No. 06-1181

In the Supreme Court of the United States

SAMSON TAIWO DADA, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner, after seeking and obtaining an order granting him voluntary departure, could avoid the consequences of failing to depart within the period specified in the voluntary departure order by stating subsequently that he wished to withdraw his request for voluntary departure.

2. Whether the filing of a motion to reopen removal proceedings automatically tolls the period within which an alien must depart the United States under an order granting voluntary departure.

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OPINIONS BELOW

The per curiam opinion of the court of appeals (Pet. App. 1-2) is not published in the *Federal Reporter* but is available at 207 Fed. Appx. 425. The decisions of the Board of Immigration Appeals (Pet. App. 3-4, 5-6) and the immigration judge (Pet. App. 7-9) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 28, 2006. The petition for a writ of certiorari was filed on February 26, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Immigration and Nationality Act (INA or Act), 8 U.S.C. 1101 *et seq.*, provides that, as an alternative to formal removal proceedings or entry of a formal

removal order, "[t]he Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense." 8 U.S.C. 1229c(a)(1) and (b)(1). Voluntary departure may be granted before the initiation of removal proceedings or during the course of such proceedings, 8 U.S.C. 1229c(a)(1), and also may be granted at the close of removal proceedings in lieu of ordering that the alien be removed, 8 U.S.C. 1229c(b)(1). Aliens who receive voluntary departure avoid the five to ten-year period of inadmissibility that would result from an order of removal. See 8 U.S.C. 1182(a)(9)(A). Voluntary departure also permits aliens "to choose their own destination points, to put their affairs in order without fear of being taken into custody at any time, [and] to avoid the stigma * * * associated with forced removals." *Thapa* v. *Gonzales*, 460 F.3d 323, 328 (2d Cir. 2006) (quoting *Lopez-Chavez* v. *Ashcroft*, 383 F.3d 650, 651 (7th Cir. 2004)). To qualify for a grant of voluntary departure at the close of removal proceedings, an alien must satisfy certain statutory conditions, including establishing that he "has the means to depart the United States and intends to do so." 8 U.S.C. 1229c(b)(1)(D); see 8 U.S.C. 1229c(b)(1)(A)-(C).

Because the Act provides that the Attorney General "may" permit an alien to depart voluntarily, see 8 U.S.C. 1229c(a)(1) and (b)(1), the determination whether to allow an alien to do so is discretionary with the Attorney General, and with the immigration judge (IJ) and Board of Immigration Appeals (BIA) who act on his behalf. And the Act further provides that "[t]he Attorney General may by regulation limit eligibility for voluntary departure * * * for any class or classes of aliens." 8 U.S.C. 1229c(e).

The Act prescribes that, when an alien is granted voluntary departure at the close of removal proceedings, "[p]ermission to depart voluntarily * * * shall not be valid for a period exceeding 60 days." 8 U.S.C. 1229c(b)(2).[1] An IJ who grants voluntary departure must "also enter an alternate order [of] removal," which takes effect if the alien fails to depart within the period specified in the voluntary departure order. 8 C.F.R. 1240.26(d); see 8 C.F.R. 1241.1(f). After entry of a final order, authority to extend a period of voluntary departure specified initially by an IJ or the BIA is vested in the district director or other officers of Immigration and Customs Enforcement (ICE) in the Department of Homeland Security, see 8 C.F.R. 1240.26(f), subject to the statutory maximum of 60 days in the case of voluntary departure granted at the conclusion of removal proceedings. Failure "to depart the United States within the time period specified" results, *inter alia*, in the alien's becoming "ineligible, for a period of 10 years" to receive certain forms of discretionary relief, including cancellation of removal, adjustment of status, and a subsequent grant of voluntary departure. 8 U.S.C. 1229c(d)(1)(B) (as amended by Pub. L. No. 109-162, § 812, 119 Stat. 3057); see 8 C.F.R. 1240.26(a).

b. The INA provides that an alien who has been found removable from the United States "may file one motion to reopen [the removal] proceedings" to present "new facts." 8 U.S.C. 1229a(c)(6)(A)-(B). The statute prescribes that "the motion to reopen shall be filed within 90 days of the date of entry of a final administrative

[1] When voluntary departure is granted before the initiation or in the course of removal proceedings, rather than at the close of such proceedings, the alien may be allowed a maximum of 120 days to depart voluntarily. 8 U.S.C. 1229c(a)(2)(A).

order of removal." 8 U.S.C. 1229a(c)(6)(C)(i). An alien who is the subject of removal proceedings and who departs the United States may not file a motion to reopen "subsequent to his or her departure." 8 C.F.R. 1003.2(d). In addition, if an alien who is the subject of removal proceedings departs the United States "after the filing of a motion to reopen," the alien's departure "constitute[s] a withdrawal of such motion." *Ibid.*

The regulations provide that, if removal proceedings are reopened, the IJ or the BIA may reinstate voluntary departure, but only "if reopening was granted prior to the expiration of the original period of voluntary departure." 8 C.F.R. 1240.26(f) and (h). Moreover, the "decision to grant or deny a motion to reopen * * * is within the discretion of the Board," and "[t]he Board has discretion to deny a motion to reopen even if the party moving has made out a *prima facie* case for relief." 8 C.F.R. 1003.2(a). Finally, the filing of a motion to reopen "shall not stay the execution of any decision made in the case," and "[e]xecution of such decision shall proceed unless a stay of execution is specifically granted by" the BIA or the IJ. 8 C.F.R. 1003.2(f).

2. Petitioner, a native and citizen of Nigeria, entered the United States on April 10, 1998, under a non-immigrant visa. The visa authorized him to remain in the United States until August 31, 1998. Petitioner, however, remained in the United States beyond the authorized period. Pet. App. 7.

In 1999, petitioner married a United States citizen, who then filed an I-130 (immediate relative) visa petition on his behalf. On February 7, 2003, the Department of Homeland Security (DHS) denied the visa petition and deemed it abandoned on the ground that the required

documentation had not been supplied. Pet. 9; Pet. App. 8; Administrative Record (A.R.) 176.

On January 4, 2004, DHS charged petitioner with being removable. On March 17, 2004, petitioner's wife filed a second I-130 visa petition on petitioner's behalf. Petitioner subsequently requested that his removal proceedings be continued to permit adjudication of the pending I-130 visa petition filed on his behalf. Pet. App. 7-8. The IJ denied a continuance, explaining that it ordinarily takes approximately 990 to 999 days to adjudicate an I-130 visa petition and that the court could not "provide a continuance for that length of time or any amount of time that would be close to that." *Id.* at 8.[2] The IJ, however, granted petitioner's request for voluntary departure in lieu of removal. *Id.* at 9.

Petitioner filed an administrative appeal to the BIA, which had the effect of rendering the IJ's order non-final and thus of suspending the voluntary departure period pending appeal. See 8 U.S.C. 1101(a)(47)(B)(i) (order becomes "final" upon affirmance by BIA); 8 U.S.C. 1229c(b)(1) (allowing Attorney General to permit voluntary departure at the conclusion of a removal proceeding under 8 U.S.C. 1229a); 8 C.F.R. 1003.6(a), 1003.39; *In re Chouliaris*, 16 I. & N. Dec. 168, 169-170 (B.I.A. 1977). On November 4, 2005, the BIA affirmed the IJ's decision without opinion. Pet. App. 5-6. The BIA's order specified that petitioner would be permitted to depart voluntarily within a period of 30 days from the date of the order. *Id.* at 5. The order also gave notice that, if peti-

[2] The IJ also noted that the government had opposed the request for a continuance because petitioner's wife had previously filed an immediate relative petition, which had been denied by DHS because his wife had failed to supply DHS with required documentation. Pet. App. 8; see pp. 4-5, *supra*.

tioner failed to depart "within the time period specified," he would "be ineligible for a period of 10 years for any further relief under," *inter alia*, the statutory provisions governing adjustment of status. *Id.* at 5-6.

3. Petitioner did not depart the United States within the 30-day voluntary departure period specified in the BIA's order. Instead, on December 2, 2005, with two days remaining in his voluntary departure period, petitioner filed a motion with the BIA to reopen its decision in his removal proceedings and to remand the proceedings to the IJ to permit petitioner to seek adjustment of status based on the pending I-130 visa petition. Pet. 11; Pet. App. 2; A.R. 8-21. In his motion to reopen, petitioner also asserted that he was "withdraw[ing] his request for voluntary departure and instead accept[ing] an order of deportation." A.R. 10-11; see Pet. 10.

On February 8, 2006, the BIA denied petitioner's motion to reopen. Pet. App. 3-4. The BIA explained that, under 8 U.S.C. 1229c(d), "an alien who fails to depart following a grant of voluntary departure, and who has been provided written notice of the consequences of remaining in the United States, is statutorily barred from applying for certain forms of discretionary relief." Pet. App. 3-4. The BIA thus held that petitioner is "statutorily ineligible" for adjustment of status. *Id.* at 4.

4. The court of appeals affirmed in an unpublished, per curiam opinion. Pet. App. 1-2. The court held that the "BIA's interpretation of the applicable statutes rendering [petitioner] ineligible" for adjustment of status, because he did not leave the United States within the 30-day voluntary departure period, "was reasonable." *Id.* at 2 (citing *Banda-Ortiz* v. *Gonzales*, 445 F.3d 387, 389-391 (5th Cir. 2006), cert. denied, 127 S. Ct. 1874 (2007)).

ARGUMENT

1. Petitioner argues (Pet. 15-17) that his assertion in his motion to reopen that he wished to withdraw his request for voluntary departure had the effect of automatically vacating his voluntary departure order, including the requirement that he depart the United States within 30 days. See Pet. App. 5-6. That contention lacks merit and does not warrant review. Petitioner points to no authority suggesting that an alien who has applied for, and been granted, voluntary departure, can subsequently avoid the requirement that he depart the United States by a specified date simply by asserting that he wishes to withdraw his request for voluntary departure. See 8 U.S.C. 1229c(d)(1)(B) (as amended by Pub. L. No. 109-162, § 812, 119 Stat. 3057) (prescribing that an alien who fails to depart within the voluntary departure period "*shall* be ineligible for," *inter alia*, adjustment of status) (emphasis added).

There is no merit to petitioner's contention (Pet. 16) that the court of appeals' decision conflicts with the Seventh Circuit's decision in *Orichitch* v. *Gonzales*, 421 F.3d 595 (2005). *Orichitch* held that the BIA's *grant* of a motion to reopen in the circumstances of that case had the effect of vacating the BIA's prior voluntary departure order, such that the alien was no longer subject to the 10-year ineligibility period concerning her application for adjustment of status. *Id.* at 598. Even assuming that the Seventh Circuit was correct in holding that the grant of the motion to reopen had the effect of vacating the voluntary departure order, the BIA in this case did not grant petitioner's motion to reopen. Petitioner's argument instead is that his mere assertion that he wished to withdraw his request for voluntary departure

had the effect of vacating the voluntary departure period. *Orichitch* provides no support for that argument.

Moreover, the Fifth Circuit's decision in this case is unpublished and non-precedential. See Pet. App. 1 n.*. It therefore is not binding in that circuit, and as a result would not in any event give rise to a circuit conflict of the sort warranting review by this Court.

2. Petitioner contends (Pet. 18-22) that his filing of a motion to reopen had the effect of automatically tolling his voluntary departure period. The court of appeals correctly rejected that argument. Although that question has divided the courts of appeals, it does not warrant review in this case or at this time.[3]

a. The court of appeals correctly concluded, in reliance on that court's previous decision in *Banda-Ortiz* v. *Gonzales*, 445 F.3d 387 (5th Cir. 2006), cert. denied, 127 S. Ct. 1874 (2007), that petitioner's filing of a motion to reopen did not automatically toll the running of the voluntary departure period.

"Voluntary departure is a discretionary form of relief. If an alien chooses to seek it—and that choice is entirely up to the alien—it can produce a win-win situation." *Naeem* v. *Gonzales*, 469 F.3d 33, 36 (1st Cir. 2006). As the court of appeals explained in *Banda-Ortiz*, voluntary departure is "an agreed-upon exchange of benefits between an alien and the Government," 445 F.3d at 389, in that it "offer[s] an alien a specific benefit—exemption from the ordinary bars on subsequent relief—in return for a quick departure at no cost to the government," *id.* at 390 (quoting *Ngarurih* v. *Ashcroft*, 371 F.3d 182, 194 (4th Cir. 2004)). The grant of volun-

[3] The same issue is raised by the second question presented by the petition for a writ of certiorari in *Moorani* v. *Gonzales*, petition for cert. pending, No. 06-610 (filed Oct. 31, 2006).

tary departure enables an alien to avoid the five to ten-year period of inadmissibility that would result from an order of removal, see 8 U.S.C. 1182(a)(9)(A); to select the destination point; to make arrangements for departure without the threat of custody; and to avoid any stigma associated with forced removal. See, *e.g.*, *Thapa* v. *Gonzales*, 460 F.3d 323, 328 (2d Cir. 2006).

"The benefits normally associated with voluntary departure," however, "come with corollary responsibilities." *Naeem*, 469 F.3d at 37. Because a principal purpose of voluntary departure is to provide an incentive for aliens to effect a prompt departure, see *Banda-Ortiz*, 445 F.3d at 390, an alien who seeks voluntary departure at the close of removal proceedings must demonstrate the means and intent to depart the country within a brief time, see 8 U.S.C. 1229c(b)(1)(D); 8 C.F.R. 1240.26(c)(1)(iv) and (c)(3). The Act accordingly prescribes that the voluntary departure period cannot exceed 60 days when voluntary departure is granted at the close of removal proceedings (or 120 days when voluntary departure is granted before or during removal proceedings). 8 U.S.C. 1229c(a)(2)(A) and (b)(2). The statute further directs that, "if an alien is permitted to depart voluntarily * * * and voluntarily fails to depart * * * within the time period specified, the alien," *inter alia*, "shall be ineligible, for a period of 10 years" to receive certain forms of discretionary relief, including adjustment of status. 8 U.S.C. 1229c(d)(1)(B) (as amended by Pub. L. No. 109-162, § 812, 119 Stat. 3057); see 8 C.F.R. 1240.26(a).

Contrary to petitioner's argument (Pet. 16-17), the INA's provision that an alien may file one motion to reopen, see 8 U.S.C. 1229a(c)(6)(A), does not establish that the filing of such a motion automatically tolls the

voluntary departure period. Petitioner contends (Pet. 21-22) that the BIA ordinarily will not have resolved a motion to reopen before the voluntary departure period expires, and that tolling is necessary to ensure that an alien has a meaningful opportunity to seek reopening. Petitioner thus suggests that tolling is necessary in order to give effect to both the Act's provision for an alien to file a motion to reopen and its provision authorizing the Attorney General to permit voluntary departure. That argument is mistaken.

As the Fourth Circuit has explained, the "voluntary departure provision" establishing the maximum departure period of 60 or 120 days "applies to *certain* removable aliens" who qualify for that relief, "while the motion to reopen provision applies to *all* aliens subject to removal." *Dekoladenu* v. *Gonzales*, 459 F.3d 500, 505-506 (2006), petition for cert. pending, No. 06-1285 (filed Mar. 22, 2007). Indeed, only 11 percent of removable aliens were granted voluntary departure in 2005. See *id.* at 506 n.5. Accordingly, "[f]ollowing the normal rule of statutory construction, the more specific voluntary departure provision governs in those limited situations in which it applies." *Id.* at 506. Motions to reopen are unaffected in other cases.

Moreover, while the INA provides that an alien may file one motion to reopen, it confers no right to substantive relief. To the contrary, the granting of reopening is discretionary. See p. 4, *supra*. Similarly, the granting of voluntary departure is discretionary with the Attorney General, and the Attorney General is expressly authorized to limit eligibility for additional classes of aliens. See p. 2, *supra*. There accordingly is no inconsistency with the Act if, under applicable procedures, an alien who files a motion to reopen and chooses to remain

in the country until the BIA acts upon it thereby gives up the benefits of voluntary departure. See 8 U.S.C. 1229c(e).

The conclusion that the filing of a motion to reopen does not automatically toll the running of the voluntary departure period, or permit an alien to disregard his undertaking to depart within the time allowed, is strongly supported by this Court's decision in *Stone* v. *INS*, 514 U.S. 386 (1995). There, the Court held that a final order of deportation remains final notwithstanding the filing of a motion to reopen, and that the time for filing a petition for judicial review of that order therefore is not tolled by the filing of a motion for reconsideration. See *id.* at 392-395. In reaching that conclusion, the Court pointed out that it was the longstanding position of the Attorney General, "a view we presume Congress understood when it amended the Act in 1990," that the filing of a motion for reconsideration (or reopening) does not serve to stay the deportation order. *Id.* at 398 (citing 8 C.F.R. 3.8 (1977)). Similarly, here, we must presume that Congress understood that rule when it enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, and the current regulations embody the same rule. See 8 C.F.R. 1003.2(f). Because a provision in a BIA decision allowing voluntary departure is simply an alternative to a formal removal order in the same BIA decision—allowing the alien to depart on his own within a specified period of time rather than being removed by the government—it follows from that regulation that the voluntary departure

requirement of the decision is likewise not stayed or tolled by the filing of a motion to reopen.[4]

By contrast, "mandat[ing] tolling of the voluntary departure period when an alien files a motion to reopen would have the effect of rendering the time limits for voluntary departure meaningless." *Dekoladenu*, 459 F.3d at 506; see *Banda-Ortiz*, 445 F.3d at 390 ("Automatic tolling would effectively extend the validity of [an alien's] voluntary departure period well beyond the sixty days that Congress has authorized."). Accepting petitioner's tolling argument also would substantially deny the government the benefits of voluntary departure—*i.e.*, securing a prompt departure without the need to devote the resources that attend the process of issuing and executing an order of removal—without requiring petitioner to bear the associated costs. *Ibid.* "If filing a motion to reopen automatically tolled the voluntary departure period, aliens who have been granted voluntary departure would have a strong incentive to file a motion to reopen in order to delay their departure." *Dekoladenu*, 459 F.3d at 506; compare *Stone*, 514 U.S. at 400-401 (explaining that because a removal order remains final and subject to execution notwithstanding the filing of a motion for reconsideration, Congress has removed the incentive for aliens to file meritless motions). And "[b]ecause voluntary departure is a privilege that is only available to a subset of removable aliens, it is nei-

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[4] Indeed, the BIA held, prior to IIRIRA, that the filing of a motion to reopen did *not* toll the voluntary departure period. See *In re Shaar*, 21 I. & N. Dec. 541 (B.I.A. 1996). Contrary to the Ninth Circuit's view in *Azarte* v. *Ashcroft*, 394 F.3d 1278, 1286-1287 (2005), there is no indication that Congress intended to overturn that rule when it enacted IIRIRA, which, after all, imposed additional statutory restrictions on both voluntary departure and motions to reopen.

ther 'absurd' nor 'nonsensical' to require aliens who wish to reap the benefits of voluntary departure to give up their right to a resolution of a motion to reopen." *Dekoladenu*, 459 F.3d at 506.

The Fourth Circuit concluded in *Dekoladenu* that "both the plain language of the statute and clear congressional intent explicitly limit the time allowed for voluntary departure and do not allow for judicial tolling of these limits" based on the filing of a motion to reopen. 459 F.3d at 504. But even if the relevant statutory provisions are regarded as ambiguous on the matter, the agency's conclusion that the filing of a motion to reopen does not automatically toll the voluntary departure period under the existing statutory and regulatory scheme would be entitled to deference. See *id.* at 507-508; *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 425 (1999).

The BIA's voluntary departure order in this case specifically informed petitioner that failure to depart within 30 days of the order would trigger the ten-year period of ineligibility for adjustment of status. See Pet. App. 5-6; see also 8 U.S.C. 1229c(d) ("The order permitting the alien to depart voluntarily shall inform the alien of the penalties under this subsection."). Moreover, the governing regulations provide that an IJ or the BIA "may reinstate voluntary departure in a removal proceeding that has been reopened * * * *if reopening was granted prior to the expiration of the original period of voluntary departure*," and further provide that "[i]n no event can the total period of time, including any extension, exceed 120 days or 60 days as set forth in" the Act. 8 C.F.R. 1240.26(h) (emphasis added). The evident corollary is that, if reopening is *not* granted "prior to the expiration of the original period of voluntary departure," no reinstatement of voluntary departure or extension of

the voluntary period is permissible. Petitioner filed his motion to reopen only two days before the expiration of his voluntary departure period, see p. 6, *supra*, and therefore was plainly on notice of the likelihood that the BIA would not act on his motion before the voluntary departure period expired.

b. As petitioner correctly explains, the courts of appeals are divided on whether the filing of a motion to reopen automatically tolls the voluntary departure period. Four courts of appeals have held that the filing of a motion to reopen automatically triggers such tolling. See *Kanivets* v. *Gonzales*, 424 F.3d 330 (3d Cir. 2005); *Sidikhouya* v. *Gonzales*, 407 F.3d 950 (8th Cir. 2005); *Azarte* v. *Ashcroft*, 394 F.3d 1278 (9th Cir. 2005); *Ugokwe* v. *United States Att'y Gen.*, 453 F.3d 1325 (11th Cir. 2006). Two courts of appeals (including the court below) have reached the contrary conclusion. See *Dekoladenu* v. *Gonzales*, 459 F.3d 500 (4th Cir. 2006), petition for cert. pending, No. 06-1252 (filed Mar. 22, 2007); *Banda-Ortiz* v. *Gonzales*, 445 F.3d 387 (5th Cir. 2006), cert. denied, 127 S. Ct. 1874 (2007).

Although the courts of appeals are divided on the question, review is not warranted in this case or at this time. First, in light of the judicial decisions and issues that have been raised, the Department of Justice has determined that it will promulgate regulations specifically regarding the tolling question presented by this case. That rulemaking process will afford the Department an opportunity to address the various statutory provisions bearing on reopening and voluntary departure, consider the various policy issues that have been raised, and further exercise the authority and discretion vested in the Attorney General under the relevant statu-

tory provisions. Review of the tolling issue by this Court should await the issuance of such regulations.[5]

Second, the Senate and the House of Representatives passed bills in the last Congress that contained provisions that would definitively resolve the tolling issue on a prospective basis in a manner consistent with the Fifth Circuit's decision in this case. See S. 2611, 109th Cong., 2d Sess. § 211(a)(3) (2006); H.R. 4437, 109th Cong., 1st Sess. § 208(b)(1) (2005). Comprehensive immigration reform is also under active consideration in the current Congress.[6] Thus, not only does the Department of Justice plan to address the issue by regulation, but there also is a prospect that Congress will do so.

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[5] In 1997, when the Department, after notice and comment, promulgated interim regulations implementing the 1996 amendments to the INA, it discussed the tolling issue in the preamble and stated that the issue would be addressed when final regulations were issued on a variety of subjects. See 62 Fed. Reg. 10,312, 10,326. No such comprehensive regulations have been issued. However, as stated in the text, the Department has now determined that further regulations will be issued on the specific question of tolling presented in this case.

[6] In addition, we have been informed that the tolling issue has been raised in a number of cases pending before the BIA.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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