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Ana Romero Jurisson

THE MISUSE OF *BRAND X* AND THE DETRIMENTAL IMPACT ON UNDOCUMENTED IMMIGRANTS IN THE TENTH CIRCUIT: REVISITING THE BASICS OF THE *CHEVRON* DOCTRINE

ANA ROMERO JURISSON*

I. INTRODUCTION

This note discusses the validity of three interpretations of the interaction between the unlawful presence bars and section 245(i) of the Immigration and Nationality Act (INA).[1] Using the *Chevron* doctrine[2] and two subsequent Supreme Court cases clarifying the application of the doctrine,[3] the note analyzes whether the Board of Immigration Appeals (BIA) and United States Citizenship and Immigration Services (USCIS) interpretations satisfy the elements of the *Chevron* test.[4] Because the agency interpretations do not meet the elements of the test, the note concludes that courts in the Tenth Circuit should follow the Tenth Circuit Court interpretation,[5] rather than the BIA and USCIS interpretation.

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996[6] amended the INA[7] by adding multiple grounds for removal and inadmissibility, including the unlawful presence bars.[8] The unlawful presence bars indicate that a person is prohibited from admission to the United States for three years, ten years, or permanently depending on how long he or she has been physically present in the United States unlawfully.[9] The statute that sets forth the unlawful presence bar rules suggests that its purpose is to discourage undocumented immigrants from entering without inspection or staying in the United States unlawfully.[10] However, the practical effect of the statutes has been to separate many undocumented immigrants from their families and to discourage many undocumented immigrants with extensive familial and community ties from trying to legalize their status.[11]

In 1994, Congress added section 245(i) to the INA, which allowed certain people who had entered without inspection to legalize their status from within the

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1. Immigration and Nationality Act of 1952, 8 U.S.C. §§ 1101–1537 (2006).
2. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).
3. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005); United States v. Mead Corp., 533 U.S. 218 (2001).
4. *See Briones*, 24 I. & N. Dec. 355 (2007) (interim decision); Interoffice Memorandum from Donald Neufeld, Acting Assoc. Dir., et al. to Field Leadership (May 6, 2009), http://www.uscis.gov/files/nativedocuments/revision_redesign_AFM.PDF (last visited June 22, 2010) [hereinafter 2009 Memorandum].
5. *See* Padilla-Caldera v. Gonzales, 453 F.3d 1237 (10th Cir. 2005).
6. Illegal Immigration Reform and Immigration Responsibility Act of 1996, Pub. L. No. 104–208, 110 Stat. 3009–546 (codified as amended in scattered sections of 8 U.S.C.).
7. Immigration and Nationality Act of 1952, 8 U.S.C. §§ 1101–1537 (2006).
8. 8 U.S.C. § 1182(a)(9); *see also infra* Part III.A.
9. Id. §§ 1182(a)(9)(B)(i)(I), 1182(a)(9)(C)(i)(I)–(II); *see also infra* Part III.A.
10. *See* 8 U.S.C. § 1182(a)(9).
11. *See* U.S. Rep. Zoe Lofgren, *A Decade of Radical Change in Immigration Law: An Inside Perspective*, 16 STAN. L. & POL'Y REV. 349, 361–64 (2005).

United States by paying a fine.[12] Congress subsequently extended 245(i) in 2000 in the Legal Immigration and Family Equity Act,[13] with the intention of preventing widespread family separation due to the unlawful presence bars.[14]

Since the most recent extension of 245(i), there has been confusion over the interaction between 245(i) and the unlawful presence bars. Namely, the question was whether 245(i) applied to all, some, or none of the four categories of unlawful presence laid out in sections 212(a)(9)(B)(i)(I)–(II) and 212(a)(9)(C)(i)(I)–(II).[15] One of the most contested issues was whether section 245(i) should apply to subsection 212(a)(9)(C)(i)(I), called the "permanent bar."[16] This subsection made people with multiple periods of unlawful stay, due to more than one instance of entering without inspection, inadmissible.[17] While some circuits determined that 245(i) does not apply to the permanent bar, the Tenth Circuit resolved the issue in favor of applying 245(i) to people who would otherwise be excluded by the permanent bar.[18]

The BIA and USCIS disagree with the Tenth Circuit.[19] In May of 2009, USCIS issued an interoffice memorandum (2009 memorandum) instructing immigration adjudicators to ignore the Tenth Circuit decision and to instead follow a BIA case that determined that 245(i) did not apply to the permanent bar.[20] This memorandum has created uncertainty for undocumented immigrants within the Tenth Circuit regarding whether they will be able to adjust their status.[21]

USCIS bases its authority to defy the Tenth Circuit on a 2005 case called *National Cable & Telecommunications Ass'n v. Brand X Internet Services*.[22] *Brand X* is a continuation of the development of the test laid out in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[23] for determining when a federal court should defer to an agency's interpretation of an ambiguous statute.[24] *Brand X* extended the application of the *Chevron* doctrine, calling for deference to an agency interpretation of an ambiguous statute even if it runs contrary to a previously decided circuit court opinion on the same issue.[25] However, *Brand X* did not change the *Chevron* doctrine itself, and the core requirements for when the doctrine applies remain the same.[26]

This note analyzes the application of the *Chevron* doctrine to the interpretation that the USCIS 2009 memorandum advances, asserting that the agency has misap-

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12. 8 U.S.C. § 1255(i).
13. Legal Immigration and Family Equity Act Amendments of 2000, Pub. L. No. 106-554, 114 Stat. 2763 (2000) (codified as amended in scattered sections of 8 U.S.C.).
14. *See infra* note 152 and accompanying text.
15. 8 U.S.C. § 1182(a)(9)(B)(i)(I)–(II).
16. *See infra* Part III.B.1–2.
17. 8 U.S.C. § 1182(a)(9)(C)(i)(I).
18. *See* Padilla-Caldera v. Gonzales, 453 F.3d 1237, 1244 (10th Cir. 2005).
19. *See infra* Part III.B.2–3.
20. *See infra* Part III.B.3.
21. Prior to the 2009 memorandum, controlling Tenth Circuit case law allowed people to adjust their status under 245(i). *See Padilla-Caldera*, 453 F.3d at 1243–44 (10th Cir. 2005). However, after USCIS issued the memorandum, whether that case law would continue to apply became unclear.
22. 545 U.S. 967 (2005); *see infra* Part III.B.3.
23. 467 U.S. 837 (1984).
24. *Brand X*, 545 U.S. at 982–83 (citing *Chevron*, 467 U.S. 837 (1984))
25. *Brand X*, 545 U.S. at 976.
26. *See infra* Part II.C.

plied *Brand X* and that the USCIS interpretation does not warrant *Chevron* deference. Contrary to USCIS's stance, the agency did not have the authority to change the relevant law in the Tenth Circuit regarding the application of 245(i) to 212(a)(9)(C)(i)(I) through the 2009 memorandum.[27] In addition to analyzing the legal reasons for not applying the 2009 memorandum's rationale, this note also discusses the negative policy implications associated with this interpretation and proposes potential solutions to the problem.[28]

Part II of this note discusses the *Chevron* doctrine and its development through subsequent case law. It examines the two-part test the U.S. Supreme Court outlined in *Chevron*, which asserts that courts should defer to agency interpretations of statutes when the statute is ambiguous and the agency interpretation is reasonable.[29] The Part next explores how *United States v. Mead Corp*.[30] reiterated and solidified the requirement that the agency employ formal rulemaking procedures in order for an interpretation to be afforded *Chevron* deference. In discussing *Brand X*'s contribution to the doctrine, the Part considers how *Brand X* calls for *Chevron* deference to an agency interpretation even when a prior circuit court opinion adopts an alternate interpretation. Noting that *Brand X* constituted an expansion of the *Chevron* doctrine,[31] the Part also highlights that *Brand X* did not change the initial tests *Chevron* and *Mead* established for when the doctrine should apply.

Part III discusses the development of the relevant immigration laws and cases that are necessary for understanding the issues addressed in this article. Part III.A outlines the development of the relevant immigration statutes, addressing the purposes and effects of the unlawful presence bars and 245(i). Next, subsection B focuses on the Tenth Circuit and BIA case law that has dealt with the interaction between the permanent bar rule and 245(i), as well as the 2009 memorandum indicating USCIS's interpretation of the statutes.

In Part IV, the note applies the steps of the *Chevron* doctrine to the BIA decision and the 2009 memorandum. At each step, the note discusses how the immigration agency interpretation of how section 245(i) should apply to the permanent bar fails to meet the requirements to warrant *Chevron* deference.[32] The analysis section outlines the argument that (1) the 2009 memorandum lacks the necessary formality, (2) both the BIA decision and the memorandum's interpretation are precluded by the Tenth Circuit's finding that there is no ambiguity, and (3) the interpretation is unreasonable.

Part IV separately addresses the policy implications of the unlawful presence bars and 245(i) and the impact of the immigration agencies' interpretation. It highlights the imbalance between the high cost to families and to U.S. society and the relatively low benefits provided by the unlawful presence bar rules and of limiting 245(i). The note concludes with suggestions for how to minimize the negative effects of the unlawful presence bars and maximize the benefits of 245(i) in ways that benefit immigrant families and the United States.

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27. *See infra* Part IV.A.
28. *See infra* Part IV.B.
29. *See infra* Part II.A.
30. 533 U.S. 218 (2001).
31. *See infra* Part II.C.
32. *See infra* Part IV.A.

II. BACKGROUND LAW: THE EVOLUTION OF THE *CHEVRON* DOCTRINE

Federal agencies are generally part of the executive branch and often have authority to take binding action.[33] In 1946 President Truman signed the Administrative Procedure Act (APA) into law to create uniformity of procedures among federal agencies.[34] The purposes of the APA are, in part, "to require agencies to keep the public currently informed of their organization, procedures and rules," to provide mechanisms for allowing the participation of the public in rulemaking, and to establish "uniform standards for the conduct of formal rule making . . . and adjudicatory proceedings . . . which are required by statute to be made on the record after opportunity for an agency hearing."[35]

The APA established a standardized notice and comment procedure for rulemaking that requires notice of a proposed rulemaking to interested parties so as to provide an opportunity for their participation in the decision-making process.[36] Leaving room for agencies to formulate their own rules for specific adjudicative procedures, the APA also lays out a basic outline for administrative adjudication procedures, both formal and informal, and establishes the right to appeal a decision to a superior agency and to a federal court.[37] Because agencies have more expertise in the often complicated intricacies of the statutes and regulations they enforce, courts often view agency decisions as influential, and give deference to agency decisions under certain circumstances.[38] Agency expertise is especially relevant in highly technical or scientific subject matters, such as pollution control, and complicated permitting schemes, like the one presented in *Chevron*.[39]

A. The Basics of the Test for the Chevron *Doctrine*

In 1984, *Chevron* set forth the basic rule and test regarding when federal courts should defer to federal agency interpretations of statutes.[40] Essentially, upon a finding that a statute is ambiguous or silent on an issue, courts should defer to the appropriate agency's interpretation, as long as it is reasonable.[41] Thus, the primary error of the District of Columbia (D.C.) Court of Appeals in *Chevron* was that it determined that the relevant statute was ambiguous, but imposed its own interpretation of the term "stationary source" rather than deferring to the Environmental Protection Agency (EPA).[42]

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33. *See* BLACK'S LAW DICTIONARY 71 (9th ed. 2009) (defining "federal agency").

34. TOM C. CLARK, U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 5 (1947), *available at* http://www.law.fsu.edu/library/admin/1947cover.html (last visited Dec. 21, 2010).

35. *Id.* at 9.

36. *See* 5 U.S.C. § 553(b)–(c) (2006); CLARK, *supra* note 34, at 26.

37. 5 U.S.C. § 554 (2006), 702; *see also* CLARK, *supra* note 34, at 93; TOMAS A. ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 291 (6th ed. 2008) (stating that the APA established a presumption of judicial review unless another statute indicates otherwise).

38. *See* United States v. Mead Corp., 533 U.S. 218, 226–27 (2000).

39. 467 U.S. 837, 848 (1984) (stating that the 1977 Amendments to the Clean Air Act "are a lengthy, detailed, technical, complex, and comprehensive response to a major social issue").

40. 467 U.S. 837, 842–43 (1984).

41. *Id.* at 844–45.

42. *Id.* at 842.

The question that arose in *Chevron* was "whether [the] EPA's decision to allow States to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single 'bubble'" was a reasonable construction of the term "stationary source."[43] In 1977, Congress enacted the Clean Air Act Amendments (CAA), which established permitting programs regulating "'new or modified major stationary sources' of air pollution."[44] The EPA subsequently issued a regulation allowing states to interpret a "stationary source" as relating to an entire plant instead of a single emitting unit.[45] Under this interpretation of "statutory source," modifications or installments of one piece of equipment in a plant will not trigger review as long as the modification does not increase the plant's total emissions.[46]

The Court of Appeals for the District of Columbia held that the part of the regulations permitting states to use the "bubble" or plant-wide definition of stationary source was contrary to the intention of the statute.[47] The court acknowledged that the statute was ambiguous regarding the precise definition of a stationary source.[48] Because the legislative history also did not explicitly clarify how the term should be interpreted, the court looked to the purpose of the amendments, which was, in part, to improve air quality by imposing a mandatory permitting scheme on nonattainment states.[49] The court determined that, although the bubble definition was adequate for permitting schemes intended to *maintain* air quality, it was not an appropriate definition when the goal was to *improve* air quality, and thus should not be used in nonattainment areas.[50]

The Supreme Court reversed, and held that the court of appeals should have deferred to the EPA's interpretation of the term "stationary source."[51] The Court established a two-part test for determining when an agency decision merits judicial deference and held that the EPA's decision met both elements of the test.[52]

The first step of the test is to determine whether Congress has spoken directly to the question at issue and made its intentions clear.[53] If Congress has explicitly stated its intent, then both the agency and the courts must defer to that intent; however, if the court finds that the statute is either silent or ambiguous regarding the meaning of the term or phrase at issue, then the court must go to the second step.[54] This is an implicit delegation of interpretive authority, in which Congress may have been unintentionally silent or ambiguous on an issue.[55]

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43. *Id.* at 840.
44. *Id.* at 839–40 (citing 42 U.S.C. § 7502(b)(6) (2006)).
45. *Id.* at 840.
46. *Id.*
47. *Id.* at 842.
48. *Id.* at 841.
49. *Id.* at 841–42. "Nonattainment states" are those states that have not achieved the original emission reduction goals set under the CAA, meaning that they needed to improve their air quality rather than simply maintain current levels. *See* 42 U.S.C. § 7407(d)(1)(A)(i) (2006).
50. *Chevron*, 467 U.S. at 841 (emphasis added).
51. *Id.* at 842.
52. *Id.* at 842–43.
53. *Id.*
54. *Id.* at 843.
55. *Id.* at 844. There are two general ways that Congress may delegate interpretive authority to an agency: express delegation and implicit delegation. *Id.* Express delegation occurs when Congress has intentionally left a gap in the statutory language for the agency to fill based on its own specialized expertise on that

At step two, the court must determine whether the agency interpretation of the contested phrase is a reasonable construction of the statute.[56] If it is not, then the court may set aside the regulations; if it is, the court must defer to that interpretation, even if it prefers a different one.[57] Regardless of whether Congress has explicitly or implicitly delegated interpretive power to an agency, the agency's regulations are reasonable and call for judicial deference "unless they are arbitrary, capricious, or manifestly contrary to the statute."[58]

A determination that a statute is ambiguous requires courts to defer to agency decisions resolving that ambiguity.[59] In *Chevron*, the Supreme Court determined that Congress did not identify a specific definition of the term "stationary source" in the 1977 CAA Amendments, leaving its intent ambiguous regarding whether or not to use the "bubble" or a single unit definition.[60] The Court relied partially on the lower court's determination of ambiguity and its finding that the statute "does not explicitly define what Congress envisioned as a 'stationary source.'"[61] The Court determined that although the CAA did not explicitly refer to the bubble definition, it also did not preclude a plant-wide interpretation.[62] Rather, the Court stated that it was for the EPA to balance the relevant interests.[63]

The Court found the EPA's interpretation of "stationary source" to be reasonable.[64] Because of the important balance between concerns about pollution control and economic development and Congress's inability to agree on which effort was more vital to the public interest, the Court found that Congress's silence and delegation of interpretive power to the EPA was justified.[65] An agency's resolution of such a conflict between the two interests should prevail unless it is contrary to what Congress would have intended.[66]

B. The Contribution of Mead*: When an Agency Interpretation May Merit* Chevron *Deference*

Judicial deference to agency decisions is not unlimited, but is reserved for when the agency has acted with a certain level of formality and procedure.[67] In *United*

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particular subject. *Id.* In addition, the Court has determined that delegations of interpretive authority may also be implicit, in which a situation arises that Congress did not anticipate and/or the statute(s) do not directly address, and the agency must exercise its specialized expertise to resolve the ambiguity. *Id.*

56. *Id.* at 843.

57. *Id.* 843–44; *see also id.* at 843 n.11 (stating that the agency's decision need not be the only possible interpretation or what the court would have come up with to be reasonable).

58. *Id.* at 844.

59. *Id.* at 843–44.

60. *Id.* at 851. The Court looked to two sections of the CAA that provide definitions of "stationary source." *Id.* at 839. One section states that a "stationary source" refers to "any building, structure, facility, or installation which emits or may emit any air pollutant." *Id.* at 849 n.2 (citing 40 C.F.R. § 51.18(j)(1)(i) (1983)). Another section defines the "stationary source" as referring to "any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant, including any major emitting facility or source of fugitive emissions of any such pollutant, as determined by rule by the Administrator." *Id.* at 851 (citing 91 Stat. 770 (now codified in 42 U.S.C. § 7602(j) (2006)).

61. *Id.* at 841 (quoting Natural Res. Def. Council, Inc. v. Gorsuch, 685 F.2d 718, 723 (D.C. Cir. 1982)).

62. Id. at 851, 865.

63. *Id.* at 851.

64. *Id.* at 845.

65. *Id.* at 847.

66. *Id.* at 845.

67. *See* United States v. Mead Corp., 533 U.S. 218 (2001).

States v. Mead Corp., the question before the Supreme Court was whether or not U.S. Customs Service (Customs) rulings called for judicial deference according to the *Chevron* doctrine.[68]

Mead, an importer of three-ring binder day-planners, challenged a Customs ruling that the planners fell under the category of bound diaries, subject to a 4 percent tariff.[69] Customs issued the ruling in a letter, indicating that the planners constituted a diary because it was a calendar with room for writing about daily events, and although it was comprised of loose leaf pages, it was bound because the pages were contained in a three-ring binder.[70]

Mead brought its dispute to the Court of International Trade (CIT), which accepted Customs' reasoning and granted summary judgment for the government.[71] Mead appealed to the U.S. Court of Appeals for the Federal Circuit, which reversed the CIT decision.[72] The Appeals Court disagreed with Customs' and CIT's reasoning regarding the classification of the planners and held that Customs rulings merit no deference whatsoever.[73]

The Supreme Court agreed with the Appeals Court that such rulings do not have the requisite formality to have the force of law and implicate *Chevron* deference, but remanded the case because the Court also determined that ruling letters could be persuasive.[74] The Court held that agency implementation of a statute merits *Chevron* deference only "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[75]

Adequate delegation of interpretive authority may be evidenced by the agency's authority to "engage in adjudication or notice and comment rulemaking, or by some other indication of a comparable congressional intent."[76] The best indicator of authority is the existence of authorization to produce regulations or when Congress has put in place some formal administrative procedure that promotes fairness and deliberation in the rulemaking or adjudicative process.[77] However, lack of this procedure does not preclude *Chevron* deference.[78] Whether an adjudicative agency decision has precedential value on other agency decisions is another indicator of authority, though not conclusive, of the appropriateness of *Chevron* deference by a reviewing court.[79] This preliminary inquiry into whether the agency in question has

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68. *Id.* at 221.
69. *Id.* at 224. Prior to the ruling, the planners fell in the "other" category, for which there was no tariff. *Id.* at 224–25.
70. *Id.* at 225.
71. *Id.*
72. *Id.* at 225–26.
73. *Id.* at 226.
74. 533 U.S. at 227. "Ruling letters" are letters issued by Customs to individual importers that "set[ ] tariff classifications for particular imports." *Id.* at 222–23.
75. *Id.* at 226–27.
76. *Id.* at 227.
77. *Id.* at 229–30.
78. *Id.* at 231.
79. *See id.* at 232.

exercised the formality of procedure necessary to trigger the *Chevron* analysis has sometimes been called *Chevron* "step zero."[80]

In determining whether the ruling in *Mead* met *Chevron* step zero, and thus warranted the application of *Chevron* deference, the Court considered Congress's delegation of authority to Customs and the characteristics of Customs rulings.[81] Customs rulings are written letters indicating the official position of Customs regarding a specific transaction or situation and "may be cited as authority in the disposition of transactions involving the same circumstances."[82] A ruling letter may be modified or revoked by anyone except the recipient, and although it may be cited, it is only binding in the specific situation it describes, not to third parties.[83] The regulations issued under the Harmonized Tariff Schedule of the United States (HTSUS) warn third parties not to rely on other letters because they are subject to change without notice.[84] At the time *Mead* was decided, the letters were not subject to notice and comment and they could generally be modified without notice and comment.[85] Also, in addition to Customs Headquarters, all forty-six of the port-of-entry Customs offices may issue ruling letters, each issuing 10,000–15,000 per year.[86]

The Court determined that the letters' lack of broader precedential value, vast annual issuance , and the lack of formal process, such as notice and comment, was inconsistent with a congressional intent of legislative authority.[87] Consequently, the Court found that the ruling letters lacked the force of law and should be treated as persuasive interpretations, similar to those in "policy statements, agency manuals, and enforcement guidelines."[88]

C. The Contribution of Brand X*: When to Apply* Chevron *Deference*

While *Mead* outlined a limitation to *Chevron* deference, in the 2005 case, *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, the Supreme Court extended the circumstances for when the *Chevron* test may apply.[89] The Court held that courts must apply *Chevron* and defer to an agency's interpretation of an ambiguous statute even when the agency's decision contradicts a federal appellate court's prior interpretation of the same issue.[90]

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80. *See* STEPHEN MANNING ET AL., *A Brand X Primer*, *in* Immigration & Nationality Law Handbook 2009-10-441, 444 (Am. Immigration Lawyers Ass'n ed., 2009).

81. *Mead*, 533 U.S. at 231.

82. *Id.* at 223–23 (quoting 19 C.F.R. § 177.9 (2000)); *see also* 19 C.F.R. § 177.8(a) (2010) (stating that the rulings issued apply only in response to the facts of a specific transaction).

83. *See Mead*, 533 U.S. at 223, 233 (quoting 19 C.F.R. § 177.9). Additional indication that ruling letters only apply to individual situations is that the CIT treats its review of the letters in the same way as it treats the Secretary's other rulings on precise, individualized, matters. *Mead*, 533 U.S. at 232–33.

84. 19 C.F.R. § 177.9(c) (2010).

85. *Mead*, 533 U.S. at 223 (citing 19 C.F.R. § 177.10(c)). After *Mead*, modifications to prior rulings became subject to a notice and comment requirement. 19 U.S.C. § 1625(c) (2006).

86. *Mead*, 533 U.S. at 233. Although the contested ruling letter was issued by Customs Headquarters instead of one of the port-of-entry offices, the Court found there was no statutory distinction between them. *Id.* at 233–34.

87. *Id.* at 231–34.

88. *Id.* at 234 (quoting Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000)).

89. 545 U.S. 967 (2005).

90. *Id.* at 982–83.

Brand X arose out of a dispute over whether cable companies that sell broadband internet service are providing a "telecommunications service" that should be subject to regulations under the Communications Act of 1934.[91] The Telecommunications Act of 1996 amended the Communications Act to distinguish between "telecommunications carriers," which are subject to regulation as common carriers, and "information service providers," which are not.[92]

When private cable television providers began using broadband systems to provide high-speed internet service, Brand X and other small internet providers wanted to use the broadband systems in the same way that they had used the narrowband connections as common carriers.[93] Brand X and other small internet service providers argued that the cable companies provide a telecommunications service that should be regulated under the Communications Act.[94] On the other hand, the Federal Communications Commission (FCC) determined that broadband internet service was an information service, and thus companies belonging to the National Cable & Telecommunications Association were exempt from the regulations governing common carriers.[95] Accordingly, the FCC issued a declaratory ruling in favor of the National Cable & Telecommunications Association, concluding that cable companies do not provide a telecommunications service as defined by the Communications Act and therefore are not subject to the regulations of common carriers.[96]

The case went to the Ninth Circuit by judicial lottery after several parties challenged the FCC's decision and petitioned for judicial review.[97] The Ninth Circuit vacated and remanded the ruling, determining that the FCC's decision was not entitled to *Chevron* deference because it conflicted with the Ninth Circuit's decision in *AT&T Corp. v. Portland*.[98] In the absence of an alternate interpretation issued by an agency, the Ninth Circuit in *Portland* held that cable modem service

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91. *Id.* at 974. The Communications Act established the Federal Communications Commission (FCC) as a centralized authority for regulating all non-federal government use of radio and television broadcasting; telecommunications including wire, cable, and satellite, interstate communications; and international communications initiated from or terminating in the United States. 47 U.S.C. § 151 (2006).

92. *Brand X*, 545 U.S. at 975. Telecommunications carriers face mandatory regulations requiring them to allow other carriers to connect to their networks, to charge reasonable and nondiscriminatory rates, and to contribute to an FCC created fund designed to promote universal service. *Id.* (citing 47 U.S.C. §§ 201–202, 251(a)(1), 254(d) (2006)). Meanwhile, information service providers, though they may be regulated under other statutes, do not face the same mandatory regulations. *Id.* at 976 (citing 47 U.S.C. §§ 151–161 (2006)).

93. *See* Brand X Internet Servs. v. FCC, 345 F.3d 1120, 1127 & n.11 (9th Cir. 2003) (stating that petitioners wanted the cable modem service to be classified as an information and cable service and that the practical effect of this would be that cable broadband providers would have to open up their lines to competition). Broadband internet service uses either cable modem service or Digital Subscriber Lines (DSL) to transmit information, which is faster than "narrowband" or "dial-up" internet connections and uses local telephone facilities. *Brand X*, 545 U.S. at 974–75. Small internet providers were able to use the narrowband telephone connections to provide internet service because they were regulated as common carriers. *See id.* at 975 (stating that the Communications Act regulated telecommunications carriers as common carriers, meaning that they had to "design their systems so that other carriers can interconnect with their communications networks").

94. *Id.* at 997–98.

95. *Id.* at 977–78.

96. *Id.*

97. *Id.* at 979; *see also* Brand X Internet Servs. v. FCC, 345 F.3d 1120 (9th Cir. 2003).

98. *Brand X*, 545 U.S. at 979–80; *see also* AT&T Corp. v. Portland, 216 F.3d 871 (9th Cir. 2000) (holding that, prior to the issuance of the FCC regulation, the transmission of internet service to subscribers over cable broadband facilities was a telecommunications service).

qualified as a telecommunications service.[99] Invoking stare decisis, the Court of Appeals held that *Portland*, as an appellate decision, overrode the FCC's declaratory ruling.[100]

The first issue before the Supreme Court in *Brand X* was whether the FCC's declaratory judgment, indicating that cable companies providing internet service are information service providers rather than telecommunications service providers, merited *Chevron* deference.[101] If so, the second question was whether that judgment was a permissible construction of the Communications Act and the Telecommunications Act.[102] The Court reversed the decision of the Ninth Circuit, determining that the pertinent section of the Communications Act was ambiguous as to the definition of "telecommunications service" and that the FCC's interpretation was reasonable and entitled to *Chevron* deference.[103] The Court held that a prior judicial decision interpreting a statute can only trump an agency's reasonable interpretation if that prior judicial decision held that the statute was unambiguous and thus left no room for the agency's interpretation.[104] Additionally, the Court asserted that in order to fulfill Congress's intent that the agencies interpret ambiguities, "[o]nly a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction."[105]

In determining whether the agency's interpretation was reasonable, the Court looked to other sections of the Communications Act and other trends in the field of telecommunications, information, and internet services.[106] It concluded that the FCC's interpretation was reasonable because of scientific and economic justifications.[107] Therefore, because *Portland* had only interpreted the ambiguity but had not held that there was no other reasonable interpretation, the Court held that the FCC's decision after *Portland* trumped the Ninth Circuit's construction of the statute and was entitled to *Chevron* deference.[108] The rationale of the Court was that it would be contrary to congressional intent for the agency's interpretive authority to rest solely on whether it or the court has issued an interpretation first.[109] Thus, judicial precedent can only displace a conflicting agency interpretation when the precedential cases have held that there is no gap or ambiguity for the agency to fill.[110]

In his dissent, Justice Scalia argued that the majority's holding amounted to the reversal of judicial decisions by executive officers.[111] He asserted that it runs contrary to the Constitution's separation of powers to permit an agency decision to trump an appellate or Supreme Court decision simply because the judicial opinion

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99. *Brand X*, 545 U.S. at 979–80 (citing *Portland*, 216 F.3d at 877–80).
100. *Id.* at 980 (citing *Brand X*, 345 F.3d at 1130–31).
101. *Id.* at 980.
102. *Id.* at 974–75.
103. *Id.* at 1003.
104. *Id.* at 982–83.
105. *Id.*
106. *Id.* at 977–1003.
107. *See id.* at 1001–1003.
108. *See id.* at 1003.
109. *Id.* at 983.
110. *Id.* at 982–83.
111. *Id.* at 1016 (Scalia, J. dissenting).

did not make specifically clear that its interpretation was the *only* interpretation rather than simply the *best* one.[112] A better conclusion, he asserted, would be the previous rule: when a court interprets an ambiguous statute in the absence of agency clarification, the court's interpretation is the law and subsequent agency interpretations are not entitled to *Chevron* deference.[113]

The majority, however, argued that an alternative interpretation by the agency does not constitute a reversal.[114] Rather, by adopting an alternate view, the agency is neither forced to assert that the court's interpretation is legally wrong nor precluded from adopting the court's interpretation in the future.[115] Additionally, it is the courts, not the agencies, that have the authority to determine whether or not the *Chevron* doctrine applies at all.[116] This last point becomes particularly significant in applying the *Chevron* doctrine to the immigration context because of the importance of agencies in immigration law. Confusion regarding what the law is or should be can result when the proper roles of the administrative and the federal courts are not well defined. In the immigration context, this confusion can have a detrimental impact on the most basic aspects of people's lives.

III. APPLYING THE *CHEVRON* DOCTRINE IN THE IMMIGRATION CONTEXT

Congress enacted the INA in 1952 in order to codify existing immigration laws that were scattered across various sections of the U.S. Code and common law.[117] One of the original intentions of the INA and of immigration laws generally was to control immigration in a way that would promote family unity.[118] The INA grants extensive authority to the Attorney General in the Department of Justice (DOJ).[119] The Attorney General then delegated most of the powers granted to it under the INA to the Immigration and Naturalization Service (INS), an agency under the DOJ.[120] The Attorney General also delegated some power to the BIA, which is an agency that was distinct from the INS, but also within the DOJ.[121] In 2002, the Homeland Security Act transferred the duties of INS to the Department of Homeland Security (DHS) and separated it into three agencies—USCIS, Customs and Border Protection (CBP), and Immigration and Customs Enforcement (ICE).[122]

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112. *Id.* at 1017–18 (Scalia, J. dissenting).
113. *Id.* at 1019 (Scalia, J. dissenting).
114. *Id.* at 983.
115. *Id.*
116. *See id.*; *see also*, Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984) (stating that "[t]he judiciary is the final authority on issues of statutory construction").
117. U.S. Citizenship and Immigration Services, *Immigration and Nationality Act*, http://www.uscis.gov/portal/site/uscis (follow "LAWS" hyperlink; then follow "Immigration and Nationality Act" hyperlink) (last visited Mar. 15, 2010).
118. *See* H.R. Rep. No. 82-1365 (1952) *reprinted at* 1952 U.S.C.C.A.N. 1653, 1680; Julie Mercer, *The Marriage Myth: Why Mixed-Status Marriages Need an Immigration Remedy*, 38 GOLDEN GATE U. L. REV. 293, 296 (2008); Lofgren, *supra* note 11, at 354.
119. 8 U.S.C. § 1103 (2006); *see also* ALEINIKOFF ET AL., *supra* note 37, at 269.
120. ALEINIKOFF ET AL., *supra* note 37, at 269.
121. *Id.*
122. *See* 8 C.F.R. § 100.1 (2010); ALEINIKOFF ET AL., *supra* note 37, at 269–70. One of the intentions of splitting the INS was to separate services from enforcement. ALEINIKOFF ET AL., *supra* note 37, at 270.

Immigration judges were part of the INS until 1983 when they and the BIA became part of DOJ's Executive Office for Immigration Review (EOIR).[123] Immigration judges and the BIA were within the DOJ and continued to be part of the DOJ even after the enactment of the Homeland Security Act.[124] The BIA was created by, and is directly responsible to, the Attorney General.[125] The BIA is an appellate administrative court that reviews lower adjudicative decisions, such as those by immigration judges (trial level administrative judges).[126] Through precedent, the BIA also provides guidance for the application and interpretation of immigration laws and regulations for the USCIS, immigration judges, and the public.[127] Only a few of the BIA decisions qualify as precedent.[128] To have precedential value, the opinion must be approved by the Attorney General and published by the EOIR.[129] After exhausting administrative remedies—which include a hearing before an immigration court and then a hearing before the BIA—a person may appeal to the appropriate federal court.[130]

A. Unlawful Presence and Adjustment of Status

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA),[131] which created several new grounds for inadmissibility.[132] Among other grounds, IIRIRA added unlawful presence as a ground for inadmissibility that would result in a person being prohibited from entry into the United States for three years, ten years, or permanently.[133] These prohibitions are known respectively as the three-year bar,[134] the ten-year bar,[135] and the permanent bar.[136] Unlawful presence occurs when a person is present in the United States after overstaying a valid visa or after entering without being legally admitted (also known as entering without inspection).[137]

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123. *Id.* at 279, 281.

124. *See id.* (stating that the corps of immigration judges and the BIA became part of the EOIR under the 1983 reorganization and that after the enactment of the Homeland Security Act, the EOIR remained part of the DOJ).

125. *Id.* at 281; *see also* 8 C.F.R. § 1003.1 (2010).

126. 8 C.F.R. § 1003.1(d); *see also* ALEINIKOFF ET AL., *supra* note 37, at 281 (stating that "noncitizens found removable by immigration judges have a right of appeal to the Board of Immigration Appeals").

127. 8 C.F.R. § 1003.1(d).

128. *Id.* § 1003.1(i).

129. *Id.*

130. *See* 8 U.S.C. § 1252(d) (2006); *see also* ALEINIKOFF ET AL., *supra* note 37, at 291 (stating that final deportation orders can be appealed to the appropriate federal circuit court of appeals after exhausting administrative remedies).

131. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 U.S.C.).

132. *Id.* § 301(b)–(c).

133. 8 U.S.C. § 1182(a)(9)(B)(i)(I)–(II) (2006).

134. *Id.* § 1182(a)(9)(B)(i)(I).

135. *Id.* § 1182(a)(9)(B)(i)(II).

136. *Id.* § 1182(a)(9)(C)(i). There are two permanent bars, one for entering or attempting to enter without inspection more than once, and one for entering or attempting to enter without inspection after having been removed pursuant to a formal removal order. *Id.* § 1182(a)(9)(C)(i)(I)–(II).

137. *Id.* § 1182(a)(9)(B)(ii). Because the provision took effect on April 1, 1997, accumulated unlawful presence can only be measured from that date. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, §309(a), 110 Stat. 3009-546 (codified as amended in scattered sections of 8 U.S.C.); Carole M. Mesrobian, *Unlawful Presence: What Happens When You Stay at the Party Too Long*, *in*

Under the three-year bar, an undocumented immigrant who was unlawfully present for a single period over 180 days but less than one year and departed voluntarily before removal proceedings are initiated against him or her is inadmissible for three years.[138] Under the ten-year bar, a person who was unlawfully present for a single period over one year is inadmissible for ten years.[139] Although a person may be accumulating unlawful presence while in the United States, he or she does not trigger the three- or ten-year bar until he or she leaves and then tries to re-enter the United States.[140] There are numerous exceptions to the three- and ten-year bars, including exceptions for minors, battered women and children, asylees with pending applications, and human trafficking victims.[141] Additionally, an undocumented immigrant may seek a waiver of inadmissibility from the Attorney General if the person is a spouse or child of a U.S. citizen or legal permanent resident and can prove that denial of admission would result in extreme hardship to the citizen or legal permanent resident.[142]

The permanent bar applies to undocumented immigrants who are unlawfully present after they have committed previous immigration violations.[143] More specifically, it applies when a person "who enters or attempts to enter the United States without being admitted" has accumulated period(s) of unlawful presence that add up to more than one year in the aggregate.[144] It also applies to people who have previously been ordered removed pursuant to INA section 235(b)(1) but subsequently attempt to re-enter.[145] Although it is called the permanent bar, a person may apply for admission after ten years from their last departure from the United States with the approval of the Secretary of Homeland Security.[146] There is also a possible waiver if the person is a self-petitioner under the Violence Against Women Act.[147]

In 1994, Congress amended the INA to include section 245(i).[148] Section 245(i) allows people physically present in the United States who have entered without

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AMERICAN IMMIGRATION LAWYERS ASSOCIATION, IMMIGRATION & NATIONALITY LAW HANDBOOK 517, 520 (2009).

138. 8 U.S.C. § 1182(a)(9)(B)(i)(I). If removal proceedings have commenced and the undocumented immigrant opts for voluntary departure under 1229(c), then the three-year bar does not apply even if the person has accumulated over 180 days to one year of unlawful presence. Mesrobian, *supra* note 137, at 517.

139. 8 U.S.C. § 1182(a)(9)(B)(i)(II).

140. *See* 8 U.S.C. § 1182(a)(9)(B)(i)(I)–(II), (a)(9)(C)(i)(II) (stating that, under this particular section, undocumented immigrants entering or attempting to enter the United States after having accrued unlawful presence will be barred from admission).

141. *Id.* § 1182(a)(9)(B)(iii). Time spent unlawfully in the United States while the person was under eighteen does not count towards unlawful presence for the purposes of this section. *Id.*

142. *Id.* § 1182(a)(9)(B)(v).

143. *Id.* § 1182(a)(9)(C).

144. *Id.* § 1182(a)(9)(C)(i)(I)–(II).

145. *Id.* § 1182(a)(9)(C)(i)(II).

146. *Id.* § 1182(a)(9)(C)(ii).

147. *Id.* § 1182(a)(9)(C)(iii). The conditions for attaining a waiver as a battered spouse are narrower under the permanent bar rule than under the three- and ten-year bar rules. *Id.* The Violence Against Women Act requires a link between the battering that the person suffered and their removal, departures, or reentries into the United States. *Id.* For normal family based immigration, a legal permanent resident or citizen family member must petition on behalf of the immigrant for the person to be admitted. *Id.* However, if the immigrant is a victim of domestic violence committed by a citizen or lawful permanent resident, the victim may become a self-petitioner—a policy adopted by Congress in order to reduce the victim's reliance on the abuser. ALEINIKOFF ET AL., *supra* note 37, at 299.

148. ALEINIKOFF ET AL., *supra* note 37, at 660.

inspection, or who were in some other classes of people who were otherwise ineligible to adjust their immigration status, to be able to adjust their status to legal permanent resident while still within the United States.[149] The law applied to people with immigrant visa petitions or labor certification applications filed on or before January 14, 1998.[150] However, in the interest of aiding family reunification, the Legal Immigration Family Equity Act of 2000 (LIFE Act) extended the INA section 245(i) to include applications filed by April 30, 2001.[151]

The purpose of the original 1994 addition of INA section 245(i) was to streamline the immigration status adjustment process by allowing people to adjust within the United States.[152] Previously, undocumented immigrants in the United States who wished to adjust their status to legal permanent resident had to leave the country and apply for their visa at a State Department outside the Unites States.[153] In contrast, 245(i) allowed people to pay a $650 fee instead and adjust their status while remaining in the United States rather than incurring the expense and family separation of traveling abroad.[154] The 2000 extension was partially a response to the harsh unlawful presence rules enacted under IIRIRA in 1996;[155] if a person had left the country to apply for a visa, their departure would have triggered one of the unlawful presence bars.[156] Under 245(i), however, people could adjust their status without leaving and thus would not run the risk of triggering the unlawful presence bars.[157]

There are several preliminary qualifications for applying for a status adjustment under INA section 245(i). First, people who are physically present in the United States, have entered without inspection, or fall within a class of legally admitted immigrants that otherwise cannot adjust their status may apply to the Attorney General to adjust their status.[158] The person must be the beneficiary of an immediate relative visa petition or must have filed an application for labor certification on or before April 30, 2001.[159] Additionally, the person must have been physically present in the United States on the day that the LIFE Act was enacted, December

149. 8 U.S.C. § 1255(i) (2006); *see also* Mesrobian, *supra* note 137, at 520–22 (discussing Ninth and Tenth Circuit cases that allowed people who had accrued unlawful presence under the first permanent bar to adjust their status under 245(i)).

150. *See* Pub. L. No. 105-119, § 111, 111 Stat. 2458 (1997) (codified at 8 U.S.C. 1255(i)); *see also* Lofgren, *supra* note 11, at 363 (discussing the political benefits of 245(i) and how Congress voted to extend it to avert the effects of the unlawful presence bar rules).

151. Legal Immigration and Family Equity Act Amendments of 2000, Pub. L. No. 106-554, tit. XV, § 1502, 114 Stat. 2763 (2000); *see* Deborah F. Buckman, Annotation, *Validity, Construction, and Application of Legal Immigration Family Equity Act (LIFE Act), and Regulations Promulgated Thereunder*, 10 A.L.R. FED. 2D 435 (2006); *see also* Lofgren, *supra* note 11, at 363 (discussing the benefits of 245(i) and its extension until Apr. 30, 2001).

152. *See* Lofgren, *supra* note 11, at 362–63.

153. *Id.* at 363.

154. *Id.*

155. *Id.* at 363.

156. *Id.* at 361–62.

157. Nancy Morawetz, *The Invisible Border: Restrictions on Short-Term Travel by Non-Citizens*, 21 GEO. IMMIGR. L.J. 201, 216–17 (2007); Lofgren, *supra* note 11, at 363–64.

158. 8 U.S.C. § 1255(i)(1)(A) (2006). Eligible classes include alien crewmen, people in unauthorized employment, people whose period of authorized presence has expired, some deportable aliens, and aliens who have violated the terms of their immigrant visa. *Id.*

159. *Id.* § 1255(i)(1)(B).

20, 2000, and pay a fee of $1,000.[160] If the applicant meets the requirements outlined above, the Attorney General may grant the application for status adjustment if the person is eligible for an immigrant visa, the person is admissible for legal permanent residence, and an immigrant visa is immediately available at the time of filing.[161]

B. Case Development on the Relationship Between Unlawful Presence and the LIFE Act

Although both the unlawful presence bars and 245(i) may seem to create bright-line rules on who may be barred from admission to the United States due to unlawful presence and who may apply to adjust their status from within the United States, the interaction of the two laws has been a source of controversy. Because a person must leave the United States to trigger the unlawful presence bars, 245(i) acts as a way for people to avoid triggering the three- or ten-year bars, but is not applicable to those who are already outside the United States.

The question courts and immigration adjudicators must address is whether or not 245(i) applies to the permanent bar. Not all of the circuits have addressed the issue, and there is a circuit split among those that have.[162] Courts that have addressed the issue generally distinguish between INA section 212(a)(9)(C)(I) (the "first permanent bar"), which applies to people who have accumulated more than one year of unlawful presence in the aggregate due to multiple entries, and INA section 212(a)(9)(C)(II) (the "second permanent bar"), which applies to people who have re-entered without inspection after a prior removal order.[163]

1. The Tenth Circuit's Broad Application of 245(i) in *Padilla-Caldera v. Gonzales*

The Tenth Circuit held that the first permanent bar does not preclude people from being able to adjust their status under 245(i).[164] In *Padilla-Caldera v. Gonzales*, the Tenth Circuit addressed the question of whether the first permanent bar precludes the Attorney General from having discretion to adjust the status of a person who has re-entered without inspection and accumulated over one year of aggregate unlawful presence.[165]

Concepción Padilla-Caldera is a native from Mexico who came to the United States when he was a teenager.[166] He entered the country without inspection in 1996 or 1997, and soon after met Keisha Cordova, a U.S. citizen who he married in

160. *Id.* § 1255(i)(1)(C).

161. *Id.* § 1255(i)(2).

162. *See* Mesrobian, *supra* note 137, at 520 (indicating that only the Second, Fifth, Sixth, Ninth, and Tenth Circuits have addressed whether someone is inadmissible under INA section 212(a)(9)(C)).

163. *See id.*

164. Padilla-Caldera v. Gonzales, 453 F.3d 1237, 1244 (10th Cir. 2005). The Ninth Circuit had also held that 245(i) applies to INA § 212(a)(9)(C)(i)(I). *See* Acosta v. Gonzales, 439 F.3d 550, 554–55 (9th Cir. 2005). *But see* Diaz-Castaneda, 25 I. & N. Dec. 188 (2010) (interim decision) (rejecting the holding of *Acosta v. Gonzales* and finding that those inadmissible under section 212(a)(9)(C)(i)(I) are therefore ineligible for adjustment of status under section 245(i)).

165. 453 F.3d at 1239.

166. *Id.*

1999.[167] Keisha filed a petition to adjust her husband's status and attain an immigrant visa for him in 2000.[168] Although INS ruled favorably on the petition, Padilla-Caldera had to leave the United States and go to Mexico to apply for a green card at the U.S. Consulate because the law at the time required that people who entered illegally apply for adjustment of status outside of the country.[169]

Because Padilla-Caldera had entered the United States without inspection and had remained in the country for over a year, he was inadmissible under the ten-year bar, even though the INS had ruled favorably on his petition in the United States.[170] The consular officer advised the couple to contact the INS in Denver to get an I-601 Waiver of Ground of Excludability, which is a waiver designed to apply to circumstances in which a person who is a U.S. citizen can demonstrate that denying his or her spouse permanent residency would cause extreme hardship.[171] Shortly after Keisha returned to Colorado to get money for the waiver fee, she became ill, and, on May 11, 2000, Padilla-Caldera re-entered without inspection to care for her.[172] Three days later, the INS detained Padilla-Caldera and found him removable under INA section 212(a)(6)(A)(i).[173] The INS released him on bond shortly after and he continued to live with his wife for three more years, during which time they had a child together.[174] On June 2, 2003, Padilla-Caldera was arrested at the ICE office.[175] The immigration judge initially intended to grant him the I-601 waiver, but the government argued that he was inadmissible under the first permanent bar and therefore a waiver was not available until ten years after his departure.[176]

Padilla-Caldera asserted that the LIFE Act should allow him to adjust his status.[177] However, even though Padilla-Caldera's wife had filed the petition before the April 2001 deadline, the immigration judge accepted the government's assertion that, because Padilla-Caldera was inadmissible under the first permanent bar, he was not eligible to benefit from the LIFE Act.[178] The BIA affirmed and Padilla-Caldera appealed to the Tenth Circuit Court of Appeals.[179]

The Tenth Circuit Court held that the first permanent bar and section 245(i) conflicted, but asserted that conflicting statutes may be resolved using the canons of statutory construction.[180] The canon the court employed was that courts should interpret conflicting statutes to give best effect to both, but should also consider subsequent amended statutes.[181] Thus, because the LIFE Act was enacted in 2000

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167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.* at 1240.
171. *Id.*
172. *Id.*
173. *Id.* The INA section 212(a)(6)(A)(i) bars undocumented immigrants who are present in the United States and have not been formally admitted or paroled. *Id.*
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.* The immigration judge asserted that because the LIFE Act indicates that only those who are otherwise admissible may adjust their status, Padilla-Caldera did not qualify. *Id.*
179. *Id.* at 1240–41.
180. *Id.* at 1241.
181. *Id.* (citing Smith v. Robinson, 468 U.S. 992, 1024 (1984)).

and IIRIRA was enacted in 1996, the court concluded that Congress intended that the LIFE Act should apply to undocumented immigrants deemed inadmissible under INA section 212(a)(9)(C)(i)(I).[182]

The court also considered the legislative history and policy reasons for passing section 245(i).[183] The court indicated that the members of Congress who supported the LIFE Act emphasized that the primary goal of the Act was to facilitate family reunification for people who had entered illegally and/or violated their status, but had otherwise "played by the rules."[184] Additionally, the court pointed out that another section of the LIFE Act grants the Attorney General the authority to "waive non-criminal grounds of inadmissibility 'to assure family unity.'"[185] Other grounds for waiver include when it serves humanitarian purposes or when it is otherwise in the public interest, including section 212(a)(9)(C)(i)(I).[186] Because the overall purpose of the Act is to benefit people who have entered illegally or violated their status, but have complied with the law in every other way, the court determined that Congress intended 245(i) to apply to people otherwise inadmissible under the first permanent bar.[187]

The government asserted that this conclusion was contrary to the Tenth Circuit's conclusion in *Berrum-Garcia v. Comfort*.[188] There, the court determined that an undocumented immigrant who has been deemed inadmissible under the second permanent bar could not adjust his status under the LIFE Act.[189] However, the court reasoned, under this second category of the permanent bar, a person is inadmissible if he or she has re-entered without inspection after departing under an order of removal, rather than simply after departing and re-entering.[190] The *Padilla-Caldera* court drew its reasoning for the distinction from another section of the INA that requires the reinstatement of a person's prior removal order if that person illegally re-enters the United States.[191] The court asserted that inadmissibility under the second permanent bar means that the person did not "play by the rules" because they violated a direct court order.[192] It was the unavailability of relief for those who have violated direct orders of removal that allowed the Court to distinguish the first permanent bar in *Padilla-Caldera* from the second permanent bar in *Berrum-Garcia*.[193]

The *Padilla-Caldera* court referred to an internal guidance memorandum issued by the INS in 1997, which indicated that people subject to the permanent bars are

182. *Id.* at 1242 (citing Watt v. Alaska, 451 U.S. 259 (1981)).
183. *Id.*
184. *Id.* (citing 146 Cong. Rec. S112 63-01 (daily ed. Oct. 27, 2000) (statement of Sen. Hatch)).
185. *Id.* (citing 8 U.S.C. § 1255(h)(2)(B) (2006)).
186. 8 U.S.C. § 1255(h)(2)(B)(most criminal and security related grounds under INA section 212 are excluded from this rule).
187. *Padilla-Caldera*, 453 F.3d at 1242.
188. *Id.* at 1243.
189. *Id.* (citing Berrum-Garcia v. Comfort, 390 F.3d 1158, 1164 (10th Cir. 2004)).
190. *Id.*
191. *Id.* The removal order cannot be re-opened and is not subject to review, and the person cannot apply for any relief under the INA. *Id.* (citing 8 U.S.C. § 1231(a)(5)).
192. *Id.*
193. *Id.*

inadmissible and ineligible to adjust their status.[194] However, the court did not find the INS's conclusion persuasive and asserted that it did "not owe rigorous deference to such determinations."[195] Declaring that the INS had no basis for such a determination, the court instead concluded that Congress clearly intended the LIFE Act to apply to people like Padilla-Caldera who have accumulated unlawful presence under the first permanent bar.[196] Thus, although the immigration judge and BIA both ruled against Padilla-Caldera and determined that the LIFE Act should not apply to undocumented immigrants subject to the permanent bar, the Tenth Circuit reversed the agency decision and held that Padilla-Caldera could apply for adjustment of status under the LIFE Act.

2. The BIA's Narrow Application of 245(i) in *Briones*

A year later, in *Briones*, the BIA came to a contrary decision, determining that inadmissibility due to the permanent bar made a person ineligible to adjust status under 245(i).[197] Alonzo Briones, a Mexican citizen, entered the United States without inspection in 1992.[198] While waiting for a visa to become available, Briones remained in the United States illegally until he went back to Mexico in December of 1998.[199] After a visa became available, Briones re-entered the United States without inspection on March 18, 1999, and filed an I-485 Application to Register Permanent Residence or Adjust Status under 245(i).[200] Although the initial petition in 1993 had been approved, his I-485 application was denied in 2004 on the basis that he was inadmissible under the first permanent bar.[201] Briones argued that inadmissibility under the first permanent bar did not preclude his status adjustment under 245(i), but the lower immigration judge disagreed and instead found him ineligible for a status adjustment.[202] Briones appealed the decision to the BIA.[203]

The BIA discussed the original intent of section 245(i)'s 1994 version, finding that it gave the Attorney General the ability to adjust the status of certain undocumented immigrants who had entered without inspection or violated their visa status and contrasted it with the intent of the post-IIRIRA extensions.[204] Briones asserted that because 245(i)(1)(A) specifically grants relief to people physically

194. *Id.* at 1244 (citing Memorandum from Louis D. Crocetti, Jr., INS Assoc. Comm'r, Office of Examinations, to INS Officials (May 1, 1997), *reprinted in* 2 BENDER'S IMMIGR. BULL. 450, 452 (June 1, 1997) [hereinafter Crocetti Memorandum]).

195. *Padilla-Caldera*, 453 F.3d at 1244; *see also* Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000) (stating that "[i]nterpretations such as those in letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference").

196. *Padilla-Caldera*, 453 F.3d at 1244.

197. *Briones*, 24 I. & N. Dec. 355, 370–71 (2007) (interim decision).

198. *Id.* at 356.

199. *Id.*

200. *Id.*

201. *Id.* at 356–57. Between April 1, 1997, when IIRIRA went into effect, and Briones' departure to Mexico in December 1998, Briones had been unlawfully present in the United States for more than one year. *Id.* at 358. His subsequent reentry in 1999 "without admission or parole after a prior period of unlawful presence . . . of more than one year" caused him to be inadmissible under the first permanent bar. *See id.* at 358.

202. *Id.* at 356–57.

203. *Id.*

204. *Id.* at 360.

present in the United States who entered without inspection, excluding people subject to the unlawful presence bars for unlawful entry would frustrate the purpose of 245(i).[205] Briones argued that if 245(i) did not apply to people who were inadmissible due to unlawful presence, then 245(i) would only apply to a very narrow and rare group of people who had entered unlawfully but had been in the United States less than 180 days.[206]

While the *Padilla-Caldera* court considered this narrow outcome as evidence that Congress intended the LIFE Act's extension of 245(i) to apply to the unlawful presence bars, the immigration judge and the BIA did not.[207] Instead, the BIA determined that because the unlawful presence bars had been enacted in 1996 as part of IIRIRA—two years after the original 245(i) in 1994—IIRIRA limited the scope of the LIFE Act's extension of 245(i).[208]

Briones also argued that INA section 212(a) provided a "savings clause" that allowed other sections of the Act to override certain inadmissibility grounds.[209] Citing a guidance memorandum that the INS issued in 1997 that directly contradicted Briones's rationale, the BIA disagreed with Briones's argument that the clause meant that 245(i) applied to 212(a)(9)(C)(i)(I).[210] The memorandum indicated that, although 245(i) would continue to apply to people otherwise inadmissible under 212(a)(6)(A)(i), it would not apply to people who had triggered the three-year, ten-year, and permanent bars under 212(a)(9)(B) and (C).[211] The BIA accepted the memorandum's reasoning, noting that the Ninth and Tenth Circuits rejected the reasoning put forth in the 1997 memorandum.[212] It asserted that the inclusion of 212(a)(6)(A)(i), but not 212(a)(9)(C)(i)(I), did not result in an absurd consequence as Briones argued, even though the group of people it applied to may be very narrow.[213] It drew its rationale for the distinction from the fact that, while 212(a)(6)(A)(i) applies to people who have only entered without inspection or overstayed their visas, 212(a)(9)(C)(i)(I) applies to a "recidivist" subset of those undocumented immigrants who departed the Unites States after accruing unlawful presence and then proceeded to re-enter or attempt to re-enter unlawfully.[214] It also asserted that in other sections of the INA, where Congress intended to override certain inadmissibility grounds, it used language that expressly negated the

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205. *Id.* at 362.

206. *Id.* at 362–63.

207. *Id.* at 362. *See generally* Padilla-Caldera v. Gonzales, 453 F.3d 1237 (10th Cir. 2005) (determining that 245(i) should apply to the unlawful presence bars in part because an alternative holding would result in too narrow of an application of 245(i)).

208. *See Briones*, 24 I. & N. Dec. at 363–64.

209. *Id.* at 364. The beginning of INA section 212 states that "aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States." 8 U.S.C. § 1182(a) (2006). Briones argued that the preceding clause, which stated that "[e]xcept as otherwise provided in this Act," meant that other sections of the Act could trump the inadmissibility grounds in section 212. *Briones*, 24 I. & N. Dec. at 364 (quoting 8 U.S.C. § 1182(a)).

210. *Id.* (citing Crocetti Memorandum, *supra* note 194, at 452).

211. *Id.* (citing Crocetti Memorandum, *supra* note 194, at 452). Section 212(a)(6)(A)(i) of the INA applies only to people who have entered without inspection or overstayed their visas, but have not yet triggered the unlawful presence bars. 8 U.S.C. § 1182(a)(6)(A)(i).

212. *Briones*, 24 I. & N. Dec. at 365.

213. *Id.*

214. *Id.*

applicability of the ground.[215] Consequently, it determined that exclusion of such specific language indicated that Congress did not intend 245(i) to apply to 212(a)(9)(C)(i)(I) violators generally.[216] Based on this rationale, the BIA determined that there was no reversible error in the immigration judge's opinion and dismissed the appeal.[217]

3. The USCIS 2009 Memorandum Adopting *Briones*' Rationale

Despite the Tenth Circuit's determination in *Padilla-Caldera* that an internal guidance memorandum does not merit strict deference, USCIS issued an interoffice Memorandum on May 6, 2009, stating that "inadmissibility under section 212(a)(9)(B) or (C) of the Act makes an alien ineligible for adjustment of status under section 245 of the [INA]."[218]

The 2009 memorandum indicates that Chapter 30.1 of the *Adjudicator's Field Manual* (AFM) consolidated USCIS's policies and guidance for immigration adjudicators relating to how a person may accrue unlawful presence and thus become inadmissible.[219] The 2009 memorandum reassigned Chapter 30.1 to Chapter 40.9 and modified and added guidance to what was Chapter 30.1.[220] Because the new Chapter 40.9 contains changes not formerly included in the AFM, the 2009 memorandum also rescinded four previously issued memoranda in their entirety and, in part, two memoranda that discussed INA sections 212(a)(9)(B) and (C).[221]

Chapter 40.9.2(a)(8)(C) of the AFM indicates that, contrary to the Tenth Circuit's holding in *Padilla-Caldera*, a person who is inadmissible pursuant to either INA sections 212(a)(9)(B) or (C) cannot adjust his or her status under 245(i).[222] The AFM demands that immigration adjudicators, including immigration judge and BIA members, follow *Briones* instead of *Padilla-Caldera* from the Tenth Circuit or *Acosta v. Gonzales* from the Ninth Circuit.[223] Although the memo does not explicitly indicate that it draws its authority from *Brand X*, immigration agencies have frequently cited *Brand X* as precedent that allows the agency to apply *Briones* even when it contradicts a previous circuit court decision.[224] Thus, the question becomes whether the memo and the change to the AFM constitute a valid use of agency authority under *Brand X* and *Chevron*. The following part applies the *Chevron* analysis to the interpretation USCIS put forth in the 2009 memorandum, breaking down each element of the three-part test. The part also draws

215. *Id.* at 367 (referring to laws enacted in 1997 and 1998 that allowed Cuban, Central American, and Haitian undocumented immigrants who had accumulated unlawful presence or engaged in unauthorized employment to adjust their status).

216. *Id.*

217. *Id.* at 371.

218. 2009 Memorandum, *supra* note 4, at 20.

219. 2009 Memorandum, *supra* note 4, at 1 (the 2009 Memorandum contains the AFM and thus subsequent citations to AFM will be cited to the appropriate page number in the 2009 Memorandum).

220. *Id.*

221. *Id.* at 1–2.

222. *Id.* at 20.

223. *Id.*

224. *See, e.g.*, Board of Immigration Appeals: Affirmance Without Opinion, referral for Panel Review, and Publication of Decisions as Precedents, 73 Fed. Reg. 34654, 34660–61 (proposed June 18, 2008) (8 C.F.R. 1003.1 (g), (e)(4)–(5) (2006)).

attention to the effect of the USCIS interpretation on the lives of hundreds of undocumented immigrants and their families.

IV. ANALYSIS

There are many legal, policy, and social problems with the adoption of the 2009 USCIS memorandum and the AFM's interpretation of the interaction between 245(i) and 212(a)(9)(C)(i)(I). Regardless of the social implications for undocumented immigrants and their families, courts in the Tenth Circuit should not follow *Briones* as the AFM and the 2009 memorandum assert they should, because *Chevron* and *Brand X* do not grant immigration courts the legal authority to do so. The policy put forth in the 2009 memorandum fails at each step of the *Chevron* analysis. Additionally, following *Briones* would have a tremendous negative impact on people and families that would otherwise have found relief under the *Padilla-Caldera* rule.

A. Inappropriate Application of Chevron *and* Brand X

1. Lack of Formality

The *Brand X* decision did not change the fundamental *Chevron* analysis. Although *Brand X* held that *Chevron* deference may apply to an agency interpretation even if there is already an on-point circuit court decision, it did not change the requirements the agency must meet before invoking the doctrine. As indicated in Part II, the preliminary step or "step zero" of the *Chevron* analysis is determining whether the agency acted with the requisite level of formality for the action to be considered binding law.[225] Only certain agency decisions qualify as binding law.[226] In *Chevron*, the EPA interpretation of the term "stationary source" had binding authority because it was a formally issued regulation.[227] Similarly, in *Brand X* the FCC's determination that cable companies are information services rather than telecommunications services had binding authority because it was a published FCC decision intended to have precedential value.[228] Conversely, the court in *Mead* held that United States Custom Service letter rulings did not merit *Chevron* deference because they could be issued and modified without notice and comment, thousands could be issued each year, and they had very limited precedential value.[229]

In the immigration context, only certain types of decisions by particular entities, including the BIA, the Attorney General, and the Secretary of Homeland Security, qualify as binding decisions.[230] Even among these three sources of binding authority, only certain decisions carry the force of law. For example, while published BIA

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225. *See supra* Part II.B.

226. *See, e.g.*, United States v. Mead Corp., 533 U.S. 218 (2001) (determining that letter rulings issued by the U.S. Customs Service were not binding law but were afforded some level of deference).

227. *See supra* note 44 and accompanying text.

228. *See supra* note 96 and accompanying text.

229. *See supra* Part II.B.

230. *See* 8 C.F.R. § 103.3(c) (2010). The Secretary of Homeland Security and the Attorney General or their designees can approve certain BIA decisions or other decisions for publication as binding precedent. *Id.* BIA and Attorney General decisions are binding on members of DHS and immigration judges, and BIA panel members may vote to determine whether a case becomes precedent for subsequent proceedings on that same issue or issues. 8 C.F.R. § 1003.1(g) (2010). By approval of the Attorney General, decisions by the Secretary of

decisions have binding precedential value, unpublished BIA decisions are neither binding on circuit courts nor on lower immigration courts.[231]

In addition, regulations dealing with immigration are published primarily under Title 8 of the Code of Federal Regulations.[232] The regulations have the force of law, in part because they must first be subjected to the notice and comment rulemaking procedure required under the APA.[233] Various immigration agencies also issue guidance in the form of memoranda and field guidance instructions, which do not carry the force of law because they have not been through the proper APA procedures.[234]

In *Mead*, the court compared non-binding customs letters to policy statements, agency manuals, and enforcement guidelines, and found that although the letters were persuasive, they were not binding precedent that warranted *Chevron* deference.[235] Similarly, the 2009 interoffice memorandum and the changes to the AFM fall directly in this category defined in *Mead* of agency interpretations that are persuasive, but lack the force of law.[236] The 2009 memorandum and its changes to the AFM provide policy guidance for immigration adjudicators;[237] while the guidance is persuasive authority, it is not binding on courts.[238] In circuits like the Tenth, where an appellate court has already decided the issue in a contrary way, the AFM and 2009 memorandum guidance may simply influence a circuit court's decision to maintain the *Padilla-Caldera* standard. Thus, district courts within the circuit are bound to adhere to their circuit court's law, not the policy offered by the AFM and 2009 memorandum.[239] Because only published BIA decisions and formally issued agency regulations may merit *Chevron* deference, the 2009 memorandum and the AFM do not reach steps one or two of the *Chevron* analysis and thus cannot be afforded *Chevron* deference.[240]

Not only must an interpretive decision be made by a person or entity with the authority to issue binding decisions, but the decision-maker must have also formally acted under that authority, invoking its gap-filling or ambiguity resolving

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Homeland Security may also be binding in the same way as BIA and Attorney General opinions. Id. § 1003.1(i).

231. *See Medrano*, 20 I. & N. Dec. 216, 220 (1991) (stating that decisions that the BIA does not designate as having precedential value are not binding on USCIS or immigration judges); *see also* United States v. Mead Corp., 533 U.S. 218, 233 (2001) (indicating that an administrative decision that only binds the parties in that specific incident and does not extend to third parties fails to carry the force of law).

232. *See* ALEINIKOFF ET AL., *supra* note 37, at 275.

233. *See id.*

234. *Id.*; *see also Mead*, 533 U.S. at 234 (citing Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000)) (suggesting that policy statements, agency manuals, and enforcement guidelines do not merit *Chevron* deference).

235. *Id.* at 234 (citing *Christensen*, 529 U.S. at 587).

236. *Id.* (stating that agency manuals and enforcement guidelines do not have the force of law).

237. 2009 Memorandum, *supra* note 4, at 1.

238. *See Mead*, 533 U.S. at 227, 234 (stating that agency interpretations that do not carry the force of law can still be persuasive).

239. *See* Hart v. Massanari, 266 F.3d 1155, 1171 (9th Cir. 2001) (stating that circuit court decisions are binding on all courts within that circuit, including the appeals court, unless overruled by the circuit court sitting en banc or by the Supreme Court).

240. *See, e.g.*, *Mead* 533 U.S. at 234 (holding that only certain agency decisions issued with sufficient process and authority may merit *Chevron* deference).

power.[241] Consequently, in order to invoke *Chevron* and *Brand X* analysis, the BIA must indicate that it is exercising its authority to interpret a statutory ambiguity by identifying the ambiguity it seeks to resolve.[242] If it asserts that it is applying the clear meaning of the law, then it is not interpreting an ambiguity that would implicate *Chevron* deference.[243] The *Briones* court based its decision on what it thought to be a clear reading of the statute at issue.[244] Because it did not identify an ambiguity that it was clarifying, the BIA failed to invoke the *Chevron* doctrine. This leads into step one of the test, an analysis of whether there is an ambiguity to be filled.

2. Lack of Ambiguity

The *Brand X* case did not change the *Chevron* analysis, but simply clarified that the *Chevron* doctrine may still apply where a circuit court has already made a ruling on an ambiguous issue in a statute.[245] In order for *Brand X* to apply, there must still be an ambiguity in the statute that would invoke the *Chevron* doctrine.[246] If the circuit court has ruled on a statute's meaning and found there to be no ambiguity, the vertical structure of the U.S. judicial system demands that lower courts, including administrative courts in that circuit, follow that ruling.[247]

As discussed in Part II.A, step one of the *Chevron* analysis looks to whether Congress's intent is clear or whether it has left an explicit or implicit gap for the appropriate agency to fill.[248] If Congress's intent is clear, lower courts and agencies must adhere to that intent, leaving no room for alternate agency interpretations.[249] Even if there was an agency decision with the requisite formality to overcome a circuit decision, *Padilla-Caldera* precludes the invocation of *Brand X* by finding, through the use of statutory construction, that the way that Congress intended 245(i) to apply to the permanent bar was not ambiguous.[250] Although the court identifies a conflict between 212(a)(9)(B) and (C) and 245(i), it resolves the conflict by considering Congress's intent in passing the LIFE Act and by implementing the canons of statutory construction.[251]

Caselaw interpreting and clarifying *Chevron* indicates that a court's use of canons of statutory construction does not necessarily mean that a statute is ambigu-

241. *See* Negusie v. Holder, 129 S.Ct. 1159, 1167 (2009) (remanding the case back to the BIA because the BIA did not exercise its interpretive authority under *Chevron* in its decision).

242. *See id.*

243. *See id*.

244. *Briones*, 24 I. & N. Dec. 355, 362–63 (2007) (interim decision); *see also infra* Part IV.A.2 (outlining the *Briones* case).

245. *See* Puentes Fernandez v. Keisler, 502 F.3d 337, 347–48 (4th Cir. 2007) ("*Brand X* in no way calls into doubt our many previous judicial interpretations that rested on the unambiguous words of the statute. *Chevron* step one remains *Chevron* step one after *Brand X*").

246. *See* Hart v. Massanari, 266 F.3d 1155, 1171 (9th Cir. 2001).

247. *See Hart*, 266 F.3d at 1171 (9th Cir. 2001) (stating that circuit court decisions are binding on all inferior courts within that circuit, and that they can only be overruled by the circuit court sitting en banc or by the Supreme Court).

248. *See supra* Part II.A.

249. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

250. *See* Padilla-Caldera v. Gonzales, 453 F.3d 1237, 1241–42 (10th Cir. 2005).

251. *Id.* at 1241–42; *see also supra* notes 178–184 and accompanying text.

ous.[252] Rather, a court may look to the purpose, history, and structure, as well as the plain text, in determining the meaning of a statute.[253] The *Chevron* court itself indicates that a court may employ traditional canons of statutory construction to arrive at a non-ambiguous conclusion. It asserts that:

> The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.[254]

Thus, the possibility for *Chevron* deference only occurs if the court's use of traditional tools of statutory construction fails to yield a clear intent.[255]

In *Padilla-Caldera*, the Tenth Circuit found that the traditional tools of statutory construction provided a clear indication of Congress's intent.[256] Looking at the order in which the statutes were passed, the social context of each statute, other related sections of the INA, and the information that was available regarding Congress's rationale for passing each section, the court determined that Congress meant for 245(i) to apply to undocumented immigrants who would otherwise be inadmissible under the unlawful presence bars.[257]

The *Briones* court failed to identify an ambiguity.[258] A BIA decision finding that the statute is clear precludes deference to that decision under *Chevron*, and the reviewing federal appellate court must consider the language of the statute de novo.[259] Even if the BIA asserts that a statute is ambiguous, a circuit court is not precluded from finding that the statute is, in fact, clear.[260] Since *Marbury v. Madison*, it has been undisputed that Article III courts "always retain the power to say 'what the law is.'"[261] Thus, a circuit court may determine that a statute is clear even when the BIA has held that it was ambiguous, and an ambiguity must exist for *Chevron* to be a relevant part of the analysis.[262]

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252. *See Chevron*, 467 U.S. at 843 n.9 (1984) ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."); General Dynamics Land Sys. Inc. v. Cline, 540 U.S. 581, 600 (2004) ("Even for an agency to claim all the authority possible under *Chevron*, deference to its statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent."); INS v. Cardoza-Fonseca, 480 U.S. 421, 446 (1987) ("The question whether Congress intended the two standards [under two statutes governing asylum applications] to be identical is a pure question of statutory construction for the courts to decide. Employing traditional tools of statutory construction, we [the court] have concluded that Congress did not intend the two standards to be identical.").

253. *See General Dynamics Land Sys. Inc.*, 540 U.S. at 600.

254. *Chevron*, 467 U.S. at 843 n.9 (citations omitted).

255. *See General Dynamics Land Systems Inc.*, 540 U.S. at 600.

256. 453 F.3d 1237, 1244 (10th Cir. 2006).

257. *Id.* at 1242–44.

258. *Briones*, 24 I. & N. Dec. 355, 369–70 (2007) (interim decision).

259. Manning, *supra* note 80, at 454.

260. *Id.*

261. *Id.* (quoting Marbury v. Madison, 5 U.S. 137, 177 (1803)).

262. This assertion is based on the idea that federal courts can overturn agency decisions when they are contrary to the clear meaning of the statute or unreasonable. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984) (asserting that "[t]he judiciary is the final authority on issues of statutory construction" and, therefore, must overturn agency decisions that contradict congressional intent).

In *Briones*, the BIA did not find that there was an ambiguity.[263] Instead, it resolved the conflict between 212(a)(9)(C) and 245(i) by looking at congressional intent and the history of each statute.[264] It employed a similar tool of statutory construction as did the court in *Padilla-Caldera*, but looked at different aspects of the history and came to the opposite result.[265] The fact that it came to an opposing result does not indicate that the statute is ambiguous, however, because it is for the federal courts, not an administrative court, to determine what the clear meaning of the statute is or whether there is an ambiguity.[266]

3. Unreasonable Interpretation of the Statute

If there is an ambiguity for the agency to fill, step two of the *Chevron* analysis looks to whether the agency's decision is a reasonable and permissible interpretation of the statute.[267] Generally, an agency interpretation is considered reasonable unless it is "arbitrary, capricious, or manifestly contrary to the statute."[268] As the *Padilla-Caldera* court and the respondent in *Briones* pointed out, a determination that 245(i) does not apply to 212(a)(9)(C)(i)(I) is unreasonable because it frustrates the intent of the LIFE Act.[269] Therefore, the interpretation offered in the 2009 memorandum would also fail at the second step of the *Chevron* analysis.

Congress enacted the LIFE Act to facilitate family reunification and expedite the immigration process for people with family members in the United States.[270] In particular, the purpose of the LIFE Act's extension of 245(i) was to reduce the immense negative impact of the unlawful presence bars.[271] Thus, the exclusion of people subject to the unlawful presence bars from section 245(i)'s relief would make the act only apply to a very narrow portion of the population affected by the bars. As the respondent in *Briones* argued, to exclude people subject to the unlawful presence bars from being able to adjust their status under 245(i) would mean that only people who had entered without inspection but applied for adjustment of status before crossing the 180-day mark would be eligible to adjust their status.[272] This would reduce the number of people who are eligible to a very narrow portion of the population and greatly reduce the effectiveness of the LIFE Act.[273]

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263. *Briones*, 24 I. & N. Dec. at 369–70; *see also supra* Part III.B.2.

264. *Briones*, 24 I. & N. Dec. at 363.

265. *Id.* at 363–65.

266. *See* Puentes Fernandez v. Keisler, 502 F.3d 337, 347–48 (4th Cir. 2007); *see also* Manning, *supra* note 80, at 443 ("Step one under *Chevron* [determining whether an ambiguity exists] plainly contemplates that Article III courts will engage in statutory interpretation.").

267. *See supra* Part II.A.

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

269. Padilla-Caldera v. Gonzales, 453 F.3d 1237, 1242 (10th Cir. 2005) (discussing the goal of the LIFE Act to facilitate family reunification for "*illegal* entrants and status violators who have *otherwise* 'played by the rules'" (citing 146 Cong. Rec. S112 63-01 (daily ed. Oct. 27, 2000) (statement of Sen. Hatch) (emphasis original)); *Briones*, 24 I. & N. Dec. 355, 364 (2007) (interim decision) (relating that Briones argued that his inadmissibility under section 212(a)(9)(C) "arises from the precise circumstance that section 245(i) was intended to forgive").

270. Buckman, *supra* note 151, § 2.

271. Lofgren, *supra* note 11, at 363.

272. *Briones*, 24 I. & N. Dec. at 364; *see also supra* Part III.B.1.

273. *See* Lofgren, *supra* note 11, at 363; *see also* James D. Kremer et al., *Severing a Lifeline: The Neglect of Citizen Children in America's Immigration Enforcement Policy* 73 (Jan. 19, 2010) (Dorsey and Whitman LLP to the Urban Institute 2009), http://www.dorsey.com/files/upload/DorseyProBono_SeveringLifeline_web.

Although the *Briones* court argued that IIRIRA changed the parameters of the original 245(i), the purpose of extending 245(i) in 2000 was in part a reaction to the negative impact of the unlawful presence bars.[274] Therefore, any interpretation of the statute that excludes violators of the first permanent bar appears to run directly contrary to the intention of the LIFE Act.

B. Policy and Social Reasons for Not Following Briones

There has been criticism of the unlawful presence bars in general for inhibiting family reunification without having an effective impact on discouraging immigration violations.[275] Additionally, there are benefits to families and U.S. society as a whole that will derive from applying 245(i) to the unlawful presence bars.[276]

The separation of families caused by the unlawful presence bars has detrimental effects on families. Due to challenges in tracking the exact number of undocumented immigrants, it is difficult to determine precisely how much of an impact the unlawful presence bars have had on increasing family separation since their enactment.[277] However, several studies indicate that the bars have forced many families, including those with family members who are U.S. citizens, to make tough choices between family unity and economic and educational advantages.[278] In 2005, an estimated 14.6 million people, including citizen relatives of undocumented immigrants, were in mixed status families.[279] Recent studies estimate that of the five million children of undocumented immigrants in the United States, three million are U.S. citizens.[280] DHS determined that more than 100,000 parents of U.S. citizen children had been removed between 1998 and 2007.[281] Consequently, the unlawful

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pdf ("[T]he vast majority of undocumented immigrants entered the U.S. without inspection and remained here for more than one year").

274. *See* Lofgren, *supra* note 11, at 363 ("Congress voted several times to extend section 245(i), to temporarily avert the problem of the 3/10-year bar.").

275. *See, e.g.*, Emma O. Guzmán, *The Dynamics of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996: The Splitting-Up of American Families*, 2 THE SCHOLAR 95, 104–05, 117–118 (2000) (discussing how IIRIRA split up families and resulted in de facto deportation of citizen children); Mercer, *supra* note 118, at 294, 301 (noting how the unlawful presence bars cause separation of spouses and how section 245(i) has had a successful, though temporary, impact in mitigating the effects).

276. *See infra* notes 296–305 and accompanying text.

277. *See* Mercer, *supra* note 118, at 313; MICHAEL HOEFER ET AL., OFFICE OF IMMIGRATION STATISTICS, DEPARTMENT OF HOMELAND SECURITY, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2009 2, *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2009.pdf (last visited Dec. 20, 2010) (estimating the numbers of undocumented immigrants in the United States and pointing out the factors that inhibit the ability to make precise calculations).

278. *See, e.g.*, Guzmán, *supra* note 275, at 2 (discussing the effects of IIRIRA and 245(i) on U.S. citizen children with undocumented parents); Lee A. Webb, *A Nation that Values Family, Except When A Family Member is Foreign: An Overview of Proposed Changes in Immigration Law and Their Devastating Effects on Many U.S. Families*, 35 U. LOUISVILLE J. FAM. L. 795, 796 (1997) (discussing the problems generally associated with increasing restrictions on admissibility and adjusting status).

279. JEFFREY S. PASSEL, PEW HISPANIC CTR., THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S.: ESTIMATES BASED ON THE MARCH 2005 CURRENT POPULATION SURVEY 7 (2006), *available at* http://pewhispanic.org/files/reports/61.pdf (last visited Dec. 20, 2010). "Mixed status families" refers to either couples in which one spouse is undocumented or families with children where one or both parents are undocumented and at least one child is a U.S. citizen. *Id.* at 7.

280. KREMER, *supra* note 273, at 1.

281. OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF HOMELAND SECURITY, OIG-09-15, REMOVALS INVOLVING ILLEGAL ALIEN PARENTS OF UNITED STATES CITIZEN CHILDREN 5 (2009), *available at* http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_09-15_Jan09.pdf (last visited Dec. 20, 2010). It is likely that the number is even higher than reported because documenting such information is voluntary, many people do not

presence bars and other inadmissibility and removal grounds frequently result in the separation of U.S. citizen children from their undocumented parents.[282]

When one or both of the parents are barred from the United States due to unlawful presence, children face de facto deportation if they choose to leave their country of citizenship to be with their parents, or life without their parents in the custody of other relatives or the state.[283] Parents must make the difficult decision of what is in their child's best interest: family unity in their home country or better educational and economic opportunities provided by leaving their children behind in the United States.[284] Citizen spouses also face de facto deportation and must decide if they want to give up the economic and educational benefits and comfort of their home country to be with their spouses outside the United States.[285] Many children have never been to their parent(s)' home country and do not speak that country's traditional language, which means that they face the turmoil of being torn from a home environment regardless of whether they stay or go.[286]

The impact of family separation has profound negative effects on the individual families affected, as well as on U.S. society as a whole. Children that stay in the United States after their parents' deportation frequently live with other family members, and may even end up in foster homes.[287] This not only results in hardship for the children, but also increases pressure on the already stretched foster care system.[288] Additionally, even if only one parent is removed or unable to re-enter the United States, the remaining parent "is more likely to need public assistance to care for [his/her] children."[289] Consequently, mixed status families face negative consequences that are borne by the family itself as well as society as a whole.

In addition, the alternative—allowing undocumented immigrants' adjustment to legal permanent resident status—would mean that the immigrants would have greater labor mobility, which would increase their ability to make greater contributions to the economy in the form of increased tax revenue and wages.[290] In fact, undocumented immigrants are more likely to earn incomes below the poverty line because of limitations on their labor mobility.[291] Thus, not only would adjustment of status benefit individual families by giving them the ability to stay together and increase their earnings, but there are also benefits to the U.S. economy, as families

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report having children for fear that their family members will get in trouble, and because the data does not include parents who may have been apprehended at the border. *Id.* 6–7.

282. *See, e.g.*, Stephen H. Legomsky, *Portraits of the Undocumented Immigrant: A Dialogue*, 44 GEORGIA L. REV. 65, 85–86 (2009) (discussing how the deportation of a parent puts him or her in an impossible bind because either their child is de facto deported or the child must be left behind).

283. *See* Guzmán, *supra* note 275, at 117–18; Legomsky, *supra* note 282, at 85–86.

284. *See, e.g.*, KREMER, *supra* note 273, at 81–84 (providing individual examples of families that have been separated).

285. *See* Mercer, *supra* note 118, at 314–18.

286. *See, e.g.,* KREMER, *supra* note 273, at 82–84 (providing examples of children who have to leave their homes in the United States because one or both of their parents has been deported and the consequences of their departure).

287. *Id.* at 118.

288. *See* Guzmán, *supra* note 275, at 118 (describing how family separation can result in children ending up in the foster care system); *Putting families first: Children are being taken into care too quickly and for too long*, THE ECONOMIST, Nov. 24, 2005, *available at* http://www.economist.com/node/5220612 (last visited Dec. 20, 2010) (discussing the shortage of case workers, budget cuts, and high numbers of children in foster care).

289. Mercer, *supra* note 118, at 318.

290. *See id.* at 314–16.

291. *Id.* at 315.

are probably more likely to contribute to the economy and less likely to rely on the government for support. Pursuing a policy that encourages legalization could also improve wages and working conditions by undercutting the market for undocumented workers who are more vulnerable to exploitation.[292]

People who entered the United States without inspection face a "catch-22" where leaving the country could trigger one of the unlawful presence bars, but remaining in the United States increases the penalty they face for being unlawfully present.[293] Facing the choice between risking detection in the United States and almost certainly being barred from the entry if they left or applied for adjustment, many people choose to remain unlawfully in the United States; consequently "[i]nstead of encouraging unauthorized foreign nationals to return home, the 3/10-year bar work[s] to encourage people to stay even longer in unauthorized status."[294] Rather than discouraging people from entering unlawfully or overstaying, the bars discourage people from leaving the United States or from seeking adjustment for fear of not being able to return.[295]

Section 245(i) was one attempt by Congress to take the interests of these immigrants and their families into account. Section 245(i) can provide significant benefits to families with undocumented family members as well as on the U.S. immigration system and society in general. This is because it could allow people who have been unlawfully present but otherwise compliant with the law to adjust their status while still living in the United States, thus preventing the detrimental effects of separation.[296]

Reports indicate that 245(i) generated significant revenue from fines it imposed on applicants' adjustment of status applications.[297] During the first five months of 245(i)'s enactment, the INS gained $49.1 million in revenue, which comprised eighty percent of the revenue gained from all adjustment of status applications.[298] The money from adjustment fees goes into the Immigration Examinations Fee Account, which then goes toward expenses for immigration adjudication, naturalization services, administrative costs for fee collection, and providing service to those who are exempt from the fee.[299] In addition to the revenue accrued, 245(i) also saved the State Department almost five-million dollars by reducing the workload

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292. *See* Legomsky, *supra* note 282, at 101.

293. Lofgren, *supra* note 11, at 361.

294. *Id.*

295. *See* Lofgren, *supra* note 11, at 363; Michael E. Piston, *Why You Don't Dare Go Home Again—The Insidious Impact of Unlawful Presence*, *in* IMMIGRATION & NATIONALITY LAW HANDBOOK 2009-10-441, 523 (Am. Immigration Lawyers Ass'n, 2009-2010).

296. *See supra* notes 283–289 and accompanying text.

297. U.S. GENERAL ACCOUNTING OFFICE, GAO/GGD-95-162FS, INS INFORMATION ON ALIENS APPLYING FOR PERMANENT RESIDENT STATUS 4 (1995), *available at* http://archive.gao.gov/t2pbat1/154380.pdf (last visited Dec. 20, 2010) [hereinafter GAO report]. This report uses data compiled by the INS and outlines the number of people applying for legal permanent resident status under 245(i) from October 1994 through February 1995, the revenue resulting from the applications, the denial rate, and the impact on the INS. *Id.* at 1–2. There are no comparable studies by the U.S. General Accounting Office on the effects of the later extensions of 245(i), so the numbers may not accurately represent current numbers, though the trends are likely similar, based on the fact that the only changes to 245(i) when it was extended were the expiration date and the amount of the fine.

298. *Id.* at 4.

299. *Id.* at 2; *see also* 8 U.S.C. § 1356(m) (2006) (indicating the use of fee revenue should be high enough to cover the administrative and service costs to people who are fee exempt such as asylum applicants).

by approximately twenty-five percent.[300] About forty-five percent of the people applying for adjustment of status were applying under 245(i), suggesting that there was a significant need for the program.[301] Thus, section 245(i) and the fine it imposes provided a way to punish people for violating immigration laws and accruing unlawful presence while still promoting family unity.

The lack of review of most immigration decisions exacerbates the problem for people who have accrued unlawful presence under the *Briones* and 2009 memorandum rules.[302] This is in part because of courts' reluctance to question agency interpretations of congressional and executive action on immigration issues.[303] This reluctance largely comes from the determination early in U.S. history that Congress "possessed the complete authority to determine immigration policies" based on the plenary power derived from Article I, Section 8, of the Constitution.[304] Another factor is that many undocumented immigrants lack the financial resources to pursue an appeal.[305] Furthermore, the classification of immigration violations as civil rather than criminal means that immigrants do not have a constitutional right to government-appointed counsel.[306] Consequently, many immigrants cannot afford legal representation, especially for the multiple appeals necessary to bring an immigration judge's decision before a federal court.[307] The BIA's adoption of the 2009 memorandum is particularly problematic for immigrants seeking to adjust their status, given the limited appellate court review of immigration cases. Even if an undocumented immigrant should be able to adjust his or her status under 245(i), it is unlikely that that immigrant's case will reach the circuit court; thus, the immigration judge, following the rule set forth in the 2009 memorandum, may rule against the person, but the person may not have the resources or the opportunity to appeal to the BIA, let alone to the circuit court.

V. CONCLUSION

Although *Brand X* extended the *Chevron* doctrine to apply to agency interpretations that contradict previously determined federal appellate court cases, it did not change *Chevron* to signify that *any* agency decision warrants deference.[308] *Brand X* was not a revolutionary change of the *Chevron* doctrine and left the steps required to invoke the doctrine untouched.[309] Despite USCIS's assertion that im-

300. LARRY M. EIG & WILLIAM J. KROUSE, CONG. RESEARCH SERV., 97-946 A, IMMIGRATION: ADJUSTMENT TO PERMANENT RESIDENT STATUS UNDER SECTION 245(I) 3 (1998).

301. GAO report, *supra* note 297, at 2.

302. *See* Piston, *supra* note 295, at 536; Quinn H. Vandenberg, *How Can the United States Rectify Its Post-9/11 Stance on Noncitizens' Rights?*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 605, 616 (2004).

303. Vandenberg, *supra* note 302, at 608–10.

304. *Id.* at 609 (citing Chae Chan Ping v. United States, 130 U.S. 581 (1889)).

305. *See* John P. Stern, *Applying the Equal Access to Justice Act to Asylum Hearings*, 97 YALE L.J. 1459, 1470 (1988) (discussing how a lack of resources to pay for an attorney and pursue appeal results in many applicants not being represented and discouraging appeals).

306. Vandenberg, *supra* note 302, at 611, 614; *see also* 8 U.S.C. § 1362 (2006) (providing that people in removal proceedings or appeals of those proceedings before the Attorney General have a right to counsel, but not to counsel paid for by the government).

307. *See* ALEINIKOFF ET AL., *supra* note 37, at 292–93 (outlining the necessary process for immigrants to exhaust their administrative remedies before they can appeal to federal circuit court); 8 U.S.C. § 1252 (2006) (giving the laws that govern the procedure for attaining judicial review).

308. *See supra* Part II.C.

309. *See supra* Part II.C.

migration adjudicators should follow *Briones* and disregard circuit court law with a contrary holding, the 2009 memorandum did not have the requisite formality and procedure to warrant such deference.[310] Additionally, *Brand X* did not alter the requirement that the statute has to be ambiguous in order for *Chevron* to apply, and even where an agency interpretation meets the formality requirement of "step zero," a federal circuit court finding that a statute is unambiguous still precludes deference to that interpretation.[311] Finally, in light of the purpose of 245(i) and the limited number of people it would apply to under the *Briones* decision, not using 245(i) with the permanent bar rule is an unreasonable interpretation of the interaction between 245(i) and the unlawful presence bar statutes.[312]

The unlawful presence bars impose harsh costs on the families of undocumented immigrants and force families to make difficult choices between economic needs and family unity. In the short term, a clarification of the rules of *Chevron* and *Brand X* and how they interact with immigration agencies and the federal court system is necessary to ensure that immigrants' cases are decided according to correct law. Although this will not protect families in circuits where the courts have determined that 245(i) does not apply to the 212(a)(9)(C)(i)(I) permanent bar, it will protect families in the Tenth Circuit, which has held that the section does apply. The circuit split would then hopefully be resolved, in favor of applying 245(i) to the unlawful presence bar, either by the Supreme Court or by congressional action that would clarify the meaning of the statutes. Because the deadline to apply under 245(i)—April 30, 2001—has already passed, any clarifications in the law will only help people who have already applied for legal permanent resident status under 245(i) and whose cases are still pending.[313]

Ultimately, there needs to be a more permanent solution to the problem. Congress has voted on making 245(i) permanent, but while the Senate strongly supported it as a part of the Commerce, Justice, State, Judiciary, and Related Agencies Appropriations Act of 1998, the House voted against even extending 245(i).[314] For both revenue purposes, and for the purpose of facilitating family unification, 245(i) should be extended in some form and/or the unlawful presence bars should be revoked. This type of long-term solution is necessary to best deal with the harsh effects of the current system.

In light of the negative effects on immigrants and their families, as well as the fact that the 2009 memorandum fails at every step of the *Chevron* analysis, it is clear that USCIS's memorandum is an inappropriate application of *Brand X* and the *Chevron* doctrine. It is not the place of the agency to determine the scope of its own power; rather, it is the courts' role to determine when a statute leaves space for agency interpretation. Consequently, immigration adjudicators in the Tenth Circuit should follow the law as set out in *Padilla-Caldera* until Congress or the Supreme Court resolve the issue, preferably in favor of a broad application of 245(i).

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310. *See supra* Part IV.A.1.
311. *See supra* Part IV.A.2.
312. *See supra* Part IV.A.3.
313. *See supra* note 159 and accompanying text.
314. *See* S. Rep. No. 105-48, at 32 (1997) (indicating that the purpose of the Act was, in part, to deal with funding problems and other shortcomings of the immigration process); Mercer, *supra* note 118, at 301–302.