an interpretation prior to *Briones*, it follows that *Briones* cannot conflict with a prior agency interpretation.

Montgomery Ward is also not appropriate because it applies when an agency, not the court, changes the law—even post *Brand X*. As the dissent in *Garfias-Rodriguez* explained:

> *Brand X* makes clear that an agency cannot overrule a judicial decision, and that a court's first-in-time interpretation of an ambiguous statute is binding unless and until that court issues a judicial decision changing its rule of law in deference to an agency's permissible, alternative interpretation. It follows from this principle that, in deferring to *Briones* and overruling our holding in *Acosta* . . . we have changed the law of this circuit. . . . I would conclude that *Chevron Oil* supplies the proper rule of decision.[68]

As a result, at first glance *Chevron Oil* might appear to be a more appropriate test than *Montgomery Ward*. As the *Garfias-Rodriguez* majority pointed out,

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[65] *Garfias-Rodriguez*, 702 F.3d at 514; *see also* James Dawson, *Retroactivity Analysis after* Brand X, 31 YALE J. ON REG. at 18 (forthcoming 2013).
[66] *Garfias-Rodriguez*, 702 F.3d at 514 n.7.
[67] *Id.* at 518.
[68] *Id.* at 545 (J. Paez, dissenting) (internal citations omitted).

Chevron Oil is the appropriate test where a court of appeals announces a new rule of law because it changed its mind about the correctness of a prior rule or because its flawed analysis was corrected by a higher court.[69]

This is not the case here, however. In these *Brand X* situations there is no incorrect rule or flawed analysis at play; rather, courts are abiding by administrative law requirements and overruling their own correct and reasonable precedent in deference to an agency's conflicting, later-issued, interpretation.

Our view is that both *Montgomery Ward* and *Chevron Oil* are inappropriate here because inherent to both tests is the notion that either a court or an agency changed their respective initial interpretations. They then set forth tests to determine whether these changed interpretations should be applied retroactively. But, in this situation (and others arising in other circuits) the court did not change its view regarding its interpretation in *Acosta*. Rather, it deferred to the BIA's interpretation. And the BIA did not change its view; rather, *Briones* was the first lawful interpretation it had offered.

What is the proper test post-*Brand X* for when a court later defers to an agency interpretation in contravention of its judicial precedent? At its heart the test must protect both a court's prerogative to decide the law and the court's obligation to protect individuals, especially vulnerable individuals, from the mischief politicized government agencies may make. The decision in *Acosta* was not wrong. It was a fair and reasonable reading of the statute. The *Garfias-Rodriguez* court did not overrule *Acosta* because it interpreted the statute incorrectly. The court overruled *Acosta* because an administrative agency thinks it has a better interpretation. The test in this situation, therefore, must take into account that rule of law principles mean that the public can take court holdings at their face value. It is asking way too much to put the onus on the public to divine the inscrutable tea leaves of a judicial opinion to figure out whether it is amenable to *Brand X*-style reversals.

Also, just as importantly, even if the public (including lawyers) *could* predict whether a court holding is amenable to *Brand X*-style reversals, they could not predict whether the agency (who is free to change its views at any time) might disagree with the court at some point in the future. That is not how civilized societies create systems of law that earn respect by the governed. *See* George Orwell, from *Notes on Nationalism,* Fifty Orwell Essays, (1945) ("One has to belong

[69] *Id.* at 516.

to the intelligentsia to believe things like that: no ordinary man could be such a fool.") Noncitizens should not be penalized for relying on circuit precedent instead of waiting years to see if the BIA would issue a contrary decision *and* then wait to see if the applicable court of appeals were to defer to it.

Instead, courts should ask what interpretation would have applied had the individual's case been decided on the day he applied to adjust status. After all, pursuant to binding law at the time, immigration authorities would have granted the applications at that time. It is a simple rule, easily followed, and balances the competing concerns in a *Brand X*-changing interpretative landscape.

Q: Did the Ninth Circuit hold that the *Montgomery Ward* test should be applied on a case-by-case basis?

A: Yes. The court held the *Montgomery Ward* test's case-by-case analysis applies when it overturns its own precedent following a contrary statutory interpretation by an agency authorized under *Brand X*.[70] When applying the *Montgomery Ward* test to Mr. Garfias-Rodriguez, the court repeatedly emphasized that it is to be applied on a case-by-case basis.[71] In doing so, the court left open the door that other applicants can avoid *Briones's* retroactive effect.

Q. **What are the Montgomery Ward factors?**

A. The *Montgomery Ward* factors are

1) Whether the particular case is one of first impression;
2) Whether the new rule represents an abrupt departure from well-established practice or merely attempts to fill a void in an unsettled area of law;
3) The extent to which the party against whom the new rule is applied relied on the former rule;
4) The degree of the burden which a retroactive order imposes on a party; and
5) The statutory interest in applying a new rule despite the reliance of a party on the old standard.[72]

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[70] *Id.* at 519.

[71] *See id.* at 523 ("Given the specific facts and timing of this case, we conclude that the second and third factors weigh against Garfias."); *id.* at 523 n.13 ("We express no opinion whether other applicants may avoid the retroactive effect of *Briones*."); *id.* at 523 ("[A]lthough we recognize the burden that retroactivity imposes on Garfias, the second, third and fifth factors *in this case* outweigh that burden.") (emphasis added).

[72] *Montgomery Ward*, 691 F.2d at 1333.

Q: How does the court apply the first *Montgomery Ward* factor to Mr. Garfias-Rodriguez?

A: The court found that the first *Montgomery Ward* factor "is not well suited" for the immigration context and thus, the court did not address how it applied to Mr. Garfias-Rodriguez.[73]

Q: How did the court apply the second and third *Montgomery Ward* factors to Mr. Garfias-Rodriguez?

A: The second factor of the *Montgomery Ward* test is whether the new rule represents an abrupt departure from well-established practice or merely attempts to fill a void in an unsettled area of law.[74] The third factor is the extent to which the party against whom the new rule is applied relied on the former rule.[75]

When addressing these two factors, the court found they "are closely intertwined" and "will favor retroactivity if a party could reasonably have anticipated the change in the law such that the new 'requirement will not be a complete surprise.'"[76] In its analysis regarding these factors, the court focused primarily on Mr. Garfias-Rodriguez's reliance interests and spent little time analyzing whether he could have "reasonably anticipated the change in law." This is because Mr. Garfias-Rodriguez submitted his application well in advance of *Perez-Gonzalez* and *Acosta*. Thus, he was not able to establish that at the time he submitted his application, there was any "law" that he could rely on. In other words, the record developed in Mr. Garfias-Rodriguez's case made it difficult for him to prevail under factors two and three of the *Montgomery Ward* test.[77]

Importantly, the court concluded that "[g]iven the specific facts and timing of this case" the second and third factors weigh against Mr. Garfias-Rodriguez.[78] This statement serves as an indication that the Ninth Circuit does not believe that these factors will weigh against all *Acosta* applicants.

There may certainly be other noncitizens with similar timing as Mr. Garfias – those whose adjustment applications were initially filed *before* there was a rule in

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[73] *Garfias-Rodriguez*, 702 F.3d at 520–22.
[74] *Montgomery Ward*, 691 F.2d at 1333.
[75] *Id.*
[76] *Garfias-Rodriguez*, 702 F.3d. at 521 (quoting *Montgomery Ward*, 691 F.2d at 1333–34).
[77] As a reminder, before *Garfias-Rodriguez* came down, it was not clear what retroactivity analysis the Ninth Circuit would apply to *Brand* X problem cases in which the court overturns its own precedent following a contrary agency interpretation.
[78] *Id.* at 523.

the Ninth Circuit. To be successful, advocates must distinguish their cases by pointing to other relevant actions taking place *after* filing. Mr. Garfias's "specific facts" on these other relevant actions was underdeveloped.

Q: How did the Court apply the fourth *Montgomery Ward* factor to Mr. Garfias-Rodriguez?

A: The court found that the fourth *Montgomery Ward* factor, the degree of burden retroactivity imposes on the party, "strongly favors" Mr. Garfias-Rodriguez.[79] The court highlighted the clear difference between facing possible deportation and facing certain deportation.[80] It also noted that "deportation alone is a substantial burden that weighs against retroactive application of an agency decision."[81] Even though the Ninth Circuit has consistently found that this factor favors the noncitizen, advocates may nevertheless wish to supplement the record with evidence of hardships caused by the new rule. Because each factor is weighed independently, a compelling showing on the fourth factor may outweigh weaker evidence on the second and third factors.

Q: How did the Court apply the fifth *Montgomery Ward* factor to Mr. Garfias-Rodriguez?

A: The *Garfias-Rodriguez* court found that the fifth factor, the statutory interest in applying a new rule, leaned in the government's direction "because non-retroactivity impairs the uniformity of a statutory scheme, and the importance of uniformity in immigration law is well established."[82] However, the factor only leaned in the government's direction because "the new rule did not follow from the plain language of the statute [as] there is an inconsistency between two statutory provisions."[83]

Q: What did the Court conclude after applying the *Montgomery Ward* factors to Mr. Garfias-Rodriguez?

A: After applying the *Montgomery Ward* factors, the court held that Mr. Garfias-Rodriguez cannot avoid the retroactive effect of *Briones*.[84] The court recognized "the burden that retroactivity imposed on Garfias" but found that "the second, third and

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[79] *Id.*
[80] *Id.*
[81] *Id.* (citing *Miguel-Miguel v. Gonzales*, 500 F.3d 941, 952 (9th Cir. 2007)).
[82] *Id.* at 522.
[83] *Id.*
[84] *Id.* at 520.

fifth factors in this case outweigh that burden."[85] This holding was particular to Mr. Garfias's "specific facts." It does not represent a holding for a class of individuals.

IV. IDENTIFYING "RELEVANT EVENTS" AND SUGGESTED ARGUMENTS APPLYING THE *MONTGOMERY WARD* FACTORS

This section identifies potential arguments for successful retroactivity claims under *Garfias-Rodriguez*'s interpretation of the *Montgomery Ward* factors. The essential purpose of retroactivity analysis is protecting reliance interests. Therefore, the essential inquiry is figuring out which actions (i.e., "relevant retroactivity events") will be protected from the changed agency rule?

The history of the penalty-fee adjustment litigation is littered with court and agency decisions – they are identified in Part II. In addressing the *Montgomery Ward* test, each of these decisions forms a threshold from which reliance and stability interests (common elements to each *Montgomery Ward* factor) will be measured. Although *every* relevant retroactivity event must have occurred before the change in agency law in order for there to be a retroactivity concern, the *reasonableness* of a noncitizen's reliance interests change overtime depending on *when* the relevant event occurred.

This practice pointer demarcates the changes in how a court could view the reasonableness of reliance based on the dates of these key decisions:

(a) *Perez-Gonzalez* decided, August 13, 2004

(b) *Brand X* decided, January 27, 2005

(c) *Acosta* decided, February 23, 2006

(d) *Briones* decided, November 29, 2007

(e) *Matter of Diaz & Lopez* decided, January 27, 2010

Each of these decisions changed how reasonable a noncitizen's belief was that he or she was eligible for penalty-fee adjustment.

Q. To benefit from *Acosta* and avoid *Briones*, what are the periods of time when reliance interests are most strongly protected?

A: In *Garfias-Rodriguez*, the Ninth Circuit identified a sweet spot: the reasonableness of an individual's reliance and stability interests peaked during the

[85] *Id.* at 523.

21-month window between *Acosta*'s publication (February 23, 2006) and *Briones*'s publication (November 29, 2007). Individuals who filed during this sweet spot are better situated than Mr. Garfias-Rodriguez because they filed their applications within the twenty-one month magic window when *Acosta* was binding law in the Ninth Circuit and before the BIA had issued an opinion to the contrary.[86]

This practice pointer suggests that there is another sweet spot: the short window between *Perez-Gonzalez*'s publication (August 13, 2004) and when the Supreme Court decided *Brand X* (January 27, 2005). Because *Garfias-Rodriguez* has already recognized the 21-month window, it should serve as the primary focus for identifying relevant retroactivity events.

To be successful under a *Montgomery Ward* analysis, then, individuals should identify relevant retroactivity events that occurred during the 21-month window, or, alternatively, during the 5-month window after *Perez-Gonzalez*. This is not, however, to say that events occurring outside these windows are irrelevant – because they are relevant *and* important for record development. The reasonableness of reliance and stability changed over time, thus, any event that occurred prior to the change in law matters. However, the timing effects the reasonableness – some actions taken outside the windows might be viewed by a court as being less reasonable because of legal instability or lack of reliance.

Q: What were the relevant retroactivity events identified in *Garfias-Rodriguez*?

A: Remember, relevant retroactivity events are actions that an individual took that should be protected from the effects of a new rule. The court outlined the relevant retroactivity events Mr. Garfias-Rodriguez had identified: 1) the payment of the $1000 penalty fee to file his 245(i) application and 2) his disclosure of his unlawful status in the country to the (then) INS in order to file his adjustment of status application.[87] Because Mr. Garfias-Rodriguez filed his application in 2002, two years before *Perez-Gonzalez* and four years before *Acosta* were decided, the court found he could not have reasonably relied on either decision when he first

[86] *See Garfias*, 702 F.3d at 522 ("The only window in which Mr. Garfias's reliance interest based on our previous rule might have been reasonable is the 21-month period in 2006 and 2007 between the issuance of *Acosta* and *Briones*."); *see id* ("After *Briones* was issued, [Mr. Garfias] was on notice of *Acosta's* vulnerability.").
[87] *Id.* at 522.

filed.[88] Thus, for Mr. Garfias-Rodriguez, filing his adjustment application did not count as a relevant retroactivity event.

Q: Why did these events not favor Mr. Garfias-Rodriguez under the *Montgomery Ward* test?

In regard to the 21-month period between *Acosta* and *Briones*, the court explained that Mr. Garfias-Rodriguez's reliance might have been reasonable during that time, but found that there was nothing in the record supporting his reliance interests for that period.[89] At oral argument, Mr. Garfias-Rodriguez pointed to the costs he expended to renew his application during the twenty-one month period, including his medical examination paperwork, as examples of his reliance interest. The court found "there is nothing in the record which disclosed the cost to Garfias of such paperwork" and that "the penalty filing fee [] is not implicated by the proceedings on remand."[90] Mr. Garfias lost because his record was incomplete.

Additionally, the court found it could not "give much weight to the fact that Garfias admitted to his illegal presence within the United States by filing for adjustment of status."[91] The court relied on *Fernandez-Vargas v. Gonzales*[92] in which the Supreme Court reasoned that "retroactivity law . . . is meant to avoid new burdens imposed on completed acts, not all difficult choices occasioned by new law" and that the petitioner "only complain[ed] of . . . the application of new law to continuously illegal action within his control both before and after the new law took effect."[93] The *Garfias-Rodriguez* court found that it "could not help but conclude that [it] should not be overly solicitous of Garfias's interest in continuing to avoid the consequences of his violation of our immigration laws."[94] We think this analysis is wrong because it relies on an overly simplistic reading of the Supreme Court's opinion. The difference between *Fernandez-Vargas* and *Acosta* is wide: in *Acosta*, the Ninth Circuit affirmatively communicated to the world that penalty-fee applicants could seek adjustment in spite of prior unlawful presence. Therefore, they filed. In *Fernandez-Vargas*, the applicant took *no* action.

Q. Is the act of filing an adjustment application the only "relevant retroactivity event"?

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[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] *Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2006).
[93] *Garfias-Rodriguez*, 702 F.3d at 522.
[94] *Id.* at 522.

A: No. There are numerous actions that may constitute relevant retroactivity events. Remember, a relevant retroactivity event encompasses actions that an individual took that should be protected from the effects of a new agency rule. In *Garfias-Rodriguez*, the only events discussed by the court were those events ("specific facts") identified by Mr. Garfias.

Q. What are other potential "relevant retroactivity events"?

A: Examples of other potential "relevant retroactivity events" include application renewal filing fees, conferring with attorneys about filing an application, attorneys fees, fees for medical examinations, work authorization renewals, advance parole fees, biometric fees and state identification cards that expired when the applicant's employed authorization document (EAD) card expired.

Relevant retroactivity events may also include choosing to forgo other immigration relief or deciding to remain in the United States. For example, an applicant whose application was denied by USCIS because of § 212(a)(9)(C) before *Acosta* and who, after *Acosta*, decides to stay in the United States to vindicate his rights before the Immigration Judge has an important retroactivity claim. Such an individual could have decided to depart the United States then and thus begin the inadmissibility period. However, *Acosta* would have given this individual every reason to stay put and fight: why subject oneself to 10-years of inadmissibility if a federal court authorizes one to stay and get permanent residence? Had *Acosta* never happened, then this individual likely would have returned to his home country and the inadmissibility period would likely be nearly elapsed. Whereas now, he is 10-years older and the inadmissibility period has not even begun to run. Critical to a successful argument on this point is developing the facts that support it in a well-argued, well-documented case. It is unlikely that there are cases before the Ninth Circuit that contain sufficient factual development to support this argument; accordingly, advocates are cautioned *not* to assert the claim without a request for remand for record development. Making bad law is no way to go.

Although there is likely some end in the chain of events that lead to "reliance" the fact that every claim is a case-by-case analysis suggests that advocates should include as much information in the record about potential links that could form a chain of events to demonstrate reliance. It does no harm (and clearly relates to a discretionary factor in adjustment applications, so it is relevant) and it may do good. For example, if an applicant made any decision that demonstrates how he or she established roots in this country because they understood that they would qualify to adjust status after *Acosta*, such information

should be included in the record. Examples may include purchasing a home, starting a business, selling property in a home country, joining community organizations and similar.[95]

The Ninth Circuit's holding does not require that an applicant have actual knowledge of the rule in *Acosta*. The Ninth Circuit's holding, though, does require a connection between an individual's actions (the retroactivity events) and a belief (or knowledge) that the individual was eligible for penalty-fee adjustment of status. Keep in mind that a retroactivity event is "relevant" when it is done in furtherance of taking advantage of the *Acosta* rule. Advocates might wish to link the instances of reliance to some type of knowledge that an applicant would have had that he or she was eligible for adjustment as communicated to the applicant by a lawyer, an accredited representative, a DHS employee, a community services organization, or news reports.

Q. Why would relevant events occurring in the period between *Perez-Gonzalez* and *Brand X* be important to identify?

A: In *Garfias-Rodriguez*, the court explained that the ambiguity in the law that required it to defer to the BIA's decision in *Briones* "also work[ed] against Garfias."[96] The court noted that "[f]rom the outset, the tension between § 212(a)(9)(C) and § 245(i) was obvious" and that the six-year dialogue between the court and the BIA regarding the ambiguity "should have given Garfias no assurances of his eligibility for adjustment of status."[97] While "Garfias might have had reason to be encouraged after" *Perez-Gonzalez* and *Acosta*, "even then, any reliance he placed on our decision held some risk because our decisions were subject to revision by the BIA under *Chevron* and *Brand X*."[98]

Under this reasoning, there is no reason to suspect that a noncitizen who engaged in a relevant retroactivity event before *Brand X* was decided could be on

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[95] These facts can be proffered via testimony, an offer of proof, declarations, or other documentary, relevant evidence.

[96] *Id.* at 522–23.

[97] *Id.* at 522.

[98] *Id.* at 522–23. Recall, in *Brand X*, the Supreme Court held that "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." 545 U.S. at 982. In other words, "the Supreme Court instructed federal courts to defer to reasonable agency interpretations of ambiguous statutes, even when those interpretations conflict with the prior holding of a federal circuit court." *Garfias-Rodriguez*, 702 F.3d at 507.

notice that his adjustment eligibility held "some risk" because, as Justice Scalia explained prior to *Brand X*:

> "I know of no case, in the entire history of the federal courts, in which we have allowed a judicial interpretation of a statute to be set aside by an agency--or have allowed a lower court to render an interpretation of a statute subject to correction by an agency."[99]

Justice Scalia's statement highlights how *Brand X* marked an unprecedented change to long-standing principles of administrative and constitutional law. That an agency's interpretation of an ambiguous statute could trump a prior judicial interpretation came as a surprise because it undervalued the importance of stare decisis—a fundamental principle of the U.S. judicial system. As the Supreme Court has consistently made clear "it is indisputable that *stare decisis* is a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon 'an arbitrary discretion.'"[100] Prior to *Brand X*, most courts and commentators assumed that stare decisis would have foreclosed an agency from issuing a contrary interpretation.[101] Now, judicial decisions are subject to reversal by executive officers.[102]

Q: What are the potential arguments for individuals who filed after *Perez-Gonzalez* and before *Brand X* to show that factors two and three favor them?

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[99] *United States v. Mead Corp.*, 533 U.S. 218, 248–49 (2001) (Scalia, J., dissenting); *see also* Kathryn A. Watts, *Adapting to Administrative Law's Erie Doctrine*, 101 NW. U. L. REV. 997, 1017 (2007) ("For the first time ever, the Court expressly sanctioned the notion that a *Chevron*-eligible agency can overrule a court's own independent judicial construction of a what a statute means.").

[100] *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) citing The Federalist, No. 78, p. 490 (H. Lodge ed. 1888) (A. Hamilton); *see also id.* citing *Vasquez v. Hillery,* 474 U.S. 254, 265, 106 S.Ct. 617, 624, 88 L.Ed.2d 598 (1986) (*stare decisis* ensures that "the law will not merely change erratically" and "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals").

[101] *See Immigration Law - Statutory Interpretation - Seventh Circuit Defers to Agency Interpretation of Evidentiary Standards. - Ali v. Mukasey, 521 F.3d 737 (7th Cir. 2008)*, 122 HARV. L. REV. 1969, 1972 (2009) ("Prior to Brand X, most courts and commentators would have assumed that the stare decisis effect of prior judicial decisions foreclosed an agency's ability to exercise interpretive discretion.").

[102] Prior to *Brand X*, even under *Chevron*, judgments issued by Article III courts could not lawfully be overturned by the executive branch *See Brand X*, 545 U.S. at 1017 (Scalia, J. dissenting) ("Judgments within the powers vest in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government.").

A: Individuals who filed during this window can argue that they could not have expected that binding Ninth Circuit law would be subject to reversal by an agency since *Brand X* had yet to be decided and that they reasonably relied on the *Perez-Gonzalez* decision when they filed. They can also argue that after the Ninth Circuit issued *Acosta*, they were further assured that their reliance on *Perez-Gonzalez* was reasonable.

Individuals who filed during this sweet spot should argue that the new requirement (*Briones*) that resulted from the *Brand X* decision came as a "complete surprise." In other words, these individuals could not have reasonably anticipated the change in law because at the time they filed, it would have come as a complete surprise that the BIA's interpretation would trump binding Ninth Circuit precedent.

Q: How can individuals who filed after *Perez-Gonzalez* but before *Acosta* demonstrate reasonableness?

A: These individuals can argue that, unlike Mr. Garfias-Rodriguez, they filed their applications in reliance on *Perez-Gonzales* and their reliance was reasonable. They relied on clear language from the *Perez-Gonzalez* decision indicating that Ninth Circuit would apply their reasoning to either provision in section 212(a)(9)(C). The *Perez-Gonzalez* court explained that "[t]he statutory terms of INA § 245(i) clearly extend adjustment of status to aliens living in this country without legal status."[103]

In other words, just like the Ninth Circuit judges relied on *Perez-Gonzalez* to fashion a rule in *Acosta*, individual applicants can argue that they too understood *Perez-Gonzalez* to adopt reasoning strongly in their favor. If it was reasonable for judges to think that *Perez-Gonzalez* spoke to the issue, then it is reasonable for noncitizen adjustment applicants (and their lawyers) to think so, too – a point that was not argued in *Garfias-Rodriguez*.

Remarkably, OIL has asserted that reliance on *Acosta* is unreasonable (and would likely argue that reliance on *Perez-Gonzalez* is unreasonable) because 1) the ambiguity in the law resulted in a six-year dialogue between the BIA and the Ninth Circuit which does not amount to a "well-established practice" and 2) in light of

[103] *Perez-Gonzalez*, 379 F.3d at 793.

Torres-Garcia and *Duran-Gonzales*,[104] applicants should have anticipated the change in the law. This argument misconstrues the statutory provisions and misapplies the *Montgomery Ward* test. A faithful application of the factors would show that the contrary is true. A noncitizen listening to the "dialogue" between the Ninth Circuit and the BIA on penalty-fee adjustment would have concluded by the time *Acosta* was published that the Ninth Circuit had won. Remarkably, OIL's position ignores the holding of *Garfias-Rodriguez* that there is no categorical rule respecting reasonableness. Instead, reasonableness of reliance must be adjudged case-by-case in light of the relevant retroactivity event.[105]

Q. What are potential arguments for individuals who filed after *Acosta* and before *Briones*?

A: Individuals who filed during the 21-month window between *Acosta* and *Briones*, can argue that they reasonably relied on the *Acosta* decision when deciding to file. Relying on clear holdings from two U.S. appellate courts is certainly reasonable, and in fact, expected. Just as importantly, applicants could not have known that the BIA would issue a contrary interpretation.[106] After *Acosta* was decided, noncitizens throughout the Ninth Circuit (and their attorneys) would have correctly deduced that they could apply to adjust status under 245(i) pursuant to the *Acosta* court's holding.

There is a valid argument that attorneys who did not advise their clients that they were eligible for 245(i) pursuant to *Acosta* (and any government attorney who did not advise a court of the holding when the noncitizens client failed to mention it) would have likely violated their ethical obligations.[107]

Q: What arguments exist for individuals who filed outside a sweet-spot?

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[104] In *Duran-Gonzales*, the Ninth Circuit held that pursuant to *Brand X*, it was required to defer to the BIA's decision in *Torres-Garcia. Gonzales v. Dep't of Homeland Sec.*, 508 F.3d 1227, 1235 (9th Cir. 2007) (*Duran-Gonzales II*).

[105] If you have an OIL brief arguing this point, please send it to AILA (subject line: Acosta cases), amicus@aila.org.

[106] *See Garfias*, 702 F.3d at 515 ("In *Acosta*, we issued a binding interpretation of ambiguous provisions of the INA, which was authoritative in this circuit at least until the agency issued a reasonable interpretation to the contrary. If the agency had never done so, *Acosta* would still be good law.").

[107] *See* ABA Rule 1.1 ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation"); ABA Rule 3.3.a.2 ("A lawyer shall not knowingly fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.)"

A: Individuals who filed their adjustment applications outside the first or second sweet-spot (but before *Briones*) can point to other actions they took after *Acosta* was decided that would amount to "relevant retroactivity events." Advocates should develop the record to include other relevant retroactivity events that occurred during the two sweet-spots.

Q. What are potential arguments to raise regarding why the fifth factor does not always lean in the government's direction?

A: The fifth factor balances the statutory interest in applying a new rule despite the party's reasonable reliance on the old rule. In *Garfias-Rodriguez*, the court explained that the fifth factor leaned in favor of the government.[108]

Arguably, the fifth factor will not always lean in the government's favor. That is, *Garfias-Rodriguez*'s analysis of the fifth factor is *not* a holding that applies to *all* applicants. Rather, it was the holding that applied to Mr. Garfias-Rodriguez based on the arguments he presented and the record he developed in his case. The application of the *Montgomery Ward* test is a case-by-case analysis and therefore, the court must consider each case on its own and new and different facts and new and different arguments must be reweighed in balancing the statutory interests under the fifth factor.

In this regard, the history of the agency-rule retroactivity cases applying the *Montgomery Ward* and *Retail Union* factors (until *Garfias-Rodriguez*) shows that, on close inspection, the "lean" toward the government for the fifth factor is not always warranted. This is so because the *Retail Union* and *Montgomery Ward* tests were developed to address retroactivity issues that arise when an *agency* overturns its own prior rule. When appellate courts apply the factors, they analyze the extent to which the parties reasonably relied on the former rule set forth by the agency. Here, however, in the post *Brand-X* situation, the agency (the BIA) *never* set forth a former rule. Rather, the agency issued its first formal contradictory interpretation after a prior binding judicial interpretation was issued. As a result, the reliance interests involved for all three categories of applicants are significantly more reasonable and more compelling than other litigants who relied on prior agency interpretations.[109] Accordingly, this difference should give the fifth factor more

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[108] *Garfias-Rodriguez*, 702 F.3d at 523.

[109] James Dawson, *Retroactivity Analysis after* Brand X, 31 YALE J. ON REG. at 30 (forthcoming 2013) ("[R]eliance on prior agency adjudications is inherently less reasonable than reliance on prior court decisions. This is because stare decisis binds courts but not agencies.").

flexibility than the case-specific holding in *Garfias-Rodriguez* might otherwise suggest. Indeed, as the *Garfias-Rodriguez* court pointed out, the *Montgomery Ward* test is flexible "and allows [the court] to take into account the intricacies of a *Brand X* problem."[110]

Q: Why does prospective application of *Briones* suffice to satisfy the statutory interest in uniformity?

A: Advocates might argue that a prospective application of *Briones* suffices to satisfy the government's statutory interest in uniformity. True, uniformity is an important rule for the immigration agency in administering the adjustment statute nationwide. The reason for uniformity is to aid in the administration of the statute and provide the same rules across the country. In this instance, the fact that the *Briones* rule applied prospectively does not undermine these goals. First, the actual number of potential beneficiaries under § 245(i) is already small and over time will eventually disappear entirely. It is a closed class of beneficiaries. So, to the extent that *Acosta* represents an anomaly in the nationwide interpretation of § 245(i), from a government-perspective, it is such a small number that each day becomes smaller and easier to manage.[111]

Second, the USCIS and Immigration Judges are well-acquainted with adjudicating immigration benefits applications using non-uniform principles. It is a common occurrence in the immigration field. For example, in *Miguel-Miguel v. Gonzales*, the Ninth Circuit noted the importance of uniformity within immigration law, but found that those interests can still be served by prospective application of the new rule.[112]

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[110] *Garfias-Rodriguez*, 702 F.3d at 518.
[111] *Chang,* 327 F.3d at 929 (explaining that "the consequence [of applying the old rule] are not overwhelming.")
[112] *Miguel-Miguel*, 500 F.3d at 952.