

# One Time Too Many: *In re Briones* and the BIA’s Rigid Interpretation of the LIFE Act and its Dire Consequences for Undocumented Reentry

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## I. INTRODUCTION

The constant flow of immigrants into the United States has existed since before the country's birth, and the overwhelming majority of U.S. citizens are descendants of immigrants.<sup>1</sup> For this reason, immigration law and policy constantly adapt to the political, economic, and cultural flow of American society.<sup>2</sup> The governance of U.S. immigration must constantly adjust in order to cope with fluctuations in immigration trends and to provide navigable means of adjusting immigration status. In recent years, U.S. immigration laws constricted so dramatically that now the process of altering one's status is extremely challenging.<sup>3</sup> At least to some degree, these restrictive laws have increased the number of illegal immigrants in the United States to close to 11.2 million. In turn, their high numbers forced the U.S. Congress to pass additional immigration reform in 2000, to better enable some classes of immigrants the opportunity to adjust their status.<sup>4</sup>

The 2000 immigration reforms held great promise and spurred high expectations for finally creating an effective means to regularize and grant legal status for a good portion of the illegal immigrant population. Yet before the reform could take full effect, a 2007 decision by the Board of Immigration Appeals (BIA) tied the hands of all immigration courts and U.S. courts of appeals when it decided *In re Briones*.<sup>5</sup> *Briones* interpreted one of the most significant 2000 reforms, President Clinton's LIFE Act, so narrowly that it effectively nullified a potential major change to U.S. immigration law and dashed the hopes of advocates for sweeping integration of undocumented residents into our society.

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1. See Darren H. Weiss, *X Misses the Spot: Fernandez v. Keisler and the (Mis)appropriation of Brand X by the Board of Immigration Appeals*, 17 GEO. MASON L. REV. 889, 890 (2010).

2. *Id.*

3. See Sylvia Moreno, *Stricter Immigration Law Dominates Smith Resume*, WASH. POST, Mar. 23, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/22/AR2007032202042.html>.

4. Hope Yen, *Number of Illegal Immigrants in US Steady at 11.2M*, ASSOCIATED PRESS, Feb 1, 2011, available at <http://www.cnsnews.com/news/article/number-illegal-immigrants-us-steady-112m>.

5. See *In re Briones*, 24 I. & N. Dec. 355, 355 (B.I.A. 2007).

This Casenote will discuss both the origins of the LIFE Act and its early potential, and then focus attention on the BIA decision itself in *Briones* and its impact on immigration courts and U.S. courts of appeals. In Part II, this Casenote will give a brief overview of the LIFE Act and its creation. Parts III and IV will discuss the issues presented in *Briones*, the facts of the case, and the BIA's decision. In Part V, the Casenote will then analyze the decision in *Briones* as it conflicts with previous case law from multiple circuit courts of appeal and goes against the congressional intent behind the LIFE Act. Additionally, Part VI will evaluate the negative impact of *Briones*' various public policy concerns. The Casenote will conclude in part VII by imploring the BIA to reevaluate the issues addressed in *Briones* and urge the U.S. Congress to amend the LIFE Act to include a precedent clause stating that § 245(i) of the Immigration and Nationality Act (INA) trumps INA § 212(a)(9)(C)(i)(I)'s definition of inadmissibility.

## II. THE CREATION OF THE LIFE ACT

On December 21, 2000, President Clinton signed into law the Legal Immigration and Family Equity Act (LIFE Act), an extension of earlier immigration reform passed in 1994.<sup>6</sup> Congress drafted the LIFE Act to provide an exception to the general rule barring illegal aliens from obtaining permanent residence, citizenship, or even a temporary visa.<sup>7</sup> Mainly, the rule targets individuals who enter the country without inspection and are thus ineligible to claim lawful permanent status.<sup>8</sup> Congress designed the LIFE Act to provide adjustment of status opportunities for a limited number of immigrants who were unable to regularize their status under previous laws.<sup>9</sup>

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6. See MATTHEW J. GIBNEY & RANDALL HANSON, IMMIGRATION AND ASYLUM: FROM 1900 TO THE PRESENT 467–68 (2005). The earlier reform, passed in 1994, was a measure which forgave undocumented immigrants and allowed them the opportunity to become permanent residents without having to leave the United States. See Section 245(i): “Adjustment of Status” Mini-Amnesty, FED’N OF AM. IMMIGRATION REFORM, July 2002, available at <http://www.fairus.org/site/PageServer?pagename=iimmigrationissuecenters326f>.

7. See Immigration and Nationality Act § 245(a) (West 2011), 8 U.S.C.A. §1255(a) (West 2011).

8. See Immigration and Nationality Act § 245(i).

9. See 146 Cong. Rec. S11263-01 (daily ed. Oct. 27, 2000) (statement of Sen. Hatch), See also 146 Cong. Rec. S11850-52 (daily ed. Dec. 15, 2000) (statement of Sen. Kennedy).

Members of Congress who spoke in support of the LIFE Act emphasized that the overriding goal of the bill was to reunify *illegal* entrants and/or status violators who have otherwise “played by the rules” with their families.<sup>10</sup> A second proponent in Congress stated “spouses, children, parents and siblings of permanent residents or U.S. citizens . . . [must be permitted] to adjust their status in the United States and avoid needless separation from their loved ones.”<sup>11</sup> The LIFE Act was codified at § 245(i), and went into effect on December 21, 2000. Section 245(i) provides, in pertinent part:

- (1) . . . [A]n alien physically present in the United States—
  - (A) who—
    - (i) entered the United States without inspection; . . .  
. . . ; and
    - (B) who is the beneficiary . . . of—
      - (i) a petition for classification . . . that was filed with the Attorney General on or before April 30, 2001; . . . and
      - (C) who, in the case of a beneficiary of a petition for classification . . . that was filed after January 14, 1998, is physically present in the United States on December 21, 2000;may apply to the Attorney General for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence. The Attorney General may accept such application only if the alien remits with such application a sum equaling \$1,000 as of the date of receipt of the application . . . .
- (2) Upon receipt of such an application and the sum hereby required, the Attorney General may adjust the status of the alien to that of an alien lawfully admitted for permanent residence if—
  - (A) the alien is eligible to receive an immigrant visa and is *admissible* to the United States for permanent residence; and
  - (B) an immigrant visa is immediately available to the alien at the time the application is filed.<sup>12</sup>

Briefly, the statute allows aliens who entered the United States without inspection to adjust their status to that of a lawful permanent resident, despite their illegal entry. However, the alien must be otherwise eligible for adjustment of status, meaning (1) someone with legal status had filed a visa petition for the alien on or before April 30, 2001; (2) if the petition was filed between January 14, 1998 and April 30, 2001, the alien was physically in the United States on the day the law went into effect (December 21, 2000); and (3) the alien pays \$1,000 to the Attorney General.<sup>13</sup>

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10. *Padilla-Caldera v. Gonzales*, 453 F.3d 1237, 1242 (10th Cir. 2006) (citing 146 Cong. Rec. S11263-01 (daily ed. Oct. 27, 2000) (statement of Sen. Hatch)).

11. *Id.* at 1242. (citing 146 Cong. Rec. S11850-52 (daily ed. Dec. 15, 2000) (statement of Sen. Kennedy)).

12. Immigration and Nationality Act § 245(i) (West 2011), 8 U.S.C.A. § 1255(i) (West 2011) (emphasis added).

13. *See id.*

III. THE BIA IN *BRIONES* ADDRESSED THE RELATIONSHIP  
BETWEEN SECTIONS 245(I) AND 212 (A)

In November 2007, in the case of *In re Briones*, the BIA addressed the issue of whether adjustment of status under § 245(i) was available to an alien who was considered inadmissible to the United States under § 212(a)(9)(C)(i)(I) of the INA.<sup>14</sup> In other words, did the exception in § 245(i) actually apply to aliens inadmissible under § 212(a)(9)(C)(i)(I)? The Immigration and Customs Enforcement (ICE) prosecutors in *Briones* sought clarification—and likely hoped to exploit a caveat in § 245(i)—to whether the exception only granted an eligible alien the option to receive a visa if found “admissible.”<sup>15</sup> This “admissible” stipulation in § 245(i) directly conflicts with the restrictions on admissibility outlined in § 212(a)(9)(C)(i)(I).

In detail, § 212(a)(9)(C)(i)(I) states that any 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 reenter the United States without being admitted is *inadmissible*.” (Emphasis added.)<sup>16</sup> Practically speaking, § 245(i) grants aliens who have entered the United States without inspection the opportunity to adjust their status so long as they are otherwise *admissible*. Paradoxically, § 212(a)(9)(C)(i)(I) makes aliens who enter the United States without inspection after accruing a previous unlawful presence inadmissible. In other words, despite their best intentions, Congress created a problematic contradiction: it drew an exception for a category of undocumented aliens to become *admissible* under § 245(i), but under § 212(a) all undocumented aliens, by virtue of their unlawful presence in the United States, are *inadmissible*. Furthermore, the language in § 245(i) neglected to state whether it meant to override or take precedence over § 212(a), specifically § 212(a)(9)(C)(i)(I), in determining whether an individual is eligible to adjust his or her status.

In *Briones*, the BIA determined that the § 245(i) exception did not trump the § 212(a)(9)(C)(i)(I) bar on admissibility of undocumented aliens. Their decision created an adverse legal precedent which the U.S.

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14. See *In re Briones*, 24 I. & N. Dec. 355, 355 (B.I.A. 2007).

15. Immigration and Nationality Act § 245(i)(2)(A), § 8 U.S.C.A. § 1255(i)(2)(A) (emphasis added).

16. Immigration and Nationality Act § 212 (a)(9) (emphasis added).

courts of appeals are bound to follow.<sup>17</sup> This is because the U.S. Supreme Court, in *Chevron, U.S.A, Inc. v. Natural Resources Defense Council, Inc.*, held that courts of appeals must give deference to an agency’s interpretation of a statute, unless the interpretation is “arbitrary, capricious, or manifestly contrary to the statute.”<sup>18</sup> In addition, the Supreme Court elaborated that courts of appeals must apply *Chevron* deference to an agency’s interpretation of a statute regardless of the fact it is contrary to their existing precedent, provided that the court’s earlier precedent was an interpretation of a statutory ambiguity.<sup>19</sup> Therefore, multiple circuits will be forced to overrule previous holdings regarding the LIFE Act reform, unless they determine that the BIA’s interpretation was arbitrary, capricious, or manifestly contrary to the statute.<sup>20</sup> *Briones* therefore binds all U.S. courts of appeals’ interpretations of § 245(i).

The BIA’s interpretation of *Briones* will also have detrimental effects on public policy. The LIFE Act was designed to keep families together and to allow illegal immigrants who have otherwise “played by the rules” to adjust their status to that of a legal permanent resident.<sup>21</sup> The BIA’s decision in *Briones* will negatively impact the application of the LIFE Act, barring *any* opportunity to obtain legal status for thousands of productive members of society who are simply waiting for visas—for which their legal relatives helped them to apply for—to become “available,” which is necessary so that they can adjust their status.<sup>22</sup> The decision will inevitably punish children who were brought into the United States at a young age, subsequently left, and reentered unlawfully again to return to their home and family. It will also prevent immigrants who are already in the United States from obtaining social security numbers, paying taxes, and registering for driver’s licenses.

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17. See *Chevron, U.S.A, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984); *In re Briones*, 24 I. & N. Dec. at 355.

18. *Chevron*, 467 U.S. at 844; *Emokah v. Mukasey*, 523 F.3d 110, 116 (2d Cir. 2008) (quoting *Chevron*, 467 U.S. at 844).

19. *Nat’l Cable & Telecomms. Assoc. v. Brand X Internet Servs.*, 545 U.S. 967, 980–82 (2005). In this case, the BIA is the governing body of the Department of Homeland Security (DHS), the U.S. immigration agency, and therefore the courts of appeals must defer to the BIA’s decisions concerning ambiguous statutes. *Board of Immigration Appeals*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/eoir/biainfo.htm> (In turn, the circuit courts of appeals are now bound to adhere to the BIA interpretation of § 245(i) because of the decision in *Briones*) (last visited Apr. 13, 2011).

20. The Supreme Court in *Chevron* made its decision on the belief that agencies are better suited to interpret ambiguous statutes based on their in-depth understanding of specific, intricate statutes. The Supreme Court reasoned that while circuit court judges have general knowledge of the statutes, agencies were more prepared to interpret statutes respecting the matters subjected to agency regulations. See *Chevron*, 467 U.S. at 844.

21. *Padilla-Caldera v. Gonzales*, 453 F.3d 1237, 1242 (10th Cir. 2006).

22. See *infra* note 25 for more detailed explanation of visa process.

*Briones'* interpretation of the relationship between §§ 245(i) and 212(a)(9)(C)(i)(I) will ultimately preclude an entire class of immigrants who have close ties with lawful permanent residents and U.S. citizens from *ever* adjusting their status, forcing them to remain illegal immigrants as long as they continue to reside in the United States with their family members. Section 245(i) specifically aims at helping this group of aliens by allowing them to adjust their status regardless of their undocumented entry.

#### IV. HOW THE WIDELY APPLICABLE FACTS OF *BRIONES* WILL HAVE DIRE CONSEQUENCES FOR SIMILARLY SITUATED UNDOCUMENTED ALIENS

The facts presented in *Briones* are common to many different immigration proceedings, and therefore will be extremely relevant in future litigation.<sup>23</sup> In *Briones*, the respondent, Alonzo Briones, was a Mexican citizen who entered the United States without inspection in 1992.<sup>24</sup> In March 1993, Briones' father, then a lawful permanent resident, filed a Petition for Alien Relative on his son's behalf.<sup>25</sup> The petition

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23. See *Acosta v. Gonzales*, 439 F.3d 550 (9th Cir. 2006); *Padilla-Caldera*, 453 F.3d 1237; *Mora v. Mukasey*, 550 F.3d 231 (2d Cir. 2008); *Ramirez-Canales v. Mukasey*, 517 F.3d 904 (6th Cir. 2008); *Renteria-Ledesma v. Holder*, 615 F.3d 903 (8th Cir. 2010).

24. See *In re Briones*, 24 I. & N. Dec. 355, 356 (B.I.A. 2007).

25. The Immigration and Nationality Act (INA) sets the number of immigrant visas that may be issued to individuals seeking permanent resident status each year. Immigrant visas available to "immediate relatives" of U.S. citizens are unlimited, and therefore are always available. Immediate relatives include parents of an adult U.S. citizen, spouses of a U.S. citizen and, unmarried children under the age of twenty-one of a U.S. citizen. However, immigrant visa numbers for individuals in a "preference category" are limited, and are not always available. Individuals in a preference category include brothers and sisters of a U.S. citizen, children over the age of twenty-one of a U.S. citizen, married children of a U.S. citizen, spouses, children under twenty-one, and unmarried children over twenty-one of a legal permanent resident.

The U.S. Department of State is the agency that distributes visa numbers. Family sponsored preference categories are limited to 226,000 per year, and employment based preference visas are limited to 140,000 per year. In addition, there are limits to the percentage of visas that can be allotted to each country. Because the demand is higher than the supply of visas for a given year for some categories, the categories become oversubscribed, and a visa queue (waiting list) forms. To distribute the visas among all preference categories, the Department of State gives out the visas by providing visa numbers according to the preference category and one's priority date. The priority date (the date the required petition was filed) is used to determine an individual's place in line in the visa queue. When the priority date becomes current, the individual will be eligible to apply for an immigrant visa. See *Visa Availability and Priority Dates*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (Sep. 29, 2009), <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c>

classified Briones as a family-sponsored immigrant in the second-preference category—an unmarried son of a lawful permanent resident.<sup>26</sup> The former Immigration and Naturalization Service (INS) (now USCIS) approved the petition in January 1994, but no visa number was available to Briones at that time because his preference category was oversubscribed.<sup>27</sup> As a result, Briones remained in the United States undocumented, waiting for a visa number until December 1998, when he returned to Mexico.<sup>28</sup>

On March 3, 1999, Briones' father became a naturalized citizen of the United States.<sup>29</sup> As a result, Briones' approved second-preference visa petition was automatically converted to an approved first-preference petition. Because there are more visa numbers available to first-preference applicants, Briones' wait to adjust his status was shortened considerably.<sup>30</sup> After less than three months abroad, on March 18, 1999, Briones reentered the United States without inspection, and thereafter, resided undocumented in the United States. In July 1999, after a visa number was finally available in his preference category, Briones filed an Application to Adjust Status with the DHS pursuant to the § 245(i) admissibility exception of the LIFE Act, on the basis of his previously approved 1994 Petition for Alien Relative.<sup>31</sup>

In 2004, the DHS denied Briones' adjustment of status application. In addition, DHS officials initiated removal proceedings, charging Briones with inadmissibility as an alien who reentered the United States without

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26. See Immigration and Nationality Act § 203(a)(2), 8 U.S.C. § 1153(a)(2) (1988); *In re Briones*, 24 I. & N. Dec. 355, 356 (B.I.A. 2007).

27. As of March 2011, the Department of State is only reviewing petitions filed on or before July 15, 1992 for Mexican citizens who are the unmarried sons or daughters of a permanent resident, those aliens waiting in the second-preference category. So, an alien currently in Briones' position could expect to wait approximately 19 years, or until 2030, for a visa to become available in their category. See *VISA BULLETIN FOR MARCH 2011*, TRAVEL.STATE.GOV, [http://travel.state.gov/visa/bulletin/bulletin\\_5337.html](http://travel.state.gov/visa/bulletin/bulletin_5337.html).

28. *In re Briones*, 24 I. & N. Dec. 355, 356 (B.I.A. 2007).

29. Naturalization is the process by which U.S. citizenship is granted to a foreign citizen or national after he or she fulfills the requirements established by Congress in the Immigration and Nationality Act. In most cases, an applicant for naturalization must be a permanent resident (green card holder) before filing. Except for certain U.S. military members and their dependents, naturalization can only be granted in the United States. See *Citizenship through Naturalization*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (Feb. 1, 2011), <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextchannel=d84d6811264a3210VgnVCM100000b92ca60aRCRD&vgnextoid=d84d6811264a3210VgnVCM100000b92ca60aRCRD>.

30. *Id.* See 8 C.F.R. § 204.2(i)(3) (1999).

31. *In re Briones*, 24 I. & N. Dec. at 356.

admission after living unlawfully within the United States for over a year.<sup>32</sup> As previously discussed, § 212(a)(9)(C)(i)(I) dictates that individuals who have reentered the United States without inspection after incurring more than one year of unlawful presence are *inadmissible* for purposes of adjustment of status and are permanently barred from future adjustment.<sup>33</sup> Briones denied the charge and attempted to renew his application for adjustment of status, arguing that inadmissibility under § 212(a)(9)(C)(i)(I) did not impede the § 245(i) adjustment exception—an exception for aliens present in the United States despite earlier uninspected entry.<sup>34</sup> The immigration judge denied Briones' application, concluding that inadmissibility under § 212(a)(9)(C)(i)(I) rendered him, and others like him, ineligible for adjustment of status.<sup>35</sup> Briones immediately appealed to the BIA.<sup>36</sup>

To better illustrate the potential impact of § 245(i), consider the following hypothetical, based on a fairly ordinary scenario: an alien enters the United States with his mother and siblings as an infant; completes elementary school, middle school, and high school; and creates a life for himself within the United States. Unfortunately, his undocumented status makes him ineligible for a social security card, therefore ineligible for any financial aid for college or graduate studies, ineligible to apply for nearly all blue or white collar jobs, and unable to register for a driver's license at the Department of Motor Vehicle. Fortunately for the alien, someone in his family is either a legal permanent resident or U.S. citizen and applies on his behalf for a visa. Years later, while still awaiting a visa number so that he can adjust his status and properly put his U.S. education to use, he receives word that a relative, who still resides in his country of citizenship, has passed away. The alien must leave the United States to settle the affairs of his deceased relative. A few weeks later he returns to his friends, family, and life in the United States, once again entering the country without inspection. Aside from his undocumented entry, this young man has otherwise fully abided by the laws of the United States. Further, his work ethic and ties within his community have benefited the country.

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32. *Id.*

33. *Id.* See Immigration and Nationality Act § 212 (a)(9)(C)(i)(I), 8 U.S.C. § 1182(a)(9)(C)(i)(I) (2000).

34. *In re* Briones, 24 I. & N. Dec. at 356.

35. *Id.* at 357.

36. *Id.*

He has created jobs, consumed U.S. products, and has consistently paid his taxes. However, under the BIA's decision in *Briones*, he, along with many others, is no longer eligible for the visa, for which he has long awaited, based on two acts which were largely beyond his control. Had he entered the United States without inspection *only* once, even the BIA agrees, he would still be eligible for adjustment of status under § 245(i).<sup>37</sup>

Under this example, the BIA would put this young man, whose only legal violation was entering the United States without inspection twice, in the same category as aliens who have shown blatant disregard for both U.S. laws and the U.S. judicial system, because, after an initial deportation, they chose to disobey a direct court order and reenter the United States. As will be discussed in greater detail later, this is the interpretation that the BIA utilized in *Briones* to hold that inadmissible aliens under § 212 (a)(9)(C)(i)(I)—aliens inadmissible based on a reentry—deserve the same treatment as inadmissible aliens under § 212 (a)(9)(C)(i)(II)—aliens inadmissible based on reentry after a *previous deportation*.<sup>38</sup>

Essentially, the BIA interprets the statute to mean that aliens who have simply entered the United States without inspection on more than one occasion deserve the same treatment as aliens who have directly defied a court order. Additionally, the BIA would allow the young man's entire family to adjust their status under § 245(i), based on the fact that they only entered without inspection on one occasion, while precluding him from adjustment based solely on a second entry after a completely voluntary departure.

#### V. THE BIA'S DEVASTATING INTERPRETATION OF THE CONFLICT BETWEEN SECTIONS 245 AND 212

In analyzing *Briones*, the BIA affirmed the lower court's decision. The BIA found that the "respondent [was] inadmissible to the United States under section 212(a)(9)(C)(i)(I) of the Act and that his inadmissibility under that section [made] him ineligible for adjustment of status under section 245(i) by precluding him from demonstrating that

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37. See *In re Briones*, 24 I. & N. Dec. at 359–60.

38. Aliens falling under § 212(a)(9)(C)(i)(II) may still be eligible for adjustment of status. However, they must submit an I-212 application for permission to reapply for admission. If this additional petition is approved, it can negate the effect of the previous deportation. Therefore, the combination of an approved I-212 application and the benefits of the LIFE Act may allow aliens who have reentered the United States after a previous deportation to adjust their status under § 245(i). See David Froman, *How VAWA Special Rule Inadmissibility and an I-212 Application Can Overcome Reinstatement of Removal and the Permanent Bar*, BENDER'S IMMIGRATION BULLETIN (forthcoming 2011).

he [was] ‘admissible to the United States for permanent residence.’”<sup>39</sup> The courts have further interpreted the decision in *Briones* to purport that “[e]ven though aliens who are inadmissible under section 212(a)(6)(A)(i) may be eligible for adjustment of status under section 245(i) by operation of section 1182(a)’s savings clause, aliens who are inadmissible also under section 212(a)(9)(C)(i)(I) are not.”<sup>40</sup> This further interpretation demonstrates the discriminatory effects that *Briones* had on a specific class of aliens that would otherwise have been eligible for the benefits of the LIFE Act. The BIA held that § 212(a)(9)(C)(i)(I) precluded aliens who reentered the United States illegally and spent more than one year in the United States unlawfully, and therefore such aliens could never benefit from the § 245(i) exception.<sup>41</sup>

The BIA based its decision in *Briones* on three main arguments. First, the BIA argued that § 212(a) aimed “to single out recidivist immigration violators and make it more difficult for them to be admitted to the United States after having departed.”<sup>42</sup> The BIA came to this conclusion by reasoning that because aliens covered by § 212(a)(9)(C) are a subset of those covered by § 212(a)(6)(A)(i), Congress must have intended to target repeat offenders over first-time offenders.<sup>43</sup> Based on this assumption, the BIA concluded that sheer existence of § 212(a), and other provisions effectively punishing recidivists, “reflects a clear congressional judgment that . . . repeat offenses are a matter of special concern and that recidivist immigration violators are more culpable . . . than first-time offenders.”<sup>44</sup> Ironically, however, § 245(i) was structured to grant relief to a subsection of potential “recidivists” who had otherwise followed the rules, yet the BIA ignored this.

Moreover, in 1994, when § 245(i) was originally enacted, immigration law drew no formal distinction between an alien who had “entered without inspection” once and one who had done so repeatedly: both the

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39. *In re Briones*, 24 I. & N. Dec. at 371.

40. *See Padilla-Caldera v. Gonzales*, 453 F.3d 1237, 1241 (10th Cir. 2006); *Mora v. Mukasey*, 550 F.3d 231, 237 (2d Cir. 2008) (discussing the effects of the holding in *Briones*). The introductory language of § 212(a) notes that “[e]xcept as otherwise provided in this chapter, aliens who are inadmissible . . . are ineligible to receive visas and ineligible to be admitted to the United States.” 8 U.S.C. § 1182(a) (West 2011) (emphasis added). This language acts as a “savings clause,” allowing admission of otherwise inadmissible aliens where the statute so provides. *See id.* at § 1182(a).

41. *See Mora*, 550 F.3d at 231 (outlining the reasoning used in *Briones*).

42. *In re Briones*, 24 I. & N. Dec. at 358.

43. *See id.* at 365–66.

44. *Id.* at 371.

first-time offender and the recidivist would have been deportable under the former § 241(a)(1)(B).<sup>45</sup> Furthermore, aliens who had reentered the United States after previously accruing more than one year of unlawful presence were not considered inadmissible, strongly suggesting that it was not Congress' intent to preclude such aliens from eligibility under § 245(i).

Second, the BIA observed how, prior to the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) in 1996, aliens who reentered the country after previous deportation—and who fall under the current § 212(a)(9)(C)(i)(II)—were not eligible for adjustment of status under § 245(i).<sup>46</sup> The BIA concluded that applying § 212(a)'s savings clause to § 212(a)(9)(C) would make adjustment of status available to a large class of aliens who *never* were entitled to it.<sup>47</sup> It came to this conclusion by reasoning that § 212(a)(9)(C) “define[s] a *unitary* ground of inadmissibility that may be predicated on various types of conduct,” contending that §§ 212(a)(9)(C)(i)(I) and (II) should not be treated differently for purposes of applying § 245(i).<sup>48</sup>

However, when IIRIRA was passed in 1996, it made aliens who reentered the country after having accrued more than one year of unlawful presence inadmissible for purposes of becoming a permanent resident. Prior to the passage of IIRIRA, such aliens *were not inadmissible*.<sup>49</sup> Moreover, when the LIFE Act was originally passed in 1994, aliens who had reentered the country after having accrued more than one year of unlawful presence were admissible for adjustment of status.<sup>50</sup> So, in making the argument that §§ 212(a)(9)(C)(i)(I) and (II) should be treated equally for purposes of § 245(i), the BIA went against the original application of the statute at the time of its creation in 1994,

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45. *Id.* at 363.

46. *See id.* at 366–69.

47. *Id.* at 366–67.

48. In discussing a “unitary ground,” the BIA was referring to the fact that under § 212(a)(9)(C)(i)(I), aliens who reenter the United States after accruing more than one year of unlawful presence are inadmissible whereas, under § 212(a)(9)(C)(i)(II), aliens who reenter the United States after being deported are inadmissible. The court reasoned that because these two classes of aliens are grouped under the same section, they must be treated the same for purposes of § 245(i). In a previous case, *In re Torres-Garcia*, the BIA held that aliens who reentered the United States after a previous deportation were ineligible for adjustment of status under § 245(i). The BIA in *Briones* reasoned that because the two classes of aliens are located near each other in the INA, the same treatment should be given to aliens who simply reentered after remaining in the United States undocumented for more than one year. *See id.* at 358–59 & 365–67 (discussing *In re Torres-Garcia*, 23 I. & N. Dec. 866, 868 (B.I.A. 2006)).

49. *See In re Briones*, 24 I. & N. Dec. at 362–63.

50. *See id.* at 366–69. *See also* GIBNEY & HANSON, *supra* note 6, at 467.

ultimately *excluding* a large class of aliens who were *always* entitled to § 245(i) benefits.

Third, the BIA reasoned “where Congress has extended eligibility for adjustment of status to inadmissible aliens (in other words, where Congress has ‘otherwise provide[d]’ within the meaning of the savings clause)” it has generally done so “unambiguously, either by negating certain grounds of inadmissibility outright or by providing for discretionary waivers of inadmissibility, or both.”<sup>51</sup> For illustrative purposes, the BIA described a statute enacted in 1998, granting a special adjustment of status option to certain Cuban, Central American, and Haitian aliens who were unlawfully present in the United States but, with certain specified exceptions, were otherwise admissible.<sup>52</sup> When Congress realized that many of the aliens eligible for this special relief might be barred from adjusting their status because of the restrictions of the 1996 IIRIRA, Congress passed amendments that explicitly gave the U.S. Attorney General discretion to waive § 212(a)(9)(C) as a ground for inadmissibility with regard to those aliens.<sup>53</sup>

The BIA concluded that this special relief and subsequent amendment “demonstrates that when Congress wants to make adjustment of status available to aliens despite their inadmissibility under section [212(a)(9)(C)], it knows how to do so.”<sup>54</sup> Thus, the BIA determined that because Congress did not clearly outline an exception to the admissibility requirement for those aliens who reentered the United States under § 212(a)(9)(C)(i)(I), it did not intend for those aliens to benefit from § 245(i). Unfortunately, the BIA’s reasoning is flawed because, until its decision in *Briones*, Congress had no necessity to amend § 245(i). Prior to the decision in *Briones*, multiple U.S. courts of appeals held that aliens who were inadmissible under § 212(a)(9)(C)(i)(I) could still

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51. *In re Briones*, 24 I. & N. Dec. at 367 (alteration in original).

52. *Mora v. Mukasey*, 550 F.3d 231, 238 (2d Cir. 2008) (citing *In re Briones*, 24 I. & N. Dec. at 367; Haitian Refugee Immigration Fairness Act of 1998, Pub.L. No. 105-277, tit. IX, § 902(a), 112 Stat. 2681-538, 2681-538 (codified as amended at 8 U.S.C. § 1255 note); Nicaraguan Adjustment and Central American Relief Act, Pub L. No. 105-100, tit. II, § 202(a), 111 Stat. 2193, 2193-94 (1997) (codified as amended at 8 U.S.C. § 1255 note)).

53. *Id.* (citing *In re Briones*, 24 I. & N. Dec. at 368; LIFE Act Amendments of 2000, Pub. L. No. 106-554, div. B, tit. XV, § 1505(a), (b), 114 Stat. 2763A-324, 2763A-326 to -327 (codified as amended at 8 U.S.C. § 1255 note)).

54. *In re Briones*, 24 I. & N. Dec. at 368.

receive the benefits of § 245(i).<sup>55</sup> Therefore, Congress had no reason to believe that the courts were having difficulty interpreting the conflicting statutes and that an amendment was necessary to clarify the issue.

Based on this reasoning, the BIA concluded inadmissibility under INA § 212(a)(9)(C)(i)(I) precludes aliens from adjusting their status under § 245(i). Furthermore, the BIA held that § 212(a)'s savings clause does not apply to aliens who are inadmissible also under § 212(a)(9)(C)(i)(I).<sup>56</sup>

## VI. THE BIA'S INTERPRETATION IN *BRIONES*: OPPOSING COURTS OF APPEALS' PRIOR PRECEDENTS AND FORCING ADHERENCE TO THE STRICT INTERPRETATION

Prior to the decision in *Briones*, multiple U.S. courts of appeals analyzed and decided whether INA § 212(a)(9)(C)(i)(I) precludes aliens from adjusting their status under § 245(i).<sup>57</sup> When compared to the three rationales of the BIA in *Briones*, these decisions contain more persuasive, but alas, non-binding reasoning. The following sample cases, while no longer good law, do illustrate why the BIA decided *Briones* incorrectly and why Congress should amend § 245(i)—unless, of course, the BIA realizes its error and overturn its decision in *Briones*. Prior to the decision in *Briones*, both the U.S. Court of Appeals for the Ninth Circuit and Tenth Circuit held that § 212(a)(9)(C)(i)(I) does not preclude aliens from adjusting their status under § 245(i).

### A. *The Tenth Circuit's LIFE Act Treatment in Padilla-Caldera v. Gonzales*

In 2005, the Tenth Circuit held in *Padilla-Caldera v. Gonzales* that an alien's permanent inadmissibility under § 212(a)(9)(C)(i)(I) did not defeat his eligibility for penalty-fee adjustment of status under § 245(i).<sup>58</sup> In making its determination, the court made five primary arguments supporting its determination.

First, the Tenth Circuit noted that the LIFE Act was created to provide an exception to the general rule that aliens who entered the country without inspection are ineligible to seek adjustment to lawful permanent

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55. See *Acosta v. Gonzales*, 439 F.3d 550, 550 (9th Cir. 2006); *Padilla-Caldera v. Gonzales*, 453 F.3d 1237, 1237 (10th Cir. 2006).

56. *Acosta*, 439 F.3d 550; *Padilla-Caldera*, 453 F.3d 1237.

57. See *Mortera-Cruz v. Gonzales*, 409 F.3d 246, 254–56 (5th Cir. 2005); *Acosta*, 439 F.3d 550; *Padilla-Caldera*, 453 F.3d 1237.

58. *Padilla-Caldera*, 453 F.3d at 1239. The Tenth Circuit subsequently overturned its decision in March 2011, as a direct result of the BIA's decision in *Briones*. See discussion *infra* note 88 and accompanying text.

status.<sup>59</sup> The Tenth Circuit reasoned that while the government relied on § 212(a)(9)(C)(i)(I), a permanent bar provision, to prevent the respondent from obtaining relief under the LIFE Act, § 212(a)'s "savings clause" preceded the "inadmissible" language and specifically states that certain classes of aliens—such as the recidivist undocumented entrant, in this case—are inadmissible "except as otherwise provided in this chapter."<sup>60</sup> The Tenth Circuit articulated that because of § 212(a)'s savings clause, aliens otherwise inadmissible under § 212(a)(9)(C)(i)(I) were eligible for the benefits of § 245(i). In other words, rather than conducting a strange and convoluted dissection of the INA subsections of § 212 as the BIA did, the Tenth Circuit acknowledged the power of the § 212(a)'s savings clause, which applied to *every* nuance of § 212(a).

Second, the Tenth Circuit reasoned that because Congress enacted the LIFE Act after it enacted § 212(a)(9)(C)(i)(I), the LIFE Act should trump § 212(a)(9)(C)(i)(I). The Tenth Circuit acknowledged that "[c]onflicting statutes should be interpreted so as to give effect to each but to allow a later enacted, more specific statute to amend an earlier, more general statute . . ."<sup>61</sup> The Tenth Circuit confirmed that the LIFE Act was signed into law in 2000, which followed the passage of § 212(a)(9)(C)(i)(I) by over three years.<sup>62</sup> The Tenth Circuit inferred that the intent of Congress when enacting the LIFE Act in 2000 was to allow a specific class of otherwise law-abiding immigrants an opportunity to adjust status to that of a lawful permanent residence. Contrary to the BIA's flimsy inference of Congressional intent by reference to the 1998 special adjustment statute, the Tenth Circuit grounded its decision on the widely accepted rule that the most recently passed legislation trumps earlier, outdated legislation and looked directly at the legislative history of the LIFE Act itself.

Third, the *Padilla-Caldera* opinion specifically included statements made by members of Congress who spoke in support of the LIFE Act. The Tenth Circuit noted that members of Congress emphasized that the overriding goal of the LIFE Act was family reunification for *illegal*

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59. *Padilla-Caldera*, 453 F.3d at 1241.

60. *Id.* See 8 U.S.C. § 1182(a).

61. *Padilla-Caldera*, 453 F.3d at 1241 (citing *Smith v. Robinson*, 468 U.S. 992, 1024 (1984)).

62. *Id.*

entrants and status violators who have *otherwise* “played by the rules.”<sup>63</sup> Additionally, the Tenth Circuit emphasized that legislators desired to use the LIFE Act to allow “spouses, children, parents and siblings of permanent residents or U.S. citizens . . . to adjust their status in the United States and avoid needless separation from their loved ones.”<sup>64</sup> The Tenth Circuit bolstered this Congressional intent finding by highlighting one section of the Act which specifically gives the U.S. Attorney General authority to waive non-criminal grounds of inadmissibility “to assure family unity.”<sup>65</sup> Both of the statements serve to show the intent of Congress to unify families, not to punish otherwise well-behaved aliens, further demonstrating the major error the BIA made in *Briones* and its failure to discern Congressional intent regarding the LIFE Act.

Like the BIA attempted in *Briones*, the Tenth Circuit’s rationale in *Padilla-Caldera* also separated § 212(a)(9)(C)(i)(II) from § 212(a)(9)(C)(i)(I). Here, however, the Tenth Circuit argued that while those aliens falling into subsection (II)—aliens who have reentered after a previous deportation or removal—are not eligible for adjustment of status under § 245(i), those aliens under subsection (I)—aliens who have reentered after accruing more than one year of unlawful presence—are.<sup>66</sup> The Tenth Circuit recognized that the class of aliens who violate § 212(a)(9)(C)(i)(II) are not the type of illegal entrants meant to be covered by § 245(i), those illegal entrants who otherwise “played by the rules.”<sup>67</sup> Instead, those aliens falling under subsection (II) are illegal entrants who violate direct court orders. In contrast, the class of aliens covered by § 212(a)(9)(C)(i)(I) fit within the intended scope of § 245(i). Unknowingly, the Tenth Circuit directly opposed the future BIA decision in determining that just because two provisions are placed near each other in the federal code does not mean they are identical: physical proximity of the statutory provisions alone cannot override the intent of Congress to apply § 245(i) to only one of these two classes of aliens.<sup>68</sup>

Finally, the *Padilla-Caldera* opinion examined other recent immigration reform acts, using those provisions as evidence of Congressional intent of the application of § 245(i).<sup>69</sup> The Tenth Circuit noted that another clause in the LIFE Act of 2000 “specifically exempted certain Central

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63. *Id.* at 1242 (citing 146 Cong. Rec. S11263-01 (daily ed. Oct. 27, 2000) (statement of Sen. Hatch) (emphasis added)).

64. *Id.* (citing 146 Cong. Rec. S11850-52 (daily ed. Dec. 15, 2000) (statement of Sen. Kennedy)).

65. *Id.* (referencing § 1255(h)(2)(B)).

66. *Id.* at 1243.

67. *Id.*

68. *Id.*

69. *Id.*

American aliens applying for adjustment of status from the strictures of § 243(a)(5).”<sup>70</sup> The Tenth Circuit further noted that the House Report accompanying the 2000 amendments clarified that the “intended effect was to permit ‘Nicaraguan [sic], Cubans, and Haitians eligible for adjustment of status . . . [to] receive this relief despite having been previously removed under an order of removal . . . .”<sup>71</sup> Neither the resulting amendment nor the House Report discussed the effect of the LIFE Act on those aliens who have been unlawfully present in the United States for an aggregate period of more than one year and who entered or attempted to reenter the United States without being admitted.<sup>72</sup> Thus, the Tenth Circuit concluded the authors of the LIFE Act did not think an exemption was necessary for *part* of this other class of aliens—those who are deemed inadmissible under § 212(a)(9)(C)(i)(I)—presumably because § 245(i) was intended to apply to *all* aliens deemed inadmissible under § 212(a)(9)(C)(i)(I).<sup>73</sup> Therefore, the Tenth Circuit reasoned that Congress did not need to enact an additional exception for aliens already eligible for adjustment of status under § 245(i).

Based on those primary arguments, the Tenth Circuit in *Padilla-Caldera* determined that aliens who are inadmissible under § 212(a)(9)(C)(i)(I) are nevertheless still eligible to adjust their status under § 245(i). Unfortunately, despite its strong reasoning and careful analysis, the Tenth Circuit’s decision predated the BIA’s decision in *Briones* which neglected to rely upon the *Padilla-Caldera* opinion.

*B. The Ninth Circuit’s Acosta v. Gonzales Shed Additional Light on the Conflict between INA Sections 245(i) and 212(a)*

In 2006, the Ninth Circuit decided *Acosta v. Gonzales* which agreed with the reasoning set forth by the Tenth Circuit in *Padilla-Caldera v. Gonzales*.<sup>74</sup> The Ninth Circuit concluded that “[t]he statutory terms of § 245(i) clearly extend adjustment of status to aliens living in this country without legal status.”<sup>75</sup> The Ninth Circuit based this broad

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70. *Id.* at 1243 (citing *Berrum-Garcia v. Comfort*, 390 F.3d 1158, 1164 (10th Cir. 2004)).

71. *Id.* (quoting H.R. Rep. No. 106-1048, at 231 (2001)).

72. *Id.*

73. *Id.*

74. *Acosta v. Gonzales*, 439 F.3d 550, 558 (9th Cir. 2006) (referencing the correctness of the *Padilla-Caldera* decision).

75. *Id.* (citing *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783, 793 (9th Cir. 2004)).

interpretation on its recognition that the statute's purpose was to allow relatives of permanent residents to avoid separation from their loved ones.<sup>76</sup>

The Ninth Circuit also relied on a previous decision relevant to the § 245(i) analysis. In *Perez-Gonzalez v. Ashcroft*, the Ninth Circuit declared, “[n]othing in the statutory provisions regarding adjustment of status, nor in the discussion of its purposes, suggests that aliens who have been previously deported or removed are barred from this form of relief.” It further determined that “the most natural reading of . . . 245(i) permits illegal aliens . . . who can demonstrate the requisite family ties and pay the requisite fee, to apply for adjustment of status.”<sup>77</sup> The court in *Acosta*, building on the reasoning set forth in *Perez-Gonzalez*, determined that nothing in the statute suggested that aliens who reenter the country after accruing more than one year of unlawful presence are ineligible for penalty-fee adjustment of status.<sup>78</sup>

In addition to its reliance on *Perez-Gonzalez*, the court in *Acosta* made four additional arguments. First, the Ninth Circuit reasoned that “in the immigration context . . . we must resolve doubts in favor of the alien.”<sup>79</sup> So, where there is a statutory ambiguity the court should interpret the ambiguity in the alien's favor. Second, like the Tenth Circuit before it, the Ninth Circuit noted the presence of and preemptive power implicit within the savings clause in § 212(a).<sup>80</sup> As a result, the Ninth Circuit reasoned that the government bore the burden of proving that adjustment of status under § 245(i) did not provide an exception for inadmissibility on these grounds.<sup>81</sup> Unlike the BIA, after considering the history and purpose of the statutory provisions, the Ninth Circuit rejected the government's interpretation of § 212(a)(9)(C)(i)(I).<sup>82</sup> Third, the Ninth Circuit pointed out that Congress extended eligibility for adjustment under § 245(i) three years after adding the inadmissibility provision in question, emphasizing that a familiar canon of statutory construction requires that “conflicting statutes should be interpreted so as to give effect to each but to allow a later enacted, more specific statute to amend an earlier, more general statute.”<sup>83</sup> Based on the additional reasoning set

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76. *Id.* (citing *Perez-Gonzalez*, 379 F.3d at 793 (citing Joint Memorandum, Statement of Senator Kennedy, 146 Cong. Rec. S11850-52 (daily ed. Dec. 15, 2000))).

77. *Perez-Gonzalez*, 379 F.3d at 793–94.

78. *Acosta*, 439 F.3d at 554.

79. *Akhtar v. Burzynski*, 384 F.3d 1193, 1198 (9th Cir. 2004).

80. *Acosta*, 439 F.3d at 555 (citing *Padilla-Caldera v. Gonzales*, 426 F.3d 1294 (10th Cir. 2006)).

81. *Id.*

82. *Id.*

83. *Id.* at 555 (citing *Padilla-Caldera*, 426 F.3d at 1296 (quoting *Smith v. Robinson*, 468 U.S. 992, 1024 (1984))).

forth—that the court must resolve doubts in favor of the alien, the burden of proof is placed on the government, and conflicting statutes must be interpreted to give effect to a later enacted statute—the Ninth Circuit determined that inadmissible aliens under § 212(a)(9)(C)(i)(I) were still eligible for the benefits of the LIFE Act.

The Ninth and Tenth Circuits in *Padilla-Caldera* and *Acosta* both gave strong, well-reasoned interpretations of the interplay between §§ 245(i) and 212(a)(9)(C)(i)(I). Both of these analyses predated the BIA's decision in *Briones* and provided persuasive guidance that, for whatever misguided reason, the BIA chose to ignore. Unfortunately, the BIA's decision to deviate from these previous holdings will have a detrimental effect on future decisions. All U.S. courts of appeals will be forced to follow the decision in *Briones*, overturning previous decisions to the contrary, unless they can find that the BIA's decision was “arbitrary, capricious, or manifestly contrary to the statute.”<sup>84</sup>

*C. Subsequent U.S. Court of Appeals Decisions Expressing  
Disdain for Briones and Potential Use of the  
Administrative Procedure Act*

Under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the U.S. courts of appeals must give deference to an agency's interpretation of a statute, unless the interpretation is contrary to the Administrative Procedure Act (APA).<sup>85</sup> Subsequent to *Chevron*, in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, the Supreme Court further held that courts of appeals must apply *Chevron* deference to an agency's interpretation of a statute regardless of the circuit's contrary precedent, provided that the court's earlier precedent was an interpretation of a statutory ambiguity.<sup>86</sup> Because of the deference that courts of appeals must give to BIA decisions, multiple circuits are forced to overrule previous precedents on this issue unless they can show that the BIA's interpretation was arbitrary, capricious, or manifestly contrary to the statute.<sup>87</sup>

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84. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

85. See *id.*; *Emokah v. Mukasey*, 523 F.3d 110, 116 (2d Cir. 2008) (quoting *Chevron*, 467 U.S. at 844).

86. *Nat'l Cable & Telecomms. Ass. v. Brand X Internet Servs.*, 545 U.S. 967, 980–82 (2005).

87. See *Chevron*, 467 U.S. at 844.

Since *Briones* was decided in 2007, multiple courts of appeals addressing the issue for the first time have been forced to follow the BIA's decision, unable to find that it was arbitrary, capricious, or manifestly contrary to the statute.<sup>88</sup> In 2008, the Second Circuit, in *Mora v. Mukasey*, held that an alien who was inadmissible under § 212 (a)(9)(C)(i)(I) was not eligible for adjustment of status under § 245(i), stating, "because we conclude that the *Briones* decision interpreted ambiguous provisions of the immigration laws in a reasonable way, we must defer to it pursuant to *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* . . . and therefore deny the petition."<sup>89</sup> The decision in *Mora* shines a bright light on the restrictive effects that the *Briones* decision has had, and will continue to have, on the U.S. courts of appeals.

In 2008, the Sixth Circuit, in *Ramirez-Canales v. Mukasey*, held that it had to give deference to *Briones* and find the alien inadmissible under § 212(a)(9)(C)(i)(I), therefore ineligible for relief under § 245(i).<sup>90</sup> However, the court remanded to the BIA to grant the alien's petition retroactively, at a point in time prior to his undocumented reentry to the United States.<sup>91</sup> The Sixth Circuit made this request so that the alien would not technically be considered inadmissible under § 212(a)(9)(C)(i)(I), and would thus be eligible to adjust his status under § 245(i).<sup>92</sup>

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88. See *Mora v. Mukasey*, 550 F.3d 231, 231 (2d Cir. 2008); *Ramirez-Canales v. Mukasey*, 517 F.3d 904, 908 (6th Cir. 2008); *Ramirez v. Holder*, No. 09-1629, 1010 WL 2499988 (4th Cir. 2010); *Renteria-Ledesma v. Holder*, 615 F.3d 903 (8th Cir. 2010). Most recently, in March 2010, the Tenth Circuit was forced to overturn its decision in *Padilla-Caldera v. Gonzalez*, when it reviewed the case for a second time. See *Padilla-Caldera v. Holder*, No. 10-9520, 2011 WL 856272 (10th Cir. Mar. 14, 2011), as corrected (Mar. 22, 2011). As discussed above, on the original petition for review, the Tenth Circuit held that the BIA erred in concluding that petitioner was statutorily ineligible for an adjustment of status, and it remanded for further proceedings. *Id.* at \*2. On remand, the immigration judge granted petitioner an adjustment of status, but the BIA reversed, relying on the intervening *Briones* opinion. *Id.* When the case was brought before the Tenth Circuit for a second time, the court concluded that the intervening *Briones* opinion was entitled to *Chevron* deference and thus was forced to overturn its previous decision. *Id.* However, the Tenth Circuit failed to give an in-depth analysis regarding the reasoning behind *Briones*, and simply chose to quote the BIA's analysis as evidence that it was reasonable. *Id.* at \*13–25. After repeating the BIA's reasoning, the Tenth Circuit stated only that it could not say that the BIA's interpretation of the statute in *Briones* was unreasonable. *Id.* at \*25. However, the Tenth Circuit implied that it may have reached a different result if allowed to interpret the law *de novo*, stating that "the court 'may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.'" *Id.* at \*14 (citing *Chevron*, 467 U.S. at 844 & n.11). The court then explained that although it had adopted a different line of reasoning in *Padilla-Caldera*, it could not find the BIA's interpretation of the statute in *Briones* unreasonable. *Id.* at \*25.

89. *Mora*, 550 F.3d at 231.

90. *Ramirez-Canales*, 517 F.3d at 908.

91. *Id.*

92. *Id.*

In remanding the case for further review and requesting that the BIA retroactively grant the alien's petition, the court attempted to offset the harsh effects of *Briones* and allow the alien the opportunity to adjust his status under § 245(i). This indicates that, like the Second Circuit in *Mora*, the Sixth Circuit was unable to find the *Briones* interpretation arbitrary, capricious, or manifestly contrary to the statute, but nonetheless disagreed with it and attempted to find a way to avoid the harsh consequences of the decision.

In April 2011, the Ninth Circuit was forced to overrule its decision in *Acosta v. Gonzales*.<sup>93</sup> While the Ninth Circuit seemed sympathetic to the alien's situation, it was unable to find that the decision in *Briones* was arbitrary, capricious, or manifestly contrary to the statute.<sup>94</sup> The Ninth Circuit determined that because *Acosta* did not "unambiguously foreclose" the BIA's authority to interpret the interplay between § 1182(a)(9)(C)(i)(I) (the codified § 212(a)(9)(C)(i)(I)) and § 1255(i) (the codified § 245(i)), the BIA remained "the authoritative interpreter (within the limits of reason)" of the immigration laws.<sup>95</sup> As a result, the court determined that the BIA's decision in *Briones* addressed a statutory ambiguity and was entitled to *Chevron* deference.<sup>96</sup> The Ninth Circuit then looked to the other courts of appeals decisions, observing that none had concluded that *Briones* was an unreasonable interpretation of §§ 1182(a)(9)(C)(i)(I) and 1255(i).<sup>97</sup> It then briefly discussed the reasoning outlined in *Briones* and determined that it agreed with the other courts of appeals.<sup>98</sup> Unfortunately for the undocumented aliens targeted by § 245(i), it appears the U.S. courts of appeals have been unable to find the *Briones* decision arbitrary, capricious, or manifestly contrary to the statute, even to the extent of overruling their own decisions.

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93. See discussion *supra* Part VI.B.

94. *Garfias-Rodriguez v. Holder*, No. 09-72603, 2011 WL 1346960, at \*1–2 (9th Cir. Apr. 11, 2011).

95. *Id.* at 5 (citing *Nat'l Cable & Telecomms. Assn. v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005)).

96. *Id.*

97. *Id.*

98. *Id.*

VII. CONCLUSION: THE BIA MISINTERPRETED THE LIFE ACT AND  
CONGRESS MUST AMEND IT TO OVERTURN *BRIONES*

The BIA's decision in *Briones* incorrectly interprets the relationship between §§ 245(i) and 212(a)(9)(C)(i)(I), and therefore the decision must be overturned. Thus the BIA should repeal its decision in *Briones*. If the BIA fails to act, then either Congress should amend the LIFE Act, or the U.S. courts of appeals should rule that the *Briones* decision is arbitrary. For the following reasons, the *Briones* decision should not stand as good law.

The *Briones* decision is contrary to congressional intent illustrated in the LIFE Act, and is extremely detrimental to the future of many undocumented aliens. As stated by Senator Hatch and Senator Kennedy, the goal of the LIFE Act was family reunification for *illegal* entrants and status violators who have otherwise “played by the rules,” and to allow “spouses, children, parents and siblings of permanent residents or U.S. citizens . . . to adjust their status in the United States and avoid needless separation from their loved ones.”<sup>99</sup> Furthermore, § 245(i) is only available to aliens who submitted petitions prior to May 1, 2001, which eliminates the risk that allowing inadmissible aliens under § 212(a)(9)(C)(i)(I) relief under § 245(i) will open the floodgates of adjusting statuses for all undocumented aliens as opponents may irrationally fear. The more appropriate interpretation of the statutes is provided in *Padilla-Caldera* (Tenth Circuit) and *Acosta* (Ninth Circuit)—that aliens inadmissible under § 212(a)(9)(C)(i)(I) are still eligible to adjust their status under § 245(i)—which should serve as references when overturning *Briones*.

The BIA should therefore reevaluate its decision in *Briones*, considering the analysis found in *Padilla-Caldera* and *Acosta*, as well as the serious consequences the decision has on courts, immigrants who play by the rules, their families, and their communities. Alternatively, Congress should enact more legislation or amend the LIFE Act, as it did in 1998, clarifying § 245(i) intent. Additionally, the U.S. courts of appeals should carefully scrutinize the analysis in *Briones* and find that it was made arbitrarily. As it stands, *Briones* will have extremely adverse consequences for immigrants in the United States and their families, and to prevent such harsh consequences and allow immigrants to receive the benefits granted them through the LIFE Act, swift action

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99. *Id.* (citing 146 Cong. Rec. S11850-52 (daily ed. Dec. 15, 2000) (statement of Sen. Kennedy)); *id.* at 1241; *Padilla-Caldera v. Gonzales*, 453 F.3d 1237, 1242 (10th Cir. 2006) (citing 146 Cong. Rec. S11263-01 (daily ed. Oct. 27, 2000) (statement of Sen. Hatch)).

must be taken by the BIA, Congress, or the U.S. courts of appeals to overturn *Briones*.

