



**U.S. Citizenship  
and Immigration  
Services**

**Non-Precedent Decision of the  
Administrative Appeals Office**

MATTER OF C-A-S-

DATE: OCT. 13, 2015

APPEAL OF PHOENIX FIELD OFFICE DECISION

APPLICATION: FORM I-601, APPLICATION FOR WAIVER OF GROUNDS OF  
INADMISSIBILITY

The Applicant, a native and citizen of Mexico, seeks a waiver of inadmissibility. See Immigration and Nationality Act (the Act) § 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v). The Field Office Director, Phoenix, Arizona, denied the application. The matter is now before us on appeal. The matter is remanded to the Field Office Director<sup>1</sup> for further proceedings consistent with the foregoing opinion and for the entry of a new decision, which, if adverse, shall be certified to us for review.

The record establishes that the Applicant entered the United States without authorization in March 1995. The Applicant departed the United States pursuant to a voluntary departure order in January 2003. The Applicant re-entered the United States without authorization in March 2003 and the record indicates he has remained in the United States to date.

The Field Office Director determined that the Applicant was statutorily inadmissible to the United States pursuant to section 212(a)(9)(C)(i)(I) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(I), for having entered the United States without authorization after having accrued unlawful presence of more than one year. The Field Office Director noted that no waiver was available for that ground of inadmissibility. Accordingly, the Field Office Director concluded that no purpose would be served in addressing the merits of the Applicant's Form I-601 application. The Form I-601 was denied accordingly.

On appeal, filed by the Applicant in September 2010 and received by this office in February 2015, the Applicant asserts that although the Form I-601 was denied solely on the ground that his inadmissibility under section 212(a)(9)(C)(i)(I) of the Act rendered him ineligible for adjustment of status, he is eligible to adjust status because he relied on the Ninth Circuit decision in *Acosta v. Gonzales*, 439 F.3d 500 (9<sup>th</sup> Cir. 2006), when he filed his adjustment application in 2007. The entire record was reviewed and considered in rendering this decision.

Section 212(a)(9) of the Act states in pertinent part:

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<sup>1</sup> The applicant has moved and now resides in the jurisdiction of the Field Office Director, Seattle, Washington, and the matter will therefore be remanded to that office for further proceedings. See 8 C.F.R. § 103.3(a)(2)(ii).

(C) Aliens unlawfully present after previous immigration violations.-

(i) In general.-Any alien who-

(I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or

(II) has been ordered removed under section 235(b)(1), section 240, or any other provision of law,

and who enters or attempts to reenter the United States without being admitted is inadmissible.

(ii) Exception.- Clause (i) shall not apply to an alien seeking admission more than 10 years after the date of the alien's last departure from the United States if, prior to the alien's reembarkation at a place outside the United States or attempt to be readmitted from a foreign contiguous territory, the Secretary has consented to the alien's reapplying for admission.

In a February 23, 2006 decision, the Ninth Circuit Court of Appeals held that aliens inadmissible under section 212(a)(9)(C)(i)(I) of the Act remained eligible for adjustment of status under section 245(i) of the Act. *Acosta v. Gonzales*, 439 F. 3d 550 (9th Cir. 2006).

On November 29, 2007, the Board of Immigration Appeals issued *Matter of Briones* 24 I&N Dec. 355 (BIA 2007). In this decision, the Board found that adjustment of status under section 245(i) of the Act was not available to individuals who were inadmissible under section 212(a)(9)(C)(i)(I) of the Act. The Board further determined that individuals inadmissible under section 212(a)(9)(C)(i)(I) of the Act could not be granted consent to reapply for admission until they remained outside the United States for 10 years after the date of the latest departure.

Based on the Board's decision in *Matter of Briones*, the Field Office Director determined that the Applicant was not eligible to adjust status in the United States. The Field Office Director further found that as ten years had not elapsed since the Applicant's last departure, he was statutorily ineligible to receive consent to apply for admission.

We note that in an August 26, 2015 decision, *Acosta-Olivarria v. Lynch*, No. 10-70902, 2015 WL 5023955 (9th Cir. August 26, 2015), the Ninth Circuit Court of Appeals held that Acosta-Olivarria, the petitioner, had reasonably relied on *Acosta v. Gonzales*, which was in effect at the time he had filed for adjustment, and thus, the Board's decision in *Matter of Briones*, which was subsequently adopted by the Ninth Circuit in *Garfias-Rodriguez v. Holder*, 702 F.3d 504 (9th Cir. 2012), should not be retroactively applied to the petitioner's case.

The Court explained that to determine whether *Matter of Briones* applies retroactively, an applicant must show, through application of a five-factor retroactivity test set forth in the Ninth Circuit decision *Garfias-Rodriguez v. Holder* (“*Montgomery Ward* factors”), that *Matter of Briones* should not apply to them. See *Garfias-Rodriguez v. Holder*, at 518-520 (applying retroactivity test set forth in *Montgomery Ward & Co. v. FTC*, 691 F.2d 1322, 1333 (9<sup>th</sup> Cir. 1982)).

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.

In applying the *Montgomery Ward* factors, the Court in *Acosta-Olivarria v. Lynch* held that the first factor did not weigh in either direction for purposes of determining whether to apply the rule from *Matter of Briones* retroactively. With respect to the second and third factors, the Court determined that it was reasonable for Acosta-Olivarria to rely on *Acosta v. Gonzales* when he applied for adjustment of status as it was a published opinion issued by the Ninth Circuit Court of Appeals, and there was no contrary Board decision because *Matter of Briones* had not yet been decided. Thus, the Court determined, it was reasonable that Acosta-Olivarria relied on the law of the Ninth Circuit when he filed his Form I-485 and paid the \$1000 fee and consequently, these two factors weighed against applying *Matter of Briones* retroactively. The Court then found that the fourth *Montgomery Ward* factor cut strongly against applying *Matter of Briones* retroactively because, before the Board issued that decision, the immigration judge had granted Acosta-Olivarria's adjustment of status application, and retroactive application of *Matter of Briones* would cause him to face deportation. The Court considered that, as the new rule in *Briones* did not follow from the plain language of the statute, the fifth factor “only leans” in favor of retroactive application, referring to *Garfias-Rodriguez*. Accordingly, the Court concluded that weighing all the factors, *Matter of Briones* should not be applied retroactively to Acosta-Olivarria as his reliance interests and the burden that retroactivity would impose on him outweighed the interest in uniform application of the immigration laws.

This office conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The record establishes that the Applicant, filed the Form I-485 and Supplement A to the Form I-485 on August 17, 2007, after *Acosta v. Gonzales* and prior to *Matter of Briones*. Based on

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the Ninth Circuit Court of Appeals recent decision in *Acosta-Olivarria v. Lynch*, we remand the matter to the Field Office Director to determine whether the Applicant has established, based on application of the *Montgomery Ward* factors outlined above, that *Matter of Briones* should not apply retroactively to him. As part of its review on remand, the Field Office Director shall address the effect of its findings on the merits of the Applicant's Form I-601. If the Form I-601 decision is adverse to the Applicant, it will be certified for review to this office pursuant to 8 C.F.R. § 103.4.

**ORDER:** The matter is remanded to the Field Office Director for further proceedings consistent with the foregoing opinion and for the entry of a new decision, which, if adverse, shall be certified to us for review.

Cite as *Matter of C-A-S-*, ID# 12808 (AAO Oct. 13, 2015)