U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Shanfield, Daniel, Esq.
Daniel Shanfield, Esq.-- Immigration Defense
31 N 2nd Street, Suite 200
San Jose, CA 95113

DHS/ICE Office of Chief Counsel - SFR
P.O. Box 26449
San Francisco, CA 94126-6449

Name: RAMIREZ BANDA, JORGE

A 086-922-186

Date of this notice: 7/9/2013

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Adkins-Blanch, Charles K.
Grant, Edward R.
Guendelsberger, John

Lulseges
Userteam: Docket

File: A086 922 186 – San Francisco, CA

Date: JUL - 9 2013

In re: JORGE RAMIREZ BANDA

IN REMOVAL PROCEEDINGS

INTERLOCUTORY MOTION

ON BEHALF OF RESPONDENT: Daniel Shanfield, Esquire

APPLICATION: Interlocutory motion to reconsider

For the reasons set forth below, the respondent's interlocutory motion to reconsider will be granted and the record will be remanded to the Immigration Court for further proceedings. On January 7, 2013, this Board sustained the Department of Homeland Security's appeal of the decision of the Immigration Judge, dated October 15, 2010, granting the respondent's application for adjustment of status under section 245(i) of the Act, 8 U.S.C. § 1255(i), and remanded the record to the Immigration Judge in order to allow the respondent to apply for other forms of relief from removal. Upon further consideration of the respondent's claims, we conclude that it is appropriate to remand the record to the Immigration Judge to also further consider the respondent's application for adjustment of status. However, as many of the issues raised in these proceedings will require fact finding by the Immigration Judge, we decline to make a definitive ruling regarding the respondent's eligibility for adjustment of status at the present time.

In the present case, the respondent, a native and citizen of Mexico, is subject to removal from the United States because he is an alien present in this country without being admitted or paroled or who arrived in the United States at any time or place other than designated by the Attorney General. *See* section 212(a)(6)(A)(i) of the Act, 8 U.S.C. § 1182(a)(6)(A)(i). Additionally, inasmuch as the respondent entered this country without being admitted by an immigration officer after having previously accrued more than 1 year of unlawful presence in this country, he is also inadmissible under the provisions of section 212(a)(9)(C)(i) of the Act.

In October 2012, the United States Court of Appeals for the Ninth Circuit, sitting en banc, held, in *Garfias-Rodriguez v. Holder*, 702 F.3d 504 (9th Cir. 2012), that the position of this Board, set forth *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007), and later reaffirmed in *Matter of Diaz & Lopez*, 25 I&N Dec. 188 (BIA 2010), that an alien who is inadmissible under the provisions of section 212(a)(9)(C)(i) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i), is ineligible for adjustment of status under section 245(i) of the Act, was entitled to deference. *See National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The Ninth Circuit's decision in *Garfias-Rodriguez* overruled its prior holding, set forth in *Acosta v. Gonzalez*, 439 F.3d 550 (9th Cir. 2005), that an alien's inadmissibility under section 212(a)(9)(C)(i) of the Act did not, in itself, preclude an alien from adjustment of status under section 245(i) of the Act.

The Ninth Circuit, upon consideration of the 5-factor test set forth in *Montgomery Ward & Co. v. FTC,* 691 F.2d 1322 (9th Cir. 1982), held that the alien described in *Garfias-Rodriguez*, who filed his application for adjustment of status in 2002, could not avoid the retroactive effect of *Briones*. *Garfias-Rodriguez v. Holder*, *supra*, at 520. However, in a footnote, the Ninth Circuit expressed no opinion as to whether other applicants may avoid the retroactive effect of *Briones*. *Id.* at 523. Under *Montgomery Ward*, *supra,* at 1333, to determine whether an adjudicatory decision should be applied retroactively, courts should consider (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.

While the Immigration Judge did consider the *Montgomery Ward* factors in a prior decision which she issued in August 2010, we deem it appropriate for the Immigration Judge to re-address such factors in light of the Ninth Circuit's decision in *Garfias-Rodriguez* and to conduct additional removal hearings before determining whether this Board's decision in *Briones* should be applied retroactively to the respondent. In particular, further hearings will be needed in order to determine to what extent, if any, the respondent relied upon *Acosta* when he filed his application for adjustment of status in July 2007. While counsel for the respondent makes assertions that the respondent relied upon *Acosta* when he filed his application for adjustment of status in July 2007 and spent significant sums of money on legal fees, such claims, at the present time, are not supported by actual evidence (Respondent's Motion at 12-15). *See Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980) (recognizing that the statements of counsel are not evidence). Likewise, the Immigration Judge should also determine the burden that retroactively applying *Briones* would have on the respondent. While the alien described in *Garfias-Rodriguez* was facing removal from this country upon the denial of his application for adjustment of status, it is unclear whether the respondent is eligible for other forms of relief from removal which would provide him with an alternative means of remaining in this country (i.e., cancellation of removal).

At the present time, we express no opinion regarding the ultimate outcome of the respondent's pursuit of adjustment of status under section 245(i) of the Act. *See Gonzales v. DHS*, ___ F.3d ___, 2013 WL 1276522, No. 09-35174 (9th Cir. Mar. 29, 2013) (remanding a claim to a district court for further consideration of the *Montgomery Ward* factors). However, as we conclude that the respondent warrants a further opportunity to demonstrate that he merits such relief, the following orders are entered.

ORDER: The respondent's interlocutory motion to reconsider is granted and this Board's prior decision, dated January 7, 2013, is vacated.

FURTHER ORDER: The record is remanded to the Immigration Court for further proceedings consistent with the foregoing opinion and the entry of a new decision.

FOR THE BOARD