No. 04-948

In the Supreme Court of the United States

RASHMIKA PATEL, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that former 8 U.S.C. 1105a(c) (1994) divested the court of jurisdiction to review petitioner's deportation order because petitioner had departed the United States.

2. Whether the court of appeals was required to provide for an evidentiary hearing on the circumstances of petitioner's departure from the United States.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A6) is reported at 378 F.3d 310. The orders of the Board of Immigration Appeals (Pet. App. A9-A12) and the decision of the immigration judge (Pet. App. A13-A17) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 2004. A petition for rehearing was denied on October 12, 2004 (Pet. App. A1). The petition for a writ of certiorari was filed on January 10, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This deportation case is governed by the transitional rules enacted by the Illegal Immigration Reform

and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546. Those transitional rules govern judicial review of final orders of deportation entered on or after October 30, 1996, where the deportation proceedings commenced before April 1, 1997. See IIRIRA § 309(c)(4), 110 Stat. 3009-626.

Judicial review in cases governed by the transitional rules is subject to former Section 106(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1105a(c) (1994), which provided that "[a]n order of deportation or of exclusion shall not be reviewed by any court if the alien * * * has departed from the United States after the issuance of the order." IIRIRA repealed that restriction on judicial review for cases in which the removal proceedings began after April 1, 1997. As a result of the statutory change, an alien's departure from the United States no longer divests the court of appeals of jurisdiction to review an order of removal. See 8 U.S.C. 1252(a) and (d); IIRIRA § 306(b), 110 Stat. 3009-612 (repealing former 8 U.S.C. 1105a).

2. Petitioner Rashmika Patel is a native and citizen of India. She entered the United States on September 19, 1995, at New York, New York, without a valid immigrant visa or a valid entry document. On February 1, 1997, the Immigration and Naturalization Service (INS) initiated deportation proceedings in the immigration court through the filing of an Order to Show Cause (OSC), charging that petitioner was not in possession of a valid entry document. Pet. App. A13.[1]

[1] On March 1, 2003, the INS ceased to exist as an agency within the Department of Justice and its enforcement functions were transferred to the Department of Homeland Security (DHS). Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135. This brief continues

On March 10, 1998, and May 19, 1998, petitioner and her counsel appeared before the immigration court. At the May 19, 1998, hearing, petitioner admitted the factual allegations in the OSC and conceded that she was deportable. Petitioner and her counsel were informed of the date of the next scheduled hearing, August 21, 1998, and petitioner was informed orally and in writing of the consequences of her failure to appear at the next hearing. Petitioner nonetheless failed to appear for her hearing on August 21, 1998. On that date, she was ordered *in absentia* to be deported from the United States. Pet. App. A13-A14.[2]

3. Almost five years later, on July 31, 2003, petitioner filed a motion to reopen her immigration proceedings. Pet. App. A14. On August 26, 2003, the immigration judge denied the motion because it had been filed beyond the 180-day time limit for such motions, and because petitioner in any event had failed to demonstrate that her failure to appear at the August 21, 1998, hearing was due to exceptional circumstances. *Id.* at A15-A16.

Petitioner appealed to the Board of Immigration Appeals (Board). She also filed a motion with the Board seeking to reopen her immigration proceedings in order to permit her to apply for adjustment of status. On January 2, 2004, the Board dismissed petitioner's appeal and denied her motion to reopen. Pet. App. A10-A12. With respect to petitioner's motion to reopen, the Board

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to refer to the INS with respect to the events that predated the reorganization.

[2] Before IIRIRA took effect, the INA provided separately for "deportation" and "exclusion" of aliens. In IIRIRA, Congress combined the two procedures under the common heading of "removal proceedings." See 8 U.S.C. 1229a.

found that petitioner did not satisfy the requirements for reopening of the proceedings to apply for adjustment of status because she had failed to submit an application for adjustment of status with her motion and had failed to file her motion within the applicable time limit of 90 days. *Id.* at A12. With respect to petitioner's appeal, the Board found that petitioner was not entitled to rescission of the *in absentia* deportation order entered against her because she had failed to demonstrate exceptional circumstances excusing her failure to appear at the August 21, 1998, hearing. *Ibid.*

The Board's order ended petitioner's administrative appeal process, and she thus was no longer subject to an administrative stay of deportation. See Pet. App. A3-A4; 8 C.F.R. 1003.23(b)(4)(iii)(A) and (C); see also 8 C.F.R. 241.33(b), 1003.2(f) (providing for execution of an order of deportation after 72 hours from time of service of decision). On February 26, 2004, the Board denied a motion filed by petitioner for reconsideration of the January 2, 2004, order. Pet. App. A9.[3]

4. On February 2, 2004, petitioner filed a petition for review in the court of appeals, but she did not concurrently request the court of appeals to stay her deportation. On February 27, 2004, at 7:45 a.m., the Department of Homeland Security (DHS), to which the

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[3] Motions to reopen and motions for reconsideration ordinarily do not stay deportation. See 8 C.F.R. 1003.2(f). One exception arises when an alien moves an immigration court to reopen an *in absentia* order, and pending any appeal to the Board of the denial of such a motion. See 8 C.F.R. 1003.23(b)(1)(v). Petitioner, however, filed a motion for reconsideration of the Board's own final order, rather than a motion to reopen, and she did not seek a stay of deportation in conjunction with her motion for reconsideration. Accordingly, petitioner's motion did not stay her deportation. See Pet. App. A3-A4.

enforcement responsibilities of the former INS have been transferred (see note 1, *supra*), moved petitioner to a "staging facility" for deportation. Petitioner's attorney was aware of her movement to a staging facility, but did not request a stay of deportation until some time after 3:00 p.m. At 3:50 p.m., the court of appeals granted a stay of deportation and informed the DHS of the court's action. That information was relayed within minutes to a DHS officer who had accompanied petitioner to the airport for placement on a commercial flight to India; but by that time, petitioner's flight had already departed. Pet. App. A2-A3.

The court of appeals, relying on former 8 U.S.C. 1105a(c) (1994), dismissed petitioner's appeal for lack of jurisdiction because petitioner was no longer in the country. Pet. App. A2-A6; see p. 2, *supra*. The court explained that petitioner was subject to removal from the United States upon entry of the original deportation order in 1998, and that "the long delay in asking [the] court for a stay was a serious error by her lawyer." Pet. App. A3. The court noted that the filing of a petition for review of the Board's January 2, 2004, order did not stay petitioner's removal from the country. The court further explained that petitioner's filing of a motion for reconsideration with the Board likewise did not stay her removal. *Id.* at A3-A4.

The court of appeals then considered whether, despite petitioner's departure, the court could retain jurisdiction over the case because petitioner was removed after the court had entered a stay. Pet. App. A4-A5. The court concluded that it would retain jurisdiction if the government had deliberately disobeyed a court-ordered stay of deportation. The court found, however, that "there was no willfulness on the part of the govern-

ment in this case—to the contrary, the violation of the stay was technical and inadvertent, the stay having been issued too late to be communicated to the airline in time to stop the departure." *Id.* at A5. The court therefore concluded that petitioner "should not be allowed to gain a procedural advantage from the action of her lawyer in dawdling about seeking a stay of the original removal order." *Id.* at A5-A6.

ARGUMENT

1. Petitioner argues (Pet. 7-11) that the court of appeals erred in concluding that former 8 U.S.C. 1105a(c) divested the court of jurisdiction over her petition for review because she was no longer in the United States. Petitioner's claim lacks merit and does not warrant review.

a. The court of appeals' dismissal of the petition for review under former 8 U.S.C. 1105a(c) does not warrant this Court's review for the threshold reason that the decision has limited and diminishing prospective significance. Former Section 1105a(c) applies only to cases that are subject to IIRIRA's transitional rules, *i.e.*, cases where the alien was placed in deportation proceedings before April 1, 1997, and for whom a final order of removal was issued after October 30, 1996. See IIRIRA §§ 309(a)-(c), 110 Stat. 3009-625 to 3009-626. Aliens whose removal proceedings commenced after IIRIRA's effective date of April 1, 1997, are not subject to former Section 1105a(c). See IIRIRA § 306(b), 110 Stat. 3009-612; IIRIRA § 309(c)(4), 110 Stat. 3009-626. For such aliens, accordingly, the courts of appeals retain jurisdiction to review a removal order notwithstanding the alien's departure from the United States.

See, *e.g.*, *Robledo-Gonzalez* v. *Ashcroft*, 342 F.3d 667, 674 n.7 (7th Cir. 2003).

The court of appeals therefore observed in its opinion that its jurisdictional holding applied "only for cases governed either by the transitional rules or by the Immigration and Nationality Act as it stood before IIRIRA was enacted." Pet. App. A4. Because the court of appeals' jurisdictional holding affects only deportation cases commenced eight or more years ago, it has limited and diminishing prospective significance. There accordingly is no warrant for granting review.

b. Even with respect to cases in which the removal proceedings began before April 1, 1997—and that therefore are subject to IIRIRA's transitional rules—there is no square conflict on whether, in circumstances such as those presented by this case, an alien's deportation notwithstanding a court-ordered stay divests a court of appeals of jurisdiction over a petition for review. Former Section 1105a(c) provided that "[a]n order of deportation or of exclusion shall not be reviewed by any court if the alien * * * has departed from the United States after issuance of the order." 8 U.S.C. 1105a(c) (1994). Contrary to petitioner's argument (Pet. 7-8), there is no "principled way to interpret the word 'departed' as failing to encompass the most relevant type of departures —involuntary departures by way of deportation." *Baez* v. *INS*, 41 F.3d 19, 24 (1st Cir. 1994), cert. denied, 515 U.S. 1158 (1995). Although some courts determined that former Section 1105a(c) did not bar the exercise of jurisdiction where the departure was carried out in violation of the alien's due process rights, see *id.* at 23 (citing cases), petitioner identifies no decision holding that jurisdiction would exist in the factual circumstances of this case.

Petitioner's reliance (Pet. 7-8) on *Camacho-Bordes* v. *INS*, 33 F.3d 26 (8th Cir. 1994), is misplaced, as that case did not involve an alien who was deported in violation of a judicial stay. Instead, the alien in that case was lawfully deported after the court of appeals had dissolved a temporary stay. See *id.* at 27. The court concluded that it would retain jurisdiction to review an order of deportation under former 8 U.S.C. 1105a, notwithstanding the alien's deportation, if the record revealed a colorable due process claim in connection with the underlying deportation proceedings. But the court concluded on the facts of the case that it lacked jurisdiction because the alien had failed to assert a colorable claim that his deportation proceedings infringed his due process rights. *Camacho-Bordes*, 33 F.3d at 28. The court did not hold or indicate that it would have had jurisdiction in the circumstances of this case, where an alien was deported in "technical and inadvertent" violation of a court-ordered stay. Pet. App. A5.[4]

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[4] Petitioner suggests (Pet. 10-11) that she has a colorable due process claim because the government failed to notify counsel that she was to be deported. Petitioner acknowledges, however, that she was "detained and eligible for deportation in light of the final order entered by the Board of Immigration Appeals on January 2, 2004." Pet. 2. The court of appeals observed that "the long delay in asking this court for a stay was a serious error by her lawyer." Pet. App. 3A. The court also observed that counsel was aware at 7:45 a.m., on February 27, 2004, that petitioner had been moved to a staging facility for removal, and that petitioner "should not be allowed to gain a procedural advantage from the action of her lawyer in dawdling about seeking a stay of the original removal order." *Id.* at A2, A5-A6. Cf. *Wainwright* v. *Torna*, 455 U.S. 586, 588 n.4 (1982) (noting that private counsel's actions cannot alone give rise to a due process violation because "[s]uch deprivation —even if implicating a due process interest—was caused by his counsel, and not by the State").

Petitioner also errs in arguing (Pet. 8-10) that the decision below conflicts with *Singh* v. *Waters*, 87 F.3d 346 (9th Cir. 1996). In that case, the alien was deported in violation of a stay issued by an immigration judge, not the court of appeals. The court of appeals ruled that the district court retained jurisdiction over the alien's petition for a writ of habeas corpus, notwithstanding the alien's deportation, because the deportation was unlawful in two respects: (i) the agency did not comply with the immigration court's stay and gave "[n]o reason" for its noncompliance; and (ii) the INS "effectively scuttled the right to counsel guaranteed to" the alien by failing to inform the alien's counsel that it possessed the alien's file, thereby preventing counsel "from seeking a stay of deportation in an orderly way." *Id.* at 349.

In a subsequent case, the Ninth Circuit described *Singh* as supporting jurisdiction only "under extreme circumstances" where "the INS removed an immigrant 'in violation of the immigration judge's order and after interference with his right to counsel.'" *Miranda* v. *Reno*, 238 F.3d 1156, 1159, cert. denied, 534 U.S. 1018 (2001) (quoting *Singh*, 87 F.3d at 349). This case does not involve "extreme circumstances" of that sort. Instead, as the court of appeals explained, "there was no willfulness on the part of the government in this case—on the contrary, the violation of the stay was technical and inadvertent." Pet. App. A5.

2. Petitioner argues (Pet. 12-17) that the court of appeals was required to provide for an evidentiary hearing on the precise circumstances surrounding her removal. That fact-bound contention lacks merit and does not warrant review.

As an initial matter, petitioner has no due process right to an evidentiary hearing concerning her removal. Petitioner has never held a legal status in the United States, and she conceded in her hearing on May 19, 1998, that she was deportable. Although petitioner later sought to reopen her immigration proceedings to permit her to seek an adjustment of status, an alien has no constitutionally-protected liberty interest in discretionary immigration relief such as an adjustment of status.[5] Petitioner's recourse, like that of all aliens outside the United States seeking admission, is to submit a visa application with the appropriate United States consular office abroad.

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[5] See, *e.g.*, *Jupiter* v. *Ashcroft*, 396 F.3d 487, 492 (1st Cir. 2005) (due process claim rejected because aliens have no liberty interest in adjustment of status or voluntary departure); *Tovar-Landin* v. *Ashcroft*, 361 F.3d 1164, 1166-1167 (9th Cir. 2004) ("aliens have no fundamental right to discretionary relief from removal for purposes of due process and equal protection"); *United States* v. *Torres*, 383 F.3d 92, 104-106 (3d Cir. 2004) (finding that alien had no liberty interest in receiving or being considered for Section 212(c) relief, because it is "entirely a piece of legislative grace, . . . convey[ing] no rights [and] no status") (quoting *United States* v. *Lopez-Ortiz*, 313 F.3d 225, 231 (5th Cir. 2002), cert. denied, 537 U.S. 1135 (2003)); *Mireles-Valdez* v. *Ashcroft*, 349 F.3d 213, 219 (5th Cir. 2003) ("Eligibility for discretionary relief from a removal order is not a liberty or property interest warranting due process protection."); *Nativi-Gomez* v. *Ashcroft*, 344 F.3d 805, 809 (8th Cir. 2003) ("The failure to receive discretionary adjustment-of-status relief does not constitute the deprivation of a constitutionally-protected liberty interest."); *Tefel* v. *Reno*, 180 F.3d 1286, 1300 (11th Cir. 1999) ("a constitutionally protected interest cannot arise from relief that the executive exercises unfettered discretion to award"), cert. denied, 530 U.S. 1228 (2000); *Achacoso-Sanchez* v. *INS*, 779 F.2d 1260, 1264 (7th Cir. 1985) (no liberty interest in adjustment of status).

Moreover, petitioner does not explain how her due process claim could affect the Board's conclusion that she is deportable and is ineligible for an adjustment of status. She provides no basis for concluding that the Board erred in declining to reconsider its initial ruling that she was not entitled to reopen her removal proceedings because her motion was untimely and because she had failed to demonstrate exceptional circumstances excusing her failure to appear at her hearing on August 21, 1998. See Pet. App. A12.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2005