No. 04-1038

In the Supreme Court of the United States

RAJINDER SINGH, AKA SATINGER SINGH, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Board of Immigration Appeals correctly ruled that petitioner was ineligible to apply for adjustment of status in his removal proceedings because he had conceded that he was an arriving alien.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is unreported.[1] The order of the district court (Pet. App. L) is unreported. The decisions of the Board of Immigration Appeals (Pet. App. J) and the immigration judge (Pet. App. I) are unreported.

JURISDICTION

The judgment (Pet. App. A at 7-8) of the court of appeals was entered on August 27, 2004. A petition for rehearing was denied on December 2, 2004 (Pet. App. B at 1-2). The petition for a writ of certiorari was filed on January 27, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] The appendix to the petition does not contain pages numbers. For citation purposes, each portion of the appendix will be cited as if separately numbered.

STATEMENT

1. Under regulations promulgated pursuant to the Immigration and Nationality Act (INA or the Act), 8 U.S.C. 1101 *et seq.*, an "arriving alien" is defined as "an applicant for admission coming or attempting to come into the United States at a port-of-entry." 8 C.F.R. 1.1(q). "An arriving alien remains such even if paroled pursuant to section 212(d)(5) of the Act." *Ibid.* Any "arriving alien who is in removal proceedings" is ineligible to apply for adjustment of status to that of a lawful permanent resident. 8 C.F.R. 245.1(c)(8); see 8 C.F.R. 245.1(a). Accordingly, the regulations provide that an immigration judge (IJ) lacks jurisdiction to consider an application for adjustment of status by an arriving alien who is in removal proceedings. 8 C.F.R. 245.2(a)(1) (emphasis added) ("After an alien, *other than an arriving alien*, is in deportation or removal proceedings, his or her application for adjustment of status * * * shall be made and considered only in those proceedings.").

2. Petitioner is a native and citizen of India. On March 26, 1992, he entered the United States without inspection. He applied for asylum on December 17, 1992, and that application was denied on September 27, 1994. On September 28, 1994, the Immigration and Naturalization Service (INS) issued an order to show cause, charging petitioner with deportability on the ground that he had entered the United States without inspection. Pet. App. A at 2; Pet. 6-7.[2]

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[2] 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.

On January 8, 1996, petitioner was apprehended when attempting to enter the United States from Canada without inspection. The same day, the INS again issued an order to show cause charging petitioner with deportability. On June 22, 1996, petitioner applied for asylum, and on July 30, 1996, his application for asylum was granted. Petitioner later left the country to travel abroad. When petitioner returned to the United States on March 4, 1997, the INS paroled petitioner into the country. See 8 U.S.C. 1182(d)(5)(A). On March 3, 1998, the INS informed petitioner of its intent to terminate his asylum on the ground that petitioner had committed fraud in connection with his application. On April 20, 1998, petitioner's asylum was terminated after he failed to appear for his asylum hearing. Pet. 7-8; Pet. App. A at 2-3; Pet. App. C at 1; Pet. App. E; Pet. App. H.

On July 22, 1998, the INS issued a notice to appear, charging petitioner with being removable on the ground that he had remained in the United States beyond his parole period. On December 8, 1998, the INS withdrew the initial charges and substituted allegations that petitioner was removable because he had committed fraud in seeking admission and had sought admission without proper documentation. The new charges specifically alleged, *inter alia*, that petitioner is "an arriving alien" and that he had "applied for admission to the United States as an asylee and [had been] paroled into the United States pursuant to section 212(d)(5) of the [INA]." Pet. App. A at 2-3; Pet. App. C; Pet. App. D.

2135. Because the relevant events in this case began before the reorganization, this brief continues to refer to the INS.

3. The proceedings before the IJ were continued on several occasions because petitioner's wife, a lawful permanent resident, had petitioned for naturalization and had submitted an application for adjustment of status on petitioner's behalf. At a hearing on March 6, 2004, petitioner, through counsel, "pleaded to the charging document * * * and admitted the factual allegations and conceded the charge of removability." Pet. App. I at 3. The IJ then ordered that petitioner be removed. The IJ reasoned that, because petitioner had admitted the charges, including the allegation that he is an arriving alien, the immigration court lacked jurisdiction to consider an application for adjustment of petitioner's status. *Ibid.*; see 8 C.F.R. 245.2(a)(1); 8 C.F.R. 245.1(c)(8).

On April 16, 2003, the Board of Immigration Appeals (BIA) affirmed the decision of the IJ. Pet. App. J. The BIA observed that petitioner had "admitted the allegations and conceded the removability charges, * * * including that [petitioner] is an 'arriving alien' and is removable." *Id.* at 2. The BIA held that, because petitioner "is an 'arriving alien' in removal proceedings," the IJ had "correctly determined that he lacked jurisdiction to adjudicate [petitioner's] application for adjustment of status." *Ibid.* (citing, *inter alia*, 8 C.F.R. 245.1(c)(8)).

4. a. Petitioner did not file a petition for review in the court of appeals. Instead, on May 2, 2003, petitioner filed a petition for a writ of habeas corpus in the district court. Pet. App. K.[3] The government's response argued

[3] The court of appeals determined (see Pet. App. A at 4) that petitioner's case is governed by the "transition rules" of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546. See

that petitioner, as an arriving alien in removal proceedings, was not eligible to apply for adjustment of status. Gov't Resp. to Pet. for Writ of Habeas Corpus 7 (filed Jan. 16, 2004). On January 22, 2004, the district court dismissed the petition "for the reasons stated in the Government's opposition." Pet. App. L at 1.

b. The court of appeals granted the government's motion for summary affirmance, holding that the BIA had not abused its discretion in dismissing petitioner's administrative appeal. Pet. App. A at 1-8. The court explained that, under 8 C.F.R. 245.2(a)(1), an IJ lacks jurisdiction over the application for adjustment of status of an arriving alien who is in removal proceedings. Pet. App. A, at 5. In this case, the court observed, petitioner "had conceded that he was an

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IIRIRA § 309(c)(1) and (4), 110 Stat. 3009-625, 3009-626. That appears to be incorrect, because the notice to appear in this case was filed on July 22, 1998, and revised on December 2, 1998, after the April 1, 1997, effective date of IIRIRA. Pet. App. C, D. Judicial review in petitioner's case therefore is governed by 8 U.S.C. 1252, which provides that review of a final order of removal is only by way of petition for review in the court of appeals. See 8 U.S.C. 1252(a) and (b)(9). Under the transition rules, judicial review is governed by former 8 U.S.C. 1105a (1994), except that, *inter alia*, judicial review of an order of exclusion is in the court of appeals rather than in the district court, as had been provided in 8 U.S.C. 1105a(b) (1994). See IIRIRA § 309(c)(4)(A), 110 Stat. 3009-626. Although IIRIRA's transition rules, like the permanent rules (8 U.S.C. 1252(a)(2)(C)), preclude judicial review in the courts of appeals in the cases of certain criminal aliens (see IIRIRA § 309(c)(4)(G), 110 Stat. 3009-626), petitioner was not ordered removed on one of the grounds that triggers those preclusions. Compare *INS* v. *St. Cyr*, 533 U.S. 289, 298-314 (2001) (holding that habeas corpus review is available to consider pure questions of law in challenge to removal order where direct review in court of appeals is precluded).

'arriving alien,'" and an "'arriving alien' remains such even if paroled." *Ibid.* (citing 8 C.F.R. 1001.1(q)). The court further noted that, "to the extent [petitioner] denies having conceded to the charge of being an arriving alien, he has failed to provide any evidence to rebut the BIA and Immigration Judge's findings." *Id.* at 5-6.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. Further review therefore is unwarranted.

1. Petitioner contends (Pet. 12-17) that he is not an arriving alien and that the IJ therefore had jurisdiction to consider his application for adjustment of status. That fact-bound contention lacks merit.

The INS's amended charge specifically alleged that petitioner is "an arriving alien" and that he had "applied for admission to the United States * * * and [was] paroled into the United States pursuant to section 212(d)(5) of the [INA]." Pet. App. D at 2. Both the BIA and the IJ observed that petitioner had admitted those allegations, Pet. App. I at 3; Pet. App. J at 2, and petitioner does not dispute the point, see Pet. 8. The fact that petitioner was paroled into the United States pursuant to Section 212(d)(5) does not affect his status as an arriving alien. See 8 C.F.R. 1.1(q) ("An arriving alien remains such even if paroled pursuant to section 212(d)(5) of the Act.").[4] As an arriving alien in removal

[4] An alien who is granted advance parole before departing the United States is not considered an arriving alien for purposes of expedited removal proceedings under Section 235(b)(1)(A) of the INA, 8 U.S.C. 1225(b)(1)(A). See 8 C.F.R. 1.1(q). That exception,

proceedings, petitioner was ineligible to apply for adjustment of status, 8 C.F.R. 245.1(c)(8), and the IJ lacked jurisdiction to consider an application for adjustment of status, 8 C.F.R. 245.2(a)(1).

Petitioner appears to contend (Pet. 13-14) that he is not properly considered an arriving alien because he has previously made (illegal) entries into the country. Petitioner acknowledged in his administrative proceedings, however, that he was "paroled into the United States pursuant to section 212(d)(5) of the [INA]." Pet. App. D at 2. Although petitioner previously has made illegal entries into the United States, his most recent effort to gain admission to the United States was on March 4, 1997. On that occasion, petitioner did not effect an illegal entry but, rather, was paroled into the country.

2. Petitioner argues (Pet. 18-19) that, even if he is an arriving alien, he falls within an exception permitting an IJ to consider an application for adjustment of status of an arriving alien who was "paroled under section 212(d)(5) of the Act," and who was previously denied an adjustment of status, if: (i) the denied application was "properly filed subsequent to the applicant's earlier inspection and admission"; and (ii) the alien's "later absence from and return to the United States was under the terms of an advance parole authorization" that was "granted to permit the applicant's absence and return to pursue the previously filed adjustment application." 8 C.F.R. 245.2(a)(1). The court of appeals correctly rejected petitioner's reliance on that exception. Pet. App. A at 6. The exception presumes an "earlier in-

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as the court of appeals correctly found, has no application here because petitioner was not placed in expedited removal proceedings. Pet. App. A at 5 n.5.

spection and admission," but petitioner has no previous "inspection and admission." His entries in 1992 and 1994 were without inspection, and although he was granted asylum after attempting to enter in 1996, the subsequent revocation of his asylum resulted in his reverting to the status of an inadmissible alien. See 8 U.S.C. 1158(c)(3).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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