No. 08-8

In the Supreme Court of the United States

ROBERT R. WATSON, PETITIONER

v.

MICHAEL B. MUKASEY, 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

GREGORY G. GARRE
Solicitor General
Counsel of Record
GREGORY G. KATSAS
Assistant Attorney General
DONALD E. KEENER
ROBERT N. MARKLE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals properly affirmed the Board of Immigration Appeals' denial of petitioner's motions to reopen his deportation proceeding from 1988, in which he was ordered deported *in absentia* after failing to appear for a duly noticed hearing, for consideration of his application for adjustment of status.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and regulations: Page

Regulations—Continued: Page

Miscellaneous:

In the Supreme Court of the United States

No. 08-8

ROBERT R. WATSON, PETITIONER

v.

MICHAEL B. MUKASEY, 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

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-4a) is not published in the *Federal Register* but is reprinted at 255 Fed. Appx. 920. The decisions of the Board of Immigration Appeals (Pet. App. 26a-29a) and the immigration judge (Pet. App. 14a-17a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 29, 2007. A petition for rehearing was denied on January 25, 2008 (Pet. App. 1a). The petition for a writ of certiorari was filed on April 24, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a native and citizen of Jamaica who, on June 30, 1986, entered the United States illegally near Los Ebanos, Texas. That same day he was apprehended by immigration authorities. A day later, he was charged with being deportable from the United States under 8 U.S.C. 1251(a)(2) (1986) as an alien who had entered the United States without being admitted or inspected by immigration officers. Pet. App. 5a-9a. The charging document, which was personally served on petitioner, also informed petitioner that the time and date of his deportation hearing would be set later (*id.* at 6a) and further warned him that failure to attend the hearing at the time and place so designated may "result in a determination being made by the Immigration Judge in your absence" (*id.* at 7a-8a). Petitioner was released from custody on his own recognizance. *Id.* at 8a.

Eight days after petitioner's release, petitioner's attorney entered an appearance with the immigration court in Harlingen, Texas. Two days after that, petitioner's attorney filed a notarized affidavit, signed by petitioner, in which petitioner admitted the allegation of deportability and requested a change of venue to Brooklyn, New York. A.R. 747-748; Pet. App. 14a. The affidavit indicated that if the request for a change of venue was granted, petitioner's address (for an apartment in Brooklyn, New York) would remain as listed in the charging document. A.R. 747.

On December 1, 1987, the immigration court sent a Notice of Master Calendar Hearing by priority via Western Union to petitioner's attorney, advising him that petitioner's deportation hearing was scheduled for December 9, 1987. A.R. 749. The letter was returned on December 5, 1987, bearing the stamp "moved left no ad-

dress." A.R. 745. On December 9, 1987, the immigration court prepared a Notice of Rescheduled Master Calendar Hearing, advising that petitioner's hearing was being rescheduled for February 3, 1988, and sent it to petitioner at the Brooklyn address that he had provided, as well as to petitioner's attorney. A.R. 746. On December 14, 1987, both notices were returned by the U.S. Postal Service to the immigration court marked "moved—not forwardable" and "moved left no address," respectively. A.R. 740, 742.

On February 3, 1988, when petitioner failed to appear at his hearing, the immigration judge (IJ) proceeded *in absentia* under 8 U.S.C. 1252(b) and found that petitioner's deportability had been established.[1] In a final order of deportation issued two days later, the IJ ordered petitioner deported to Jamaica. A.R. 738. In a Memo to File, the IJ noted that petitioner's attorney had been disbarred in Texas in September 1987, but that "[p]rior to [his] actual disbarment, the Court had for many months sent notices in duplicate, to him and to his clients, as notices to [him] were being consistently returned by the post office with notations that he had moved without leaving a forwarding address." A.R. 743. The immigration court mailed a copy of the IJ's decision to petitioner at the Brooklyn address that petitioner had provided. A.R. 736. That decision also was returned as "moved - not forwardable." A.R. 737.

2. a. In November 2002, more than 14 years later, petitioner, through new counsel, moved to reopen the

[1] Section 1252(b) provided for conducting deportation hearings and issuing deportation orders *in absentia* when an alien failed to attend a scheduled hearing if the alien had been given a reasonable opportunity to be present and, without reasonable cause, failed or refused to attend. 8 U.S.C. 1252(b) (1988).

deportation proceeding to apply for adjustment of status under 8 U.S.C. 1255(i).[2] A.R. 713-716. In the motion, petitioner asserted that he is the beneficiary of an I-130 immediate-relative visa petition filed by his United States citizen wife that had been approved four months earlier. A.R. 714-715. Petitioner's wife, a lawful permanent resident alien at the time of their marriage in 1996, became a naturalized United States citizen in February 2001. A.R. 715.

In his motion to reopen, petitioner also claimed that he did not receive notice of the February 1988 hearing. Petitioner asserted that the Brooklyn address he pro-

---

[2] The statute authorizing the Attorney General to adjust the immigration status of aliens provides:

> The status of an alien *who was inspected and admitted or paroled into the United States* * * * may be adjusted by the Attorney General * * * to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.

8 U.S.C. 1255(a) (emphasis added). In 1994, Congress amended Section 1255 to permit certain aliens (like petitioner) who had entered without inspection to seek adjustment to lawful permanent resident status upon payment of a surcharge. 8 U.S.C. 1255(i) (1994); see Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1995, Pub. L. No. 103-317, § 506(b), 108 Stat. 1765-1766. Congress has twice extended and amended Section 1255(i), authorizing the adjustment of the status of aliens who (as relevant here) were the beneficiaries of a visa petition filed on or before April 30, 2001. See LIFE Act Amendments of 2000, Pub. L. No. 106-554, § 1502(a)(1), 114 Stat. 2673A-324.

Under regulations promulgated by the Attorney General, after an alien is in deportation proceedings, his application for adjustment of status "shall be made and considered only in those proceedings." 8 C.F.R. 245.2(a)(1) (2002).

vided was the address of a friend's home where petitioner had resided, and that the friend either did not receive the notice or did not notify petitioner of its receipt. A.R. 713. In an affidavit, petitioner stated that, after being released from Immigration and Naturalization Service (INS) custody in July 1986, he "returned to the New York area where I have resided ever since. I never heard from the [INS] again about a hearing date and I learned that I was order[ed] deported in absentia on February 3, 1988." A.R. 715. The affidavit provided no information as to what petitioner's address had been in the "New York area" during the relevant time period, and no statement from the persons who resided at the Brooklyn address that petitioner had provided to the immigration court.

In January 2003, the IJ denied the motion to reopen. Pet. App. 14a-17a. The IJ noted that petitioner had filed an affidavit (A.R. 747) with the immigration court in 1986, before his 1988 deportation hearing, in which he acknowledged that he was in deportation proceedings, admitted that he was deportable as charged, and requested no relief from deportation. Pet. App. 14a-15a. The IJ also found that petitioner had filed no separate application for relief or protection under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, before the 1988 *in absentia* hearing. *Ibid.*

The IJ concluded that petitioner "has not demonstrated that he had reasonable cause for his failure to appear at the hearing," based on the IJ's findings that (1) proper notice was sent to the last known address of both petitioner and his counsel; (2) both of those notices were returned by the United States Postal Service as undeliverable; (3) petitioner did not contend that he had advised either the immigration court or the former INS

of any change of address for him before his 1988 deportation hearing; and (4) petitioner failed to show that he did not receive that notice. *Id.* at 15a-16a. The judge also noted that petitioner's motion was untimely because it was not filed by September 30, 1996—the deadline for filing motions to reopen deportation proceedings.[3] *Id.* at 17a.

In April 2004, the Board of Immigration Appeals (Board) affirmed. A.R. 681. The Board found that petitioner had failed to submit a change of address when he moved; that the hearing notice was properly sent to petitioner's last known address; and that petitioner "has not explained why he waited 14½ years to seek reopening." *Ibid.* Petitioner did not seek judicial review.

b. Thereafter, petitioner filed five motions requesting the Board to reopen his proceeding and to reconsider its decisions denying reopening. In each motion, petitioner renewed his claim that he did not receive notice of his 1988 hearing and requested that his deportation proceeding be reopened to permit him to apply for adjustment of status. The following is a summary:

(1) In January 2005, petitioner filed a motion to reopen in which he claimed that he did not receive notice of the February 1988 hearing as a result of ineffective assistance of his prior counsel. A.R. 599. He admitted

---

[3] In May 1996, following a Congressional mandate to establish a temporal limit on filing motions to reopen deportation proceedings, the Attorney General promulgated regulations generally providing that a motion to reopen a proceeding "must be filed not later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened, or on or before September 30, 1996, whichever is later." See *Executive Office for Immigration Review; Motions and Appeals in Immigration Proceedings*, 61 Fed. Reg. 18,908 (adding new 8 C.F.R. 3.23(b)(4)(i)).

that the hearing notice was in fact sent to the Brooklyn address he had provided in his affidavit (A.R. 747) but argued that, because he "had already moved to New York by the time of the notice's mailing, he did not, nor could he, receive the notice" sent to his prior counsel. A.R. 601.

The Board denied the motion. It ruled that the motion was untimely to the extent it was considered a motion to reconsider, and that the motion exceeded numerical limits to the extent it was considered a motion to reopen. A.R. 591. It also determined that petitioner "ha[d] not established that sua sponte reopening [was] warranted due to any ineffective assistance [of] former counsel or for any other reason." *Ibid.* Finally, the Board also found that none of the exceptions available under 8 C.F.R. 1003.2(c)(3) to the time and number restrictions for motions to reopen or reconsider applied. A.R. 591. Petitioner did not seek judicial review.

(2) In August 2005, petitioner filed a motion to "Rescind, Reconsider and Reopen." A.R. 326. He admitted that the notice of the hearing had been sent to the address where he "previously resided," but gave no explanation as to why he did not receive the notice, and he renewed his claim that he had been provided ineffective assistance of counsel. A.R. 329.

The Board denied the motion. It found that petitioner's contentions had been addressed by the IJ in the January 2003 decision denying reopening (A.R. 699-701), and that they were "essentially the same claims that were considered and rejected by the Board" in its prior decisions. A.R. 189. Specifically, the Board held that petitioner "failed to show reasonable cause for his failure to appear at the deportation hearing." *Ibid.* Petitioner did not seek judicial review.

(3) In December 2005, petitioner filed a motion to reconsider. A.R. 164. In March 2006, the Board denied that motion. It held that the "motion fails to offer new arguments based on a substantial change in law or otherwise establish an error of fact or law in our decision [that] would affect the result in this case." A.R. 160. Recapping its findings in prior decisions, the Board explained:

> [Petitioner] was aware that he was in deportation proceedings and he retained an attorney to represent him. Even if we presume that [petitioner] provided a change of address to that attorney * * * who was disbarred, and we also presume that [petitioner] was ineffectively represented by * * * [that attorney] as a result of his failure to submit the change of address to the immigration court, [petitioner] waited more than 14 years before taking any steps to reopen his case.

Ibid. The Board concluded that "[petitioner's] failure to make any attempt to contact the immigration court about the status of his case for that length of time does not warrant reopening of his case." *Ibid*. Petitioner timely petitioned for judicial review of this ruling.

(4) In July 2006, petitioner filed another "Motion to Reopen, Rescind and Change Venue." A.R. 93. In November 2006, the Board denied that motion, noting that petitioner "makes essentially the same claims that were considered, and rejected, by the Board in our previous orders, which are incorporated herein by reference." Pet. App. 27a. The Board further noted that the motion was untimely and numerically barred, and that there was no basis for equitable tolling or for *sua sponte* re-

opening petitioner's case. *Ibid*. Petitioner timely petitioned for judicial review of the decision.

(5) In December 2006, petitioner filed yet another motion to reconsider. A.R. 11. In February 2007, the Board denied the motion. Pet. App. 28a-29a. The Board noted that its statement in its preceding decision that petitioner's motion was time-barred and number-barred was incorrect in view of another Board decision holding that regulations imposing temporal and numerical limitations on motions to rescind *in absentia* removal orders issued pursuant to 8 U.S.C. 1252b (1994) do not apply to deportation proceedings that, like petitioner's, were conducted under former 8 U.S.C. 1252(b) (1988). *Id.* at 29a (citing *In re Cruz-Garcia*, 22 I. & N. Dec. 1155, 1157 (B.I.A. 1999), aff'd, 229 F.3d 1137 (3d Cir. 2000) (Table)). On the merits, however, the Board stated that a decision to grant a motion to reopen rests in the sound discretion of the Board and that it had addressed petitioner's claims in its decisions denying petitioner's four prior motions. *Ibid*. Petitioner petitioned for judicial review.

3. The court of appeals consolidated the three petitions (which sought review of the Board's denials of motions (3), (4), and (5)) and, in an unpublished, per curiam opinion, dismissed in part and denied in part. Pet. App. 2a-4a. It dismissed the petition for review of the Board's February 2007 decision for lack of jurisdiction because the petition was filed late. *Id.* at 3a. It denied on the merits the petitions for review of the March 2006 and November 2006 decisions. *Id.* at 3a-4a. The court determined that petitioner had failed to show any error in the Board's determination that lack of actual notice, where the government properly mailed notices of the deportation hearing to petitioner's last known address,

did not constitute reasonable cause for failure to appear. *Id* at 4a. Accordingly, it held that petitioner failed to demonstrate that the Board abused its discretion in denying his motions to reopen and reconsider. *Ibid*.

ARGUMENT

Petitioner argues that the court of appeals erred in holding that the Board did not abuse its discretion in denying his motions to reopen a deportation proceeding from 1988 that resulted in an *in absentia* deportation order, on the ground (*inter alia*) that he was not advised to inform the immigration court of address changes and that he did not actually receive notice of the hearing. The court of appeals' unpublished decision does not conflict with any decision of this Court or of another court of appeals and does not otherwise warrant review by this Court. Moreover, petitioner's motions to reopen, which likely were untimely, were subject to the Board's broad discretion, and there is no good reason to question the exercise of that discretion on the facts of this case. Accordingly, no further review is warranted.

1. As this Court has emphasized, due to the government's strong interest in the finality of deportation orders, the Attorney General's discretion in deciding whether to reopen a completed removal proceeding is very broad, and judicial review of denials of such motions is correspondingly narrow. See *INS* v. *Doherty*, 502 U.S. 314, 322-323 (1992). A motion to reopen is comparable to a motion for a new trial in a criminal case on the basis of newly discovered evidence, "as to which courts have uniformly held that the moving party bears a heavy burden." *INS* v. *Abudu*, 485 U.S. 94, 110 (1988). And the Board's broad discretion permits it to deny motions to reopen for reasons wholly distinct from the mer-

its of the alien's eligibility for the relief to be sought at a reopened proceeding. *Id.* at 106-107.

Here, the Board identified several reasons for denying reopening, including its determinations that petitioner: (1) failed to establish that the hearing notice was not properly sent to his last known address; (2) failed to establish his claim that his failure to appear at the hearing was attributable to the ineffective assistance of his counsel; and (3) failed to justify the 14-year-long period of delay between the time that he was ordered deported *in absentia* and the time that he moved to reopen his removal proceeding. See Pet. App. 27a (incorporating by reference all the reasons it previously gave for denying reopening and reconsideration). Indeed, it was not until after petitioner became the beneficiary of an approved visa petition and a potential recipient of an immigration benefit that he made his whereabouts known to immigration authorities and submitted himself to the jurisdiction of the immigration court. Taken together, those reasons demonstrate that the Board did not abuse its discretion in declining to reopen proceedings. The Board's reasonable and factbound determination does not warrant this Court's review.

In addition, petitioner did not seek judicial review of the Board's decision affirming the IJ's denial of his first motion to reopen the deportation order entered in 1988 See p. 6, *supra*. All of the five subsequent motions petitioner filed, including the two that were before the court of appeals, were *successive* motions that presented no grounds different from those presented in the first motion, which petitioner allowed to become final and unreviewable. The Board was not required to reopen its now 20-year-old decision in response to such successive motions.

Finally, the premise of petitioner's petition—that the procedural requirements set forth in 8 U.S.C. 1252b (1994) were applicable to his deportation proceeding—is incorrect. Petitioner asserts that the charging document served upon him was deficient because, contrary to Section 1252b, the government did not advise him of the change-of-address requirement and did not provide him notice of the date of hearing "by certified mail if personal service was not possible." Pet. 10. But Section 1252b was not enacted until 1990, *after* petitioner had been ordered deported. See Immigration Act of 1990 (1990 Act), Pub. L. No. 101-649, § 545(a), 104 Stat. 5061. Petitioner's case was instead governed by 8 U.S.C. 1252(b) (1988), which did not prescribe a change-of-address warning or a specific method of notice. Rather, at that time, the INA directed the Attorney General to provide by regulation that the alien "be given notice, reasonable under all the circumstances, * * * of the time and place at which the proceedings will be held." 8 U.S.C. 1252(b)(1) (1988).

Even assuming some defect in the government's notice, petitioner cannot demonstrate prejudice from any such defect. As of February 1988, petitioner had no apparent grounds on which to challenge his deportability or obtain any form of relief that would have permitted him to remain permanently in the United States. Notably, before the hearing, petitioner had admitted that he was deportable as charged, and requested no relief or other protection from deportation. Pet. App. 14a-15a. Accordingly, there is no reason to believe that, had peti-

tioner appeared, the outcome of the deportation proceeding would have been any different.[4]

2. The court of appeals' unpublished decision does not establish circuit precedent that could give rise the sort of circuit conflict that might warrant review by this Court. In any event, contrary to petitioner's contention (at 12-14), the Fifth Circuit's decision in this case does not conflict with any decision of another court of appeals.

In *Lahmidi* v. *INS*, 149 F.3d 1011 (1998), on which petitioner relies, the Ninth Circuit concluded that the Board abused its discretion in denying a motion to rescind an *in absentia* order—entered in accordance with the post-1990 Act, § 545(a), 104 Stat. 5061, procedures set forth in 8 U.S.C. 1252b—for an alien who had not received notice and had not been advised to update his address. The Ninth Circuit held that, because the alien had been charged before the 1990 Act's effective date, the Board had erred in applying the Act's procedures in the first place. *Lahmidi*, 149 F.3d at 1016. In this case, by contrast, petitioner's deportation proceeding started and finished before the Section 1252b procedures went into effect, and there is no contention that the IJ or

---

[4] Asserting that he had obtained a labor certification, petitioner now argues that he had "initiated proceedings to obtain [a] benefit which made it less likely that I would simply ignore [a] later immigration proceeding of which I had notice." Pet. 25. An approved labor certification, however, establishes only that an alien is not inadmissible under 8 U.S.C. 1182(a)(5)(A)(i) (requiring certification from the Secretary of Labor that there are not sufficient workers skilled to perform the particular type of labor sought to be performed by the alien), not that an employment-based immigrant visa is immediately available to the alien. See *United States* v. *Ryan-Webster*, 353 F.3d 353, 355-356 (4th Cir. 2003). In any event, the record does not support petitioner's assertion.

Board applied the wrong statutory regime. Moreover, the time lag between the deportation order and the motion to reopen was considerably less in *Lahmidi* than the 14-year lag present here. *Id.* at 1012. Finally, there is no indication that, like petitioner here, the alien in *Lahmidi* was seeking an adjustment of status based on a development that arose long after the fact, rather than seeking to challenge the underlying basis of his deportation order. That distinction is meaningful because it bears on whether notice would have made any substantive difference (p. 12, *supra*) and on the timeliness of the motion to reopen (pp. 15-16, *infra*).

Petitioner also alleges a conflict with decisions of the Seventh Circuit. See Pet. 12-14 (citing *Sabir* v. *Gonzales*, 421 F.3d 456 (7th Cir. 2005); *Joshi* v. *Ashcroft*, 389 F.3d 732 (7th Cir. 2004); and *Chowdhury* v. *Ashcroft*, 241 F.3d 848 (7th Cir. 2001)). None of those decisions, however, conflicts with the ruling below.

In *Sabir*, which involved an *in absentia* removal order entered under a subsequent statutory regime, the court of appeals held that the IJ had abused his discretion in concluding that the alien had thwarted delivery of notice of his hearing by changing the spelling of his name on his mailbox, pointing out that the address on the mailbox was correct and the mail was properly addressed. 421 F.3d at 459. Here, by contrast, petitioner does not claim that he had provided an address that was valid at the time the notice was delivered. And, unlike here, the alien in *Sabir* had filed his motion to reopen "immediately" after the removal order. *Id.* at 457.

In *Joshi*, also involving an *in absentia* removal order entered under a subsequent statutory regime, the court of appeals held that the Board had not properly considered evidence probative of the issue of whether the alien

had received notice of her scheduled removal hearing, and it remanded for a further explanation. 389 F.3d at 736-737. Here, by contrast, there was no claim before the court of appeals that the Board overlooked or failed to adequately consider the evidence that petitioner submitted. And, once again, the motion to reopen in *Joshi* followed the removal order in a much more timely fashion, and there is no indication that the alien there had sought adjustment of status based on an after-the-fact development. 389 F.3d at 733.

Finally, in *Chowdhury*, the court of appeals held that the Board abused its discretion in ruling that an alien's motion to reopen was successive and therefore numerically barred. 241 F.3d at 852-854. The court of appeals here, however, did not uphold the Board's denial on timing or numerosity grounds, but rather considered and rejected petitioner's claim based on facts relevant to the notice issue. Pet. App. 4a. In any event, the time lag between the deportation order and the motion to reopen was considerably shorter in *Chowdhury* than here. 241 F.3d at 849.[5]

3. It also appears that petitioner's motions to reopen were untimely. Although a motion to reopen to challenge an *in absentia* deportation order generally is not restricted by time or numerical limits (see Pet. App. 29a), a motion to reopen to seek discretionary relief

---

[5] Petitioner also cites (at 13) an unpublished decision of the Second Circuit, *Singh* v. *Gonzales*, 177 Fed. Appx. 128 (2006). Even if a conflict between two unpublished dispositions could justify this Court's review, petitioner fails to account for a critical distinction: the Second Circuit's finding—unlike here—that the alien in that case "would only have benefitted from attending his June 2001 hearing, had he been aware of it," because he was *then* the beneficiary of an approved visa petition. *Id.* at 130.

from deportation (such as adjustment of status) must comply with the regulation's time and numerical limits. See *In re Cruz-Garcia*, 22 I. & N. Dec. 1155, 1160 (B.I.A. 1999), aff'd, 229 F.3d 1137 (3d Cir. 2000) (Table). Under 8 C.F.R. 3.23(b)(1) (2002) (now 8 C.F.R. 1003.23(b)(1)), "[a] motion to reopen must be filed within 90 days of the date of entry of a final administrative order of * * * deportation * * *, or on or before September 30, 1996, whichever is later." Petitioner's motion to reopen, filed in November 2002, did not comply with that deadline. See *In re Cruz-Garcia*, 22 I. & N. Dec. at 1160 ("Insofar as the [alien's] motion to reopen requested an adjudication of her application for adjustment of status, the motion was untimely because it was not filed by September 30, 1996."). And there is no independent entitlement to adjustment of status that trumps that time limit. See, *e.g.*, *Mudric* v. *Attorney Gen.*, 469 F.3d 94, 98 (3d Cir. 2006) (while alien may be eligible for adjustment of status under immigration laws, he is not entitled to such benefits); *Naeem* v. *Gonzales*, 469 F.3d 33, 38-39 (1st Cir. 2006) (reopening and adjustment of status are discretionary in nature, not entitlements or rights); *Obioha* v. *Gonzales*, 431 F.3d 400, 409 (4th Cir. 2005) (alien has no legal entitlement to discretionary relief).

Petitioner nonetheless argues (at 23, 27) that he is entitled to reopening under 8 U.S.C. 1229a(b)(5)(C)(ii) (permitting rescission of an *in absentia* deportation order upon motion to reopen "filed at any time" if the alien demonstrates that the alien did not "receive" proper notice). But that provision—added by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 304(a)(3), 110 Stat. 3009-590—does not apply to petitioner. See

IIRIRA § 309(c)(1), 110 Stat. 3009-625 ("in the case of an alien who is in exclusion or deportation proceedings as of [April 1, 1997]—(A) the amendments made by this subtitle shall not apply, and (B) the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments"). In any event, as explained above, it should not be read to require reopening merely to allow an alien to seek adjustment of status based on a development that arose long after the fact, rather than to challenge the underlying deportation order.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

GREGORY G. GARRE
Solicitor General
GREGORY G. KATSAS
Assistant Attorney General
DONALD E. KEENER
ROBERT N. MARKLE
Attorneys

OCTOBER 2008