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NON-RETROACTIVITY OF BIA PRECEDENT DECISIONS: DE NIZ ROBLES V. LYNCH AND OTHER RECENT COURT OF APPEALS RULINGS

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Earlier this year, in *Zombie Precedents, the Sequel*, I discussed how the Second Circuit's April 2015 decision in *Lugo v. Holder* exemplified a better way of dealing with precedent decisions that had been overturned by a court. As I noted in that blog post, the Second Circuit remanded *Lugo*to the BIA not only to deal with the issue raised by the overturned precedent, but also to deal with a related question regarding the retroactivity of the BIA's decision in *Matter of Robles-Urrea*. In that regard, the Second Circuit's decision in *Lugo*forms part of an interesting trend regarding limits on the retroactivity of BIA decisions, most recently exemplified by the Tenth Circuit's decision last week in *De Niz Robles v. Lynch*.

The issue in *De Niz Robles* concerned the interaction of INA §245(i), 8 U.S.C. §1255(i), with INA §212(a)(9)(C)(i)(I), 8 U.S.C. §1182(a)(9)(C)(i)(I). The former provision, as has been discussed previously on this blog in a September 2010 post by Cyrus D. Mehta, allows adjustment of status by certain applicants who have entered without inspection, or are otherwise disqualified from adjustment under INA §245(a) and (c), if they are "grandfathered" as the principal or derivative beneficiaries of appropriate visa petitions or labor certification applications filed prior to April 30, 2001. The latter provision declares inadmissible those who have been unlawfully present in the United States for a year or more and have subsequently re-entered without inspection, subject to a potential waiver which must be sought 10 years after one's last departure from the United States. These provisions, as the 10th Circuit noted in *De Niz Robles*, are in some tension with one another.

Approximately ten years ago, the Tenth Circuit held in *Padilla-Caldera v.*

Gonzales (Padilla-Caldera I), 426 F.3d 1294 (10th Cir. 2005), *amended and superseded on reh'g*, 453 F.3d 1237 (10th Cir. 2006), that §245(i) prevailed over §212(a)(9)(C)(i)(I), such that Mr. Padilla-Caldera could adjust status under §245(i) despite having been unlawfully present for over a year, left the United States in order to seek an immigrant visa, and ultimately re-entered without inspection. The BIA then held differently in *Matter of Briones, 24 I&N Dec. 355 (BIA 2007)*, finding that inadmissibility under §212(a)(9)(C)(i)(I) prevented §245(i) adjustment. The Tenth Circuit, in *Padilla-Caldera v. Holder (Padilla-Caldera II), 637 F.3d 1140 (10th Cir. 2011)*, deferred to this BIA decision pursuant to *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984), and *National Cable & Telecommunications Ass'n v. Brand X Internet Services ("Brand X"), 545 U.S. 967 (2005)*, finding it to be a reasonable interpretation of ambiguous statutory language.

In the meantime, however, between the time of *Padilla-Caldera I* and *Matter of Briones*, Mr. De Niz Robles had applied for adjustment of status under §245(i) based on *Padilla-Caldera I*. His application took so long to process that it was adjudicated after *Padilla-Caldera II*, and the BIA, applying that decision and *Matter of Briones*, denied Mr. De Niz Robles's application. He argued that this was an inappropriately retroactive application of *Matter of Briones* to an application filed before that decision was issued. The Tenth Circuit agreed. As the Tenth Circuit pointed out, when Mr. De Niz Robles filed his application in 2007, he had the option of instead leaving the United States, and serving out the ten-year period before he could apply for a waiver of his inadmissibility under INA §212(a)(9)(C)(i)(I). In reliance on the case law as it existed at that time, specifically *Padilla-Caldera I*, he chose to apply for adjustment of status instead. The BIA, by applying *Matter of Briones* to Mr. De Niz Robles six years later in 2013, and defending that position on appeal in 2015, had put Mr. De Niz Robles in the position of having lost years of time that he could have spent towards the ten-year waiver qualification period—by now, he would have served out eight of the required ten years and been only two years away from being able to apply for a waiver, had he left. This, the Tenth Circuit said, was retroactive application of the *Briones* decision, and was not permissible.

When the BIA or a similar agency tribunal acts to overturn an existing decision via *Brand X*, the Tenth Circuit decided, it should be treated for retroactivity purposes similarly to an agency that declares its new policy through rulemaking. Although retroactive rulemaking is sometimes permitted, it is

disfavored. Applying the factors that govern such a retroactive agency rulemaking, the Tenth Circuit determined that the reasonableness of Mr. De Niz Robles's reliance on *Padilla-Caldera I*, and the dire consequences to him if the BIA's ruling was allowed to stand, weighed particularly strongly in favor of finding that *Briones* should not be applied to him.

In this way, *De Niz Robles*went beyond what *Lugo*had done, flatly finding that it would be inappropriate to give retroactive effect to the BIA's ruling rather than merely remanding for further explanation of the point. This is partly because the context made clearer in *De Niz Robles*that there had in fact been a retroactive ruling. The Second Circuit in *Lugo* had asked the BIA to address, among other factors, "whether its holding in *Matter of Robles-Urrea*was a departure from prior law." *Lugo*, slip op. at 5. In *De Niz Robles*, the Tenth Circuit did not need to defer to the BIA on the analogous question, but was able to resolve it on its own: it was quite clear that *Briones* was a departure from prior law, at least within the jurisdiction of the Tenth Circuit, where it was contrary to *Padilla-Caldera I*.

The Court of Appeals for the Ninth Circuit followed a similar path to the Tenth in *Acosta-Olivarria v. Lynch*, decided less than two months before *De Niz Robles*, on August 26, 2015. Like the Tenth Circuit, the Ninth had, prior to *Matter of Briones*, issued a decision allowing §245(i) adjustment despite inadmissibility under INA §212(a)(9)(C)(i)(I): *Acosta v. Gonzales, 439 F.3d 550 (9th Cir. 2006)*. Like the Tenth Circuit, after *Briones*, the Ninth Circuit had overruled its decision, in *Garfias-Rodriguez v. Holder, 702 F.3d 504 (9th Cir. 2012) (en banc)*, deferring to the BIA under *Brand X*. And like Mr. De Niz Robles, Mr. Acosta-Olivarria had applied for adjustment of status after his Circuit case law indicated he could do so, and before the BIA and Circuit told him he could not. The bottom line was the same in *Acosta-Olivarria* as in *De Niz Robles*: the Ninth Circuit held, over one judge's dissent, that the BIA's ruling in *Briones* could not be applied retroactively to Mr. Acosta-Olivarria, and so an immigration judge's order granting him adjustment of status, which had been set aside by the BIA, was reinstated.

De Niz Robles, *Acosta-Olivarria*and *Lugo*are not the only relatively recent decisions to reject or cast doubt on retroactive application of a BIA ruling. The Court of Appeals for the Seventh Circuit also did this in its July 2014 decision in *Velasquez-Garcia v. Holder*, 760 F.3d 571 (7th Cir. 2014). There, the Seventh Circuit rejected retroactive application of the BIA's decision in *Matter of O. Vasquez, 25 I&N Dec. 817 (BIA 2012)*, interpreting the "sought to acquire"

language of the Child Status Protection Act (CSPA).
As discussed in more detail by a numberof postson this blogand articleson our firm's website, INA §203(h)(1)(A), added by section 3 of the CSPA, requires that a child have "sought to acquire" lawful permanent residence within one year of visa availability in order to take advantage of protections under the CSPA that fix the child's age for purposes of derivative visa eligibility at a point younger than that child's actual biological age. The BIA held in *Matter of O. Vasquez* that absent "extraordinary circumstances", this provision could only be satisfied by the actual filing of an application for adjustment of status or of analogous forms and fees used to apply for an immigrant visa from the Department of State. (USCIS subsequently issued an interim Policy Memorandum elaborating on what it would consider to be extraordinary circumstances.) Prior to *O. Vasquez*, however, the BIA had in several non-precedential decisions been more lenient, allowing a broader set of "substantial steps" towards the obtainment of permanent residence to qualify as seeking to acquire for CSPA purposes. As discussed in a previous post on this blog, for example, the BIA's October 2010 unpublished decision in *Matter of Murillo* and other pre-2010 cases allowed such steps as hiring an attorney to meet the seeking-to-acquire requirement. The Seventh Circuit in *Velasquez-Garcia*held that it would not be appropriate to apply the stricter *O. Vasquez* standard to those who may have complied with the prior, laxer standard of seeking to acquire before *O. Vasquez* was issued. As the Court of Appeals explained: "In light of the state of the law at the critical time, a reasonable person reasonably could have assumed that the did not require him to file an application within one year." Given the immense burden that applying the new rule retroactively would have imposed on Velasquez, and the tension between the effect of retroactive application and the remedial purpose of the CSPA to ameliorate the effect of administrative delays – among which the Seventh Circuit included the eight-year delay by the BIA before promulgating precedential guidance regarding "sought to acquire" in *O. Vasquez* – the Seventh Circuit held that Mr. Velasquez-Garcia should be permitted to proceed under the standard in effect prior to *O. Vasquez*.

These sorts of retroactivity issues can be expected to continue to arise in the future as the BIA aggressively uses its policymaking interpretative authority under *Chevron* and *Brand X*, at least when that authority is used to reinterpret a standard unfavorably to immigrants. (Changes in a rule which are more favorable to those affected by that rule are not the sort which raise retroactivity

concerns under the case law, since allowing someone to apply for a benefit from which he or she previously was precluded does not raise the same unfairness concerns as a change in the other direction.) Under such circumstances, attorneys and clients should be alert for the possibility that the less-favorable BIA precedent may not apply retroactively, particularly to those who could potentially have relied on the prior state of the law. The issue of retroactivity is often a complicated one, but it is worth exploring in appropriate cases.