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IMMIGRATION LAW—NINTH CIRCUIT DECISION ALLOWS FOR ALIENS TO BE PENALIZED FOR EXERCISING THEIR RIGHT TO APPEAL

*Kelli Gavin**

ALTHOUGH the burden of deportation is heavy and fraught with long-term consequences, a recent Ninth Circuit decision deferred to the Board of Immigration Appeal's (BIA) statutory interpretation that deems any alien who is removable under the Immigration and Nationality Act ineligible for status adjustment and applied that rule retroactively to affirm removal.¹ In *Garfias-Rodriguez v. Holder*, the court stated that the onus of deportation was outweighed by the extent of reliance on a previous ruling and the statutory interest in applying the new interpretation.² The court dealt an additional blow by failing to equitably stay the alien's grant of voluntary departure, citing the Attorney General's regulation declaring that such grant automatically terminates upon filing a petition requesting review of a BIA decision.³

Allowing an alien to voluntarily depart provides him an easier path of future legal reentry into the United States compared with the tumultuous journey of deportation and its associated harsh penalties. The Attorney General's regulation, and the Ninth Circuit decision that supports it, essentially punish vulnerable non-citizens who employ the fundamental right in the American legal system to appeal an adverse decision to a higher court.⁴ Although Mr. Francisco Javier Garfias-Rodriguez (Garfias) met the stringent requirements for voluntary departure, with one stroke of the pen the Attorney General unfairly compelled him to make an almost impossible decision: (1) use the benefit of voluntary departure, thereby forfeiting the ability to have his decision reviewed and possibly overturned, or (2) decline voluntary departure and pursue an appeal that

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1. *Garfias-Rodriguez v. Holder*, 702 F.3d 504, 528 (9th Cir. 2012).

2. *Id.* at 523.

3. *See id.* at 534–44.

4. *See United States v. Arce-Hernandez*, 163 F.3d 559, 563 (9th Cir. 1998).

could still result in removal.⁵ Thus, Garfias was penalized for exercising a right that should be available to any alien facing the prospect of removal from his family, friends, and established life in the United States.

Garfias is a Mexican national who illegally entered the United States in 1996.⁶ In April 2002, after leaving and reentering the United States in 1999 and again in 2001, Garfias married Nancy, a U.S. citizen, and applied to adjust his status to lawful permanent resident.⁷ Two years later, the United States Citizenship and Immigration Service charged Garfias with removability under section 212(a)(6)(A)(i) for being “present in the United States without being admitted or paroled,” and under section 212(a)(9)(C)(i) for being an alien who was “unlawfully present in the United States for the aggregate period of more than 1 year” and who reentered without permission.⁸

At hearings before an immigration judge (IJ) in 2004, Garfias admitted removability on both grounds but requested relief of either adjustment of status or voluntary departure.⁹ In response, the IJ accepted Garfias’s recognition of his removability, deemed him “inadmissible under [] § 212,” and stated that Garfias was “ineligible for adjustment [of status] under § 245(i).”¹⁰ However, the IJ granted Garfias’s request for voluntary departure.¹¹ Garfias appealed to the BIA, which remanded the case in 2006 based on two recent Ninth Circuit decisions allowing adjustment of inadmissible aliens under § 212.¹²

On remand, Garfias’s petition was again denied because his original petition was filed after § 245(i)’s expiration date.¹³ Garfias appealed once more to the BIA, but this was dismissed on account of a recent BIA decision that applied to all Ninth Circuit cases, including Garfias’s case.¹⁴ The BIA stated there was no longer any question as to Garfias’s eligibility to adjust his status and left him with two options: (1) voluntarily depart within sixty days, or (2) file a petition for review of his appeal and automatically terminate the grant of voluntary departure under 8 C.F.R. § 1240.26(i).¹⁵

The Ninth Circuit granted Garfias’s petition for rehearing en banc to decide if aliens who are inadmissible under § 212(a)(9)(C)(i)(I) are nev-

5. See *Garfias*, 702 F.3d at 534–44.

6. *Id.* at 507.

7. *Id.*

8. 8 U.S.C. § 1182 (2012); *Garfias*, 702 F.3d at 507–08.

9. *Garfias*, 702 F.3d at 508.

10. *Id.*

11. *Id.*

12. *Id.*; see *Acosta v. Gonzales*, 439 F.3d 550, 556 (9th Cir. 2006); *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783, 788 (9th Cir. 2004).

13. *Garfias*, 702 F.3d at 508.

14. *Id.*; see generally *In re Briones*, 24 I. & N. Dec. 355 (BIA 2007).

15. *Garfias*, 702 F.3d at 508; see Voluntary Departure—Authority of the EOIR, 8 C.F.R. § 1240.26 (2009) (“If, prior to departing the United States, the alien files a petition for review. . . any grant of voluntary departure shall terminate automatically upon the filing of the petition.”).

ertheless eligible for adjustment of status under § 245(i).¹⁶ In deciding to defer to the BIA's interpretation that removable aliens are not eligible for adjustment, the Ninth Circuit overruled its holding in *Acosta*.¹⁷ Using the five-factor test laid out in *Montgomery Ward & Company v. FTC*, the court found that the BIA decision in *Briones* applied retroactively to Garfias's case.¹⁸ Although one factor, the burden of retroactivity, substantially favored Garfias, making him certainly deportable, it was outweighed by Garfias's lack of reliance on a previous interpretation and by the absence of a disadvantage resulting from a changed rule.¹⁹ The court also stated that it lacked the authority to give Garfias an equitable stay of his grant of voluntary departure because the Attorney General's regulation was an appropriate use of his Congressional power to revoke said grants.²⁰ According to the court, the financial benefit to the government of an alien's prompt, voluntary departure would disappear if he were permitted to stay in the United States while his appeal was adjudicated.²¹

In *Acosta* and *Perez-Gonzalez*, the Ninth Circuit held that an alien's inadmissibility under § 212(a)(9)(C) does not prohibit him from adjusting his status under § 245(i) because the ambiguity amid the sections was not resolved by a formal BIA decision.²² However, following the BIA's *Briones* decision, the Ninth Circuit decided *Gonzales v. Department of Homeland Security*²³ and deferred to the BIA's resolution of the uncertainty in concluding that an alien found to be inadmissible under § 212 is not eligible for adjustment of status under § 245.²⁴ In short, the court overturned its own precedent and deferred to an agency opinion based on the Supreme Court's decisions in *National Cable & Telecommunications Association v. Brand X Internet Services* and *Chevron USA, Inc. v. Natural Resources Defense Council*.²⁵

In reaching its decision, the court applied the *Montgomery Ward* test, which is used when a "new administrative policy is announced and implemented through adjudication."²⁶ The court stated this test was appropriate because it was overturning precedent as a result of "a contrary statutory interpretation by an agency."²⁷ The court chose the *Montgomery Ward* test over the test applied in *Chevron Oil Company v. Huson*,

16. *Garfias*, 702 F.3d at 513–14.

17. *Id.* at 514.

18. *Id.* at 517–20; see *Montgomery Ward & Co. v. FTC*, 691 F.2d 1322, 1328 (9th Cir. 1982); see generally *Briones*, 241 I. & N. Dec. 355.

19. *Garfias*, 702 F.3d at 514–23. The BIA's decision merely clarified the law, rather than changed it outright. *Id.*

20. *Id.* at 524–28.

21. *Id.* at 528.

22. *Id.* at 509–11; see *Acosta v. Gonzales*, 439 F.3d 550, 556 (9th Cir. 2006); see *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783, 792–95 (9th Cir. 2004).

23. See *Gonzales v. Dep't of Homeland Sec.*, 508 F.3d 1227 (9th Cir. 2007).

24. *Garfias*, 702 F.3d at 511.

25. *Id.*; see *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005); *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 842–44 (1984).

26. *Garfias*, 702 F.3d at 518.

27. *Id.* at 520.

which addresses when a rule changed by a court should be applied retroactively, since the court itself was not announcing a new rule of law.²⁸ The court stated that it was simply “approving and applying a new rule that the BIA announced,” rather than offering a perspective on the correctness of a prior rule or being corrected by a higher court.²⁹ In addition, the court disregarded the first factor and focused on the other *Montgomery Ward* factors of:

[W]hether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void[;] . . . the extent to which the party against whom the new rule is applied relied on the former rule[;] . . . the degree of the burden which a retroactive order imposes on party[;] and . . . the statutory interest in applying a new rule despite the reliance of a party on the old standard.³⁰

The fourth factor of the *Montgomery Ward* test—degree of burden—strongly favored Garfias.³¹ And, even though the court had stated on more than one occasion that “‘deportation alone is a substantial burden that weighs against retroactive application of an agency adjudication,’” it nevertheless determined that the rule announced in *Briones* should apply retroactively to Garfias.³² The court stated that Garfias’s reliance interest was insufficient, and that his case was not one where the agency diverged from a previously stated standard of conduct.³³

After concluding that the rule applied to Garfias retroactively and he was therefore deportable, the court stated that it was within the Attorney General’s power to take away a grant of voluntary departure.³⁴ In § 1229c, Congress granted the Attorney General the authority to control grants of voluntary departure.³⁵ The Ninth Circuit noted that the regulation exemplified the Attorney General’s power “to *prohibit* and thereby terminate voluntary departure” and his “authority to *limit eligibility*” under the statute.³⁶

The Ninth Circuit found that an alien is not penalized for exercising his fundamental right to appeal an adverse decision because he is still afforded the opportunity to depart thirty days after filing the appeal and to work on his case outside the country.³⁷ The only penalty the court linked to the regulation was the financial harm to the government when an alien overstayed the thirty-day period, remained in the United States illegally, and made the government fund the appeal.³⁸ However, in his dissent,

28. *Id.* at 517–18; see *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106–07 (1971).

29. *Garfias*, 702 F.3d at 517.

30. *Id.* at 518.

31. *Id.* at 523.

32. *Id.* at 520–23 (quoting *Miguel-Miguel v. Gonzales*, 500 F.3d 941, 952 (9th Cir. 2007)).

33. *Garfias*, 702 F.3d at 520–23.

34. *Id.* at 527.

35. 8 U.S.C. § 1229c (2012).

36. *Garfias*, 702 F.3d at 527.

37. *Id.* at 528.

38. *Id.*

Judge Reinhardt argued that the choices presented to a non-citizen—someone who is at a presumptive disadvantage in the American court system—are not fair for anyone to have to make.³⁹

Perhaps the Ninth Circuit's most significant mistake was not acknowledging that the Attorney General's regulation exceeded his congressionally granted power to limit and prohibit eligibility for voluntary departure.⁴⁰ The court's decision discourages aliens from contributing to America's infrastructures and economy by forcing them to decide between using their basic privilege of judicial process or returning to their home countries to face possible lack of support, torture, imprisonment, and other dangers.⁴¹ As the court pointed out, there is a loss of benefit to the government when it must finance the adjudication of an alien's appeal.⁴² However, that cost may potentially be recovered if an alien was permitted to voluntarily depart after an appeal and legally reenter the United States at a later date to become a participating member of American society. Also, if an alien chooses to appeal but departs within the thirty-day grace period, there is no guarantee that he will be able to successfully prepare his appeal or give effective assistance to his counsel in the United States.⁴³

To encourage more nonimmigrants to become legal permanent residents and those residents to become naturalized U.S. citizens, the Department of Homeland Security decreased the wait time for certain groups of immigrants to file petitions.⁴⁴ Recent articles show that a significant portion of the permanent resident population is eligible for citizenship, but choose not to act on that opportunity.⁴⁵ These missed opportunities result in harm to our economy, as there is evidence that a legal permanent resident is less likely than a citizen to buy a home, invest, take part in community activities, or pursue other economic endeavors.⁴⁶

The specter of removal is monumental in an alien's life, and the Ninth Circuit acknowledged the decision's magnitude by repeatedly "[r]ecognizing . . . that non-citizens in removal hearings are entitled to

39. *Id.* at 534–37 (Reinhardt, J., dissenting).

40. *See id.* at 534.

41. *See id.*; Mariela Olivares, *Renewing the Dream: Dream Act Redux and Immigration Reform*, 16 HARV. LATINO L. REV. 79, 120 (2013) ("One recent study analyzing the effects of immigration on the U. . . economy concluded that immigrants 'expand the U.S. economy's productive capacity, stimulate investment, and promote specialization that in the long run boosts productivity.'").

42. *See Garfias*, 702 F.3d at 535.

43. *Id.* at 536–37.

44. *See* U.S. DEP'T OF STATE, VISA BULLETIN FOR OCTOBER 2013, VOL. IX, NO. 61, (Sept. 9, 2013), available at http://travel.state.gov/visa/bulletin/bulletin_6062.html.

45. *See* Ann Garcia, *The Facts on Immigration Today*, CTR. FOR AM. PROGRESS (Aug. 14, 2013), <http://www.americanprogress.org/issues/immigration/report/2013/04/03/59040/the-facts-on-immigration-today-3/>.

46. *See* Manuel Pastor & Justin Scoggins, *Citizen Gain: The Economic Benefits of Naturalization for Immigrants and the Economy*, CTR. FOR STUDY IMMIGRANT INTEGRATION (Dec. 2012), http://csii.usc.edu/documents/citizen_gain_web.pdf.

due process protections under the Fifth Amendment.”⁴⁷ However, in this case, the court had no a problem with the fact that the regulation takes away this right from aliens. An alien’s life can be permanently impacted by the different benefits and consequences associated with being deported versus voluntarily departing.⁴⁸ While voluntary departure allows an alien time to take care of his obligations and relationships before leaving, removal does not give him this same opportunity.⁴⁹ Moreover, while voluntarily departure does not subject an alien to a time ban prohibiting him from legally reentering the United States at a later date, deportation can subject him to a ten-year ban, a lifelong ban, or even criminal prosecution for reentering.⁵⁰

There are two distinct types of voluntary departure: “pre-decisional” and “post-decisional.”⁵¹ An alien requesting pre-decisional voluntary departure does not have to meet any specific qualifications, other than agreeing not to file for another type of relief.⁵² To be eligible for post-decisional departure, an alien must meet the strict standard of having one or more years of presence in the United States, a five-year history of good moral character, no record of committing certain criminal or other offenses, and the intent and financial means to depart the United States.⁵³ Post-decisional voluntary departure also requires an alien to depart in less time than a pre-decisional grant, and the grantees must post a bond to cover their deportation costs.⁵⁴

The Ninth Circuit ignored a key difference between these two types of voluntary departure that existed prior to the regulation. Pre-decisional departure necessarily involves giving up the right to appeal or seek other relief, but those procedural rights are still guaranteed if an alien qualifies for the loftier post-decisional voluntary departure.⁵⁵ Additionally, the higher standard for obtaining a post-decisional grant provides insight into an alien’s character and shows the government that, perhaps, this person should not be deported. At least, the United States should want all aliens to have an equitable judicial experience to encourage them to return to America to invest time, money, and skills.⁵⁶ The choice faced by aliens places them at a disadvantage compared with other non-citizens.⁵⁷

There are no cases supporting the Ninth Circuit’s position that the Attorney General has the power to automatically terminate a grant of vol-

47. *Garfias*, 702 F.3d at 534; *see Campos-Sanchez v. INS*, 164 F.3d 448, 450 (9th Cir. 1999).

48. *See Garfias*, 702 F.3d at 536.

49. *Id.*

50. *Id.*

51. *See* 8 U.S.C. § 1229c (2012); *Garfias*, 702 F.3d at 537–38.

52. *See* 8 U.S.C. § 1229c (2012); *Garfias*, 702 F.3d at 537–38; *In re Arguelles-Campos*, 22 I. & N. Dec. 811, 814–16 (BIA 1999).

53. *Garfias*, 702 F.3d at 538.

54. *Id.* at 537–38.

55. *See id.*; *El Himri v. Ashcroft*, 344 F.3d 1261, 1262–63 (9th Cir. 2003).

56. *See Garfias*, 702 F.3d at 536.

57. *See* 8 U.S.C. § 1229c (2012).

untary departure, nor is there any evidence of legislative intent that the statute deprive an alien of his procedural rights.⁵⁸ Elimination of a non-citizen's procedural rights seems to remove the vital difference between the separate types and disregards the purpose behind having two distinct categories in the first place. The regulation's effect could be equated to requiring pre-decisional applicants to meet the higher standard for post-decisional voluntary departure. In fact, the BIA itself specifically acknowledged that a key difference between the two types of voluntary departure is the loss of procedural rights in one but not the other.⁵⁹

The court also maintained that the Attorney General has the power to take away a grant of voluntary departure at any moment after it is granted, perhaps even up until the time the alien has actually departed the country.⁶⁰ The court ran into statutory issues when it stated that the ability to limit a class means that you can require someone to meet a future condition, which is not permissible. Requiring an alien to sustain his eligibility into the future and taking away his grant at any point up until he departs the country would be like disallowing someone from voting or serving on a jury because there is a possibility they will commit a crime in the future. Additionally, there is nothing in the statute or the Attorney General's regulation stating that a breach of any of the other post-decisional requirements results in automatic termination of a grant.⁶¹ The Attorney General does have the ability to revoke a grant of voluntary departure, but can only do so if it should never have been granted in the first place, another example of a present tense time frame rather than a future one.⁶²

Lastly, the Ninth Circuit tried to turn the granting of voluntary departure into a two-step process that always requires approval by the Attorney General, when the statute mentions nothing about this.⁶³ Both the IJ and BIA have the power to act as surrogates of the Attorney General to grant the orders in the first place.⁶⁴ The court's decision also ignores that the Attorney General essentially created a new kind of departure by giving the alien thirty days to voluntarily depart without penalty after filing his petition for review.⁶⁵ The Attorney General has never been given the authority to create departure standards.⁶⁶

A more equitable and judicially acceptable outcome could have resulted if the court decided that, while an inadmissible alien is not eligible to adjust, the rule should not have retroactively applied to Garfias under the *Chevron* test. More importantly, the court should have concluded that

58. *Garfias*, 702 F.3d at 537.

59. *Id.* at 538–39.

60. *Id.* at 539–40.

61. *Id.* at 540.

62. *See id.*

63. *See id.* at 541–42 (Reinhardt, J., dissenting).

64. *Id.*

65. *See id.* at 544 (Reinhardt, J. dissenting).

66. *Id.*

the Attorney General's regulation exceeded his powers because it is unjust for a grant of voluntary departure to terminate upon filing an appeal. Such a decision would allow those who qualify for voluntary departure to retain that benefit and still be able to exercise their right to appeal granted by virtue of their participation in the American legal system, encourage aliens to immigrate legally to the United States, and establish the Ninth Circuit's agreement with the BIA's interpretation of the ambiguous sections.

The Ninth Circuit's decision in *Garfias* will have a detrimental effect on aliens who wish not only to exercise the fundamental right of judicial review, but also desire to depart the country voluntarily so as to avoid the harsh repercussions associated with deportation.⁶⁷ The potentially enduring influence a removal proceeding can have on an alien's life should have alerted the court to the fact that the Attorney General's regulation was not a reasonable interpretation of the statute and went far beyond his granted power. The penalty that is inflicted on these aliens could drastically diminish our ability to enhance the American economy through job competition, investment, and integration of these non-citizens into our communities.

67. *See id.* at 534-44 (Reinhardt, J., dissenting).