No. 19-1477

In the Supreme Court of the United States

PHILIP CHI YAN MAN, PETITIONER

v.

WILLIAM P. BARR, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Board of Immigration Appeals permissibly denied petitioner's untimely and number-barred motions to reopen his removal proceedings to allow an immigration judge to consider whether to grant petitioner's waiver of inadmissibility under 8 U.S.C. 1182(d)(3)(A)(ii) for purposes of obtaining a grant of U nonimmigrant status from the Department of Homeland Security, where the Department of Homeland Security had already denied petitioner such a waiver in the exercise of its discretion.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-9) is reported at 940 F.3d 1354. A prior opinion of the court of appeals (Pet. App. 12-16) is not published in the Federal Reporter but is reported at 773 Fed. Appx. 422. The decisions of the Board of Immigration Appeals (Pet. App. 18-19, 20-24) are not published in the Administrative Decisions Under Immigration and Nationality Laws but are available at 2016 WL 946721 and 2016 WL 8468288. Prior decisions of the Board of Immigration Appeals (Pet. App. 25-28, 29-30) are unreported. The decision of the immigration judge (Pet. App. 31-33) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 17) was entered on October 24, 2019. A petition for rehearing was denied on February 7, 2020 (Pet. App. 10-11).

By order of March 19, 2020, this Court extended the deadline for all petitions for writs of certiorari due on or after the date of the Court's order to 150 days from the date of the lower court judgment or order denying a timely petition for rehearing. The petition for a writ of certiorari was filed on July 2, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, defines "admission" as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. 1101(a)(13)(A). Certain aliens are inadmissible, that is "ineligible for visas or admission." 8 U.S.C. 1182(a). An alien may be inadmissible for various reasons, including because of a public health concern, because of past criminal convictions, or because the alien poses a potential security threat. *Ibid.*

If an alien seeking admission as a nonimmigrant is inadmissible under Section 1182(a), he may apply for an exercise of discretion under Section 1182(d)(3)(A)(ii). That section states that, "[e]xcept as provided in [Section 1182(d)]," an inadmissible alien who "is seeking admission" "may be admitted into the United States temporarily as a nonimmigrant in the discretion of the Attorney General," unless his basis for inadmissibility is one of several grounds not at issue here. 8 U.S.C. 1182(d)(3)(A)(ii). Since the passage of the Homeland Security Act of 2002, Pub. L. No. 107-296, § 451(b), 116 Stat. 2196, the power to adjudicate Section 1182(d)(3)(A)(ii) waivers has been transferred to the Secretary of Homeland Security in most circumstances. See 6 U.S.C. 271(b) and 557; 8 C.F.R. 212.4(b) (2002).

Immigration judges in the Executive Office for Immigration Review in the Department of Justice are authorized to "exercise the powers and duties delegated to them * * * by the Attorney General through regulation," as well as any powers specifically delegated to them by the INA. 8 C.F.R. 1003.10(b). The Attorney General has delegated authority to immigration judges to adjudicate requests for a Section 1182(d)(3)(A)(ii) waiver in certain circumstances. See 8 C.F.R. 1212.4(b) and 1235.2(d).[1] The applicable Department of Justice regulations provide that an application for a waiver must first be submitted at a port of entry to the district director in the Department of Homeland Security (DHS) in charge of considering the alien's admissibility upon arrival in the United States; if the waiver is denied by the district director and the alien is placed directly in removal proceedings, the alien may renew the application before the immigration judge during those removal proceedings. *Ibid.*; see *In re Khan*, 26 I. & N. Dec. 797, 801-802 (B.I.A. 2016). The Board of Immigration Appeals (Board) hears appeals from decisions of immigration judges, including as to Section 1182(d)(3)(A)(ii) waivers. See 8 U.S.C. 1229a(c)(5); 8 C.F.R. 1003.1(b)(3), 1003.10(a) and (b).

b. An alien who has previously been admitted as a nonimmigrant can seek to change his status, including by obtaining a different nonimmigrant status. See 8 U.S.C. 1258. In 2000, Congress enacted the "U" nonimmigrant visa program to strengthen the ability of law enforcement agencies to investigate certain crimes

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[1] Some regulations refer to Section 1182(d)(3)(A)(ii) by its original designation as Section 1182(d)(3)(B). See Real ID Act of 2005, Pub. L. No. 109-13, Div. B, § 104, 119 Stat. 309; *In re Khan*, 26 I. & N. Dec. 797, 802 & n.6 (B.I.A. 2016).

while offering protection to alien crime victims. See Battered Immigrant Women Protection Act of 2000 (BIWPA), Pub. L. No. 106-386, Div. B, Tit. V, § 1513(a)(2), 114 Stat. 1533-1534.

Responsibility for the U nonimmigrant visa program was initially lodged with the Attorney General. See BIWPA § 1513(a)(2)(C) and (b), 114 Stat. 1534-1535. Congress subsequently shifted responsibility over visa petitions generally and U-visa petitions specifically to the Secretary of Homeland Security. See Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, Tit. VIII, Subtit. A, §§ 801(b)(1), 802(b), 119 Stat. 3054 (amending 8 U.S.C. 1101(a)(15)(U) and 1255(m) (2006); 8 U.S.C. 1182(d)(14)); see also 6 U.S.C. 271(b)(1).

To be eligible for a U visa, an alien must demonstrate, among other requirements, that he has been a victim of a specified crime and that he is being, has been, or is likely to be helpful in investigating or prosecuting the offense. See 8 U.S.C. 1101(a)(15)(U)(i) and (iii); 8 C.F.R. 214.14. The Secretary of Homeland Security determines whether those requirements are satisfied. 8 U.S.C. 1101(a)(15)(U)(i).

The INA further provides that "[t]he Secretary of Homeland Security shall determine whether a ground of inadmissibility exists" with respect to a U-visa applicant. 8 U.S.C. 1182(d)(14). Section 1182(d)(14) then provides that the "Secretary of Homeland Security, in the Attorney General's discretion,[2] may waive the application of [Section 1182(a)]" for a U-visa applicant, with

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[2] As the official reporter indicates, the reference to the Attorney General's discretion appears to be an error, and the statute should

one exception not at issue here, "if the Secretary of Homeland Security considers it to be in the public or national interest to do so." *Ibid.* (footnote omitted).

By regulation, the Secretary of Homeland Security has delegated this authority to United States Citizenship and Immigration Services (USCIS). 8 C.F.R. 212.17, 214.14(c)(1), 245.24(f); see 8 U.S.C. 1101(a)(3). Regulations governing the procedure for U-visa applications provide that "USCIS has sole jurisdiction over all petitions for U nonimmigrant status." 8 C.F.R. 214.14(c)(1). An alien seeking a U-visa, including an alien "in removal proceedings," must file a U-visa petition directly with USCIS. 8 C.F.R. 214.14(c)(1)(i). An alien in removal proceedings may move to "terminate proceedings without prejudice with the immigration judge or Board of Immigration Appeals * * * while a petition for U nonimmigrant status is being adjudicated by USCIS." *Ibid.* If the alien already "is the subject of a final order of removal," he may still file a U-visa petition; but again, he must do so "directly with USCIS." 8 C.F.R. 214.14(c)(1)(ii). The pendency of a U-visa petition does not affect the government's authority to remove the alien, but an alien "may file a request for a stay of removal" based on the pending petition. *Ibid.*

The regulations provide that USCIS may, "in its discretion," grant a waiver of inadmissibility under Section 1182(d)(3) or Section 1182(d)(14). 8 C.F.R. 212.17(b)(1). The regulations also provide substantive guidance to USCIS regarding how it should exercise that discretion. In particular, consistent with the statutory requirement, USCIS may grant a Section 1182(d)(14) waiver

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refer to the "Secretary's" discretion. 8 U.S.C. 1182(d)(14) n.6. Petitioner agrees that Section 1182(d)(14) grants waiver authority to the Secretary rather than the Attorney General. Pet. 8.

only "if it determines that it is in the public or national interest" to do so. *Ibid.* Where, as here, inadmissibility arises from a criminal offense, USCIS must "consider the number and severity of the offenses of which the applicant has been convicted." 8 C.F.R. 212.17(b)(2). Unlike the regulations governing waiver requests filed at a port of entry, see p. 3, *supra*, the U regulations provide that a waiver denial cannot be appealed. 8 C.F.R. 212.17(b)(3).

2. The court of appeals decision in this case denied consolidated petitions for review of the final removal order entered against petitioner and his second and third motions to reopen seeking to have an immigration judge grant him a waiver of inadmissibility as one step to obtaining a U visa from USCIS.

a. Petitioner is a native of Hong Kong and a citizen of China. Pet. App. 31. In 1997, Petitioner was admitted to the United States as a nonimmigrant visitor with authorization to remain for up to six months. Administrative Record (A.R.) 1485. Petitioner overstayed that visa and has remained in the United States since that time. See Pet. App. 8. In 2006 and 2007, petitioner was convicted of felony possession of marijuana for sale in violation of Cal. Health & Safety Code § 11359 (West 2000); two instances of possession of marijuana in violation of Cal. Health & Safety Code § 11357(c) (West 2000); driving without a license in violation of Cal. Veh. Code § 12500(a) (West 2000); and failing to register while on probation in violation of Cal. Penal Code § 186.33(a) (West 2000). A.R. 761-762, 917, 1352-1357.

b. In 2007, the DHS charged petitioner with being removable from the United States under 8 U.S.C. 1227(a)(1)(B), which renders removable an alien who,

after admission into the United States as a nonimmigrant, remains longer than permitted. A.R. 1485.

Petitioner conceded the charge of removability, and the immigration judge ruled that petitioner was removable. Pet. App. 31. The judge further determined that petitioner was not eligible for adjustment of status to that of lawful permanent resident based on his marriage to a U.S. citizen, see 8 U.S.C. 1255(a), because of his felony conviction for selling marijuana. Pet. App. 32.

c. The Board dismissed petitioner's appeal. Pet. App. 29-30. The Board agreed with the immigration judge that petitioner was "not statutorily eligible for adjustment of status" because of his controlled substance violation. Pet. App. 30 (citing 8 U.S.C. 1182(a)(2)(A)(i)(II)). The Board also explained that petitioner was not eligible for a waiver of inadmissibility under 8 U.S.C. 1182(h), which allows the Attorney General to waive inadmissibility for certain aliens convicted of marijuana offenses, because his offense did not involve simple possession of marijuana. *Ibid.* Petitioner filed a petition for review of the final removal order.

d. Petitioner subsequently filed a petition for a U nonimmigrant visa, along with a request for a waiver of inadmissibility, with USCIS based on the assistance he provided to law enforcement as the victim of a gang shooting in 2004. See A.R. 916-1064.

While that U-visa petition was pending with USCIS, petitioner filed the first of three motions to reopen his removal proceedings with the Board. A.R. 903-914. In that motion to the Board, petitioner made no argument about a waiver of inadmissibility. See *ibid.* The Board denied the motion. Pet. App. 25-28. As relevant here, the Board found that petitioner's pending U-visa petition did not constitute previously unavailable evidence

that might furnish a basis for reopening, because the petition was based on a crime committed against him in 2004, "well before his removal proceedings were commenced in 2007," and petitioner failed to explain why he could not have obtained the required materials and applied for the visa earlier. *Id.* at 26. The Board further noted that petitioner "does not need to obtain reopening of his proceedings to pursue a U visa," and that he can seek a stay of removal while his U-visa petition "is being considered by the DHS." *Id.* at 28. Petitioner did not file a petition for review of the Board's denial of his first motion to reopen.

e. In 2014, USCIS denied petitioner's application for a waiver of inadmissibility under Section 1182(d)(3) and (14). A.R. 660-662. In reaching that decision, USCIS considered the initial evidence petitioner submitted and additional evidence requested by USCIS. A.R. 661. After addressing petitioner's criminal history and personal circumstances, USCIS concluded that petitioner "ha[d] not provided sufficient evidence to establish that granting a waiver would be in the national or public interest." A.R. 662. Because petitioner was inadmissible, USCIS denied the petition for a U visa. A.R. 657-658.

Petitioner filed a motion for reconsideration of that denial of a waiver of inadmissibility, and USCIS reopened its decision. A.R. 356. After further consideration of the record, USCIS concluded that petitioner "remain[s] a risk to society" and affirmed its decision to deny the application for a waiver of inadmissibility. A.R. 361; see A.R. 356-361. Petitioner then filed a second motion for reconsideration with USCIS. See A.R. 71.

f. While the second motion for reconsideration was pending with USCIS, petitioner filed a second motion to

reopen his removal proceedings with the Board, requesting that, after reopening, his removal proceedings be remanded to the immigration judge so that he could "seek review * * * of the erroneous denial by [USCIS] of [the] application for a waiver of inadmissibility." A.R. 149; see A.R. 147-181, Pet. App. 22.

The Board denied the motion to reopen. Pet. App. 20-24. The Board determined that because the INA allows an alien only one motion to reopen and this was petitioner's second motion, it was numerically barred. *Id.* at 20-21 (citing 8 U.S.C. 1229a(c)(7)(A)). The Board also determined that the motion, which was filed more than two years after the final order of removal, was untimely. *Id.* at 21-22 (citing 8 U.S.C. 1229a(c)(7)(C)(i)). The Board explained that petitioner did not identify any "statutory or regulatory exception[] to the time and numeric limits on motions." *Id.* at 21. It further rejected petitioner's argument for equitable tolling of those limits based on alleged ineffective assistance of counsel, *ibid.*, noting that the attorney's "alleged errors did not affect the outcome of [petitioner's] removal proceedings or result in prejudice," because "a U visa and the accompanying waiver of inadmissibility" were "not available in removal proceedings" and because petitioner "has been able to pursue a U visa and waiver of inadmissibility before the DHS," *id.* at 22-23.

The Board also observed that the immigration judge did not have authority to adjudicate petitioner's request for a waiver of inadmissibility. Pet. App. 23. It explained that *L.D.G.* v. *Holder*, 744 F.3d 1022 (7th Cir. 2014), which concluded that an immigration judge may consider an application for a waiver of inadmissibility in

the U-visa context was neither controlling nor persuasive. *Ibid.* Petitioner filed a petition for review of that denial of his second motion to reopen.

g. USCIS subsequently reaffirmed its denial of petitioner's application for a waiver of inadmissibility. A.R. 71-73. After again reviewing the entire record, USCIS reiterated that petitioner had not presented "sufficiently persuasive evidence of [his] rehabilitation" and determined that "the equities are simply outweighed by the adverse matters" in petitioner's case. A.R. 73.

h. Petitioner then filed a third motion to reopen with the Board. A.R. 34-75. The Board denied petitioner's motion. Pet. App. 18-19. As with petitioner's second motion, the Board determined that the motion was both untimely and number-barred. *Id.* at 18. The Board further noted that, since its prior decision, it had issued a precedential decision in *Khan*, *supra*, which "establish[ed] that an Immigration Judge does not have jurisdiction to adjudicate a request for * * * a waiver of inadmissibility by a petitioner for U nonimmigrant status." Pet. App. 19. Petitioner filed a petition for review of the Board's denial of that third motion to reopen.

3. The court of appeals denied all three petitions for review. Pet. App. 1-9.[3]

The court of appeals denied review of the Board's original removal order because petitioner's past conviction was a drug-trafficking aggravated felony under the INA, rendering petitioner inadmissible and ineligible for adjustment of status. Pet. App. 2 (citing 8 U.S.C.

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[3] The court of appeals first issued a memorandum disposition. Pet. App. 12-16. It then withdrew that disposition, *id.* at 17, and issued a published decision, *id.* at 1-9.

1182(a)(2)(A)(i)(II) and 1255(a)). Petitioner does not seek review of that ruling in this Court. See Pet. 15 n.5.

Turning to petitioner's second and third motions to reopen, the court of appeals observed that "[a]part from denying the motion based on the temporal and numerical limitations," the Board had also rejected petitioner's argument that an immigration judge "has independent authority to adjudicate an application for [a] waiver of admissibility [under 8 U.S.C. 1182(d)(3)(A)(ii)]." Pet. App. 3. The court agreed with the Board on that point. *Id.* at 4.

The court of appeals explained that 8 U.S.C. 1182(d)(14) specifically grants DHS the authority to grant a waiver of inadmissibility for a U-visa applicant. Pet. App. 4. Another provision, 8 U.S.C. 1182(d)(3)(A)(ii), sets out the Attorney General's general authority to grant a waiver of inadmissibility to aliens seeking admission. The court explained that "ambiguity reigns," given the need to reconcile Congress's "grant of a specific inadmissibility waiver and sole grant of U visa adjudicatory power to the Secretary of Homeland Security" with the "pre-existing inadmissibility waiver power in the Attorney General for aliens who are seeking admission." Pet. App. 5-6. Given that ambiguity, the court held, the Board's interpretation was "entitled to deference." *Id.* at 5.

The court of appeals then concluded that the Board had reasonably interpreted the INA in *Khan*, *supra*. Pet. App. 6-7. In *Khan*, the Board determined that, as relevant here, the delegated authority of immigration judges under Section 1182(d)(3)(A)(ii) is "limited to when an inadmissible nonimmigrant alien [is] seeking admission at a port of entry." *Id.* at 6 (quoting *Khan*, 26 I. & N. Dec. at 802) (emphasis omitted). It further

concluded that the Attorney General delegated this authority to adjudicate waivers of inadmissibility to immigration judges in "narrow and specific circumstances that are inapplicable to a petitioner for U nonimmigrant status." *Id.* at 6-7 (quoting *Khan*, 26 I. & N. Dec. at 802). Petitioner, the court observed, "has been in the United States since 1997," and was not seeking a waiver incident to his arrival or initial admission, such that he was not eligible for a Section 1182(d)(3)(A)(ii) waiver as an alien seeking admission. *Id.* at 8.

The court of appeals noted that the Board's analysis comported with that of the Third Circuit, which held that the Attorney General's Section 1182(d)(3)(A)(ii) authority "extends only over those 'seeking admission.'" Pet. App. 7 (quoting *Sunday* v. *Attorney Gen.*, 832 F.3d 211, 214 (2016)). The court found the Third Circuit's conclusion "persuasive and consistent with the statutory text and the Board's conclusion." *Ibid.* The court disagreed with the Seventh Circuit's view that the Section 1182(d)(3)(A) power extends more broadly, noting that the Seventh Circuit "did not analyze [Section] 1182(d)(3)(A)(ii)'s language limiting the Attorney General's jurisdiction over inadmissibility waivers to requests by non-citizen[s] 'seeking admission.'" *Id.* at 8 (citing *L.D.G.*, *supra*) (emphasis omitted). It likewise deemed unpersuasive the Eleventh Circuit's similar conclusion, which "simply agreed with the Seventh Circuit" "[w]ithout independent analysis." *Ibid.* (citing *Meridor* v. *U.S. Att'y Gen.*, 891 F.3d 1302 (11th Cir. 2018)). Accordingly, the court explained that petitioner "had not identified any reason to displace the Board's interpretation of [Section] 1182(d)(3)(A)(ii)." *Id.* at 8.

4. The court of appeals denied a petition for rehearing and rehearing en banc. Pet. App. 10.

ARGUMENT

Petitioner challenges the affirmance of the Board's denial of his second and third motions to reopen, contending that an immigration judge has jurisdiction to waive his inadmissibility for purposes of a U-visa petition filed with USCIS after that same waiver relief was denied by USCIS. The court of appeals did not err in upholding the denial, and its decision does not present a conflict warranting this Court's review at this time.

In any event, petitioner's case would be an unsuitable vehicle for addressing the question presented, because he filed a U-visa petition and sought an inadmissibility waiver from USCIS after his removal proceedings were already completed and a final order of removal had been entered against him. When USCIS denied a waiver of inadmissibility, petitioner sought to have an immigration judge grant a waiver of inadmissibility for the first time by filing second and third motions to reopen with the Board. The Board correctly denied petitioner's motions to reopen as untimely and number-barred, quite aside from its ruling that an immigration judge would not have had authority to grant a waiver of inadmissibility in the circumstances here. It would be especially disruptive of the administrative scheme to allow an alien who had a final order of removal entered against him, and then was denied a waiver of inadmissibility in connection with an application for a U visa by USCIS, to obtain a second bite at the apple from an immigration judge through a motion to reopen his already final removal order—especially a motion that is both untimely and number-barred.

1. a. The court of appeals correctly upheld the Board's decisions not to reopen. Principles of *Chevron*

deference apply when the Board interprets the immigration laws. *Scialabba* v. *Cuellar de Osorio*, 573 U.S. 41, 56 (2014) (plurality opinion); *id.* at 76-79 (Roberts, C.J., concurring in the judgment) (deferring to Board under *Chevron*); see *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999); see also *Negusie* v. *Holder*, 555 U.S. 511, 516-517 (2009). In addition, the Board's interpretation of ambiguous immigration regulations must be upheld as long as it is reasonable. See *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997); see also *Kisor* v. *Wilkie*, 139 S. Ct. 2400, 2414-2418 (2019).

The Board reasonably determined in *In re Khan*, 26 I. & N. Dec. 797 (2016) that an immigration judge lacks authority to grant a waiver of inadmissibility to a U-visa applicant who has previously been lawfully admitted into the United States. The Board explained that, under governing regulations, it had long held that an immigration judge's authority to adjudicate waivers under Section 1182(d)(3)(A)(ii) is "limited" to situations when an inadmissible nonimmigrant alien is "seeking admission at a port of entry." *Id.* at 802; see *In re Fueyo*, 20 I. & N. Dec. 84, 86-87 (B.I.A. 1989). That authority does not extend to an alien like petitioner who is already present in the United States following a lawful admission. See *Sunday* v. *Attorney Gen.*, 832 F.3d 211, 214 (3d Cir. 2016) ("By definition" the group of aliens "'seeking admission'" into the United States "does not include individuals who have already lawfully entered.").

In addition, Section 1182(d)(3)(A) grants the Attorney General waiver authority "[e]xcept as provided in this subsection." 8 U.S.C. 1182(d)(3)(A). Here, Section 1182(d)(14) provides that, for a U-visa applicant, "[t]he Secretary of Homeland Security shall determine whether a ground of inadmissibility exists," and that the

"Secretary of Homeland Security * * * may waive [the ground of inadmissibility]." 8 U.S.C. 1182(d)(14). That provision grants specific authority to the Secretary of Homeland Security, not to the Attorney General, to determine whether a ground of inadmissibility exists for a U-visa applicant. Moreover, it allows a waiver "if *the Secretary of Homeland Security* considers it to be in the public or national interest to do so." *Ibid.* (emphasis added). That authority has been delegated to USCIS, which considers applications for such relief when filed by an alien.

The Board also reasonably interpreted the governing regulations to limit the granting of authority to immigration judges with respect to a Section 1182(d)(3)(A)(ii) waiver to "narrow and specific circumstances that are inapplicable to a petitioner for U nonimmigrant status." *Khan*, 26 I. & N. Dec. at 802; see *id.* at 803 (citing 8 C.F.R. 1003.10). Specifically, under those regulations, the request must be made by an alien arriving at a port of entry, first submitted to a district director in charge of the alien's arrival, and presented to the immigration judge if the waiver is denied and the alien is placed directly in removal proceedings. See 8 C.F.R. 1212.4(b), 1235.2(d). Those regulations "restrict an [immigration judge's Section 1182](d)(3)(A)(ii) waiver authority to only those instances where the alien has applied to a district director" at the port of entry. *Sunday*, 832 F.3d at 217. Because petitioner does not fit into this limited circumstance, the immigration judge lacked authority under the regulations to grant him a Section 1182(d)(3)(A)(ii) waiver. The regulations limiting an immigration judge's authority to grant a waiver of inadmissibility to the situation in which a waiver is denied by an inspecting officer at a port of entry and the alien is then placed

directly in removal proceedings reflects an especially reasonable interpretation of the statutory scheme in the context of an alien, like petitioner, who had previously been *lawfully admitted* and seeks a U visa from USCIS.

Petitioner's contrary view of an immigration judge's authority would allow a circumvention of USCIS's non-appealable authority over U-visa petitions, putting immigration judges in the position of overturning a considered USCIS decision to deny a waiver to a U-visa applicant in the exercise of discretion, followed by appellate review by the Board, and the courts of appeals. See A.R. 149 (petitioner's motion to reopen his case before the immigration judge so he can "seek review * * * of the erroneous denial by [USCIS] of [the] application for a waiver of inadmissibility"). Granting immigration judges that authority would be especially incongruous because, unlike most waivers, which, if granted, foreclose removal, an inadmissibility waiver for a U-visa applicant "renders [the alien] *eligible* for a visa," without itself lifting the basis for removal. *Meza Morales* v. *Barr*, 973 F.3d 656, 662 (7th Cir. 2020) (Barrett, J.). On petitioner's view, then, an immigration judge can rule on one of the requirements for a U visa, even though USCIS has exclusive authority to grant a U visa, and the immigration judge can do so even *after* USCIS itself has already deemed a waiver inappropriate for the particular alien. The Board reasonably concluded that interpreting the statutory and regulatory scheme to allow an immigration judge to do so would be inefficient, inviting the immigration judge to adjudicate "collateral matters," and then, if the immigration judge grants a waiver of inadmissibility, requiring the alien to "re-file a petition for U nonimmigrant status with the USCIS and await its adjudication." *Khan*, 26 I. & N. Dec. at

804; see *Meza Morales*, 973 F.3d at 659 (noting the "coordination problems" that have resulted from allowing immigration judges to grant U-visa inadmissibility waivers).

b. None of petitioner's contrary arguments undermines the Board's interpretation. Petitioner contends (Pet. 28-30) that deference is not warranted in this case because the Board does not administer Section 1182(d)(14). Pet. 29. But the Board warrants deference for its interpretation of the Attorney General's authority under Section 1182(d)(3)(A)(ii) and for its interpretation of the regulations the Attorney General promulgated addressing his delegation of power to immigration judges. See pp. 13-14, *supra*. And while petitioner contends (Pet. 2, 26) that deference is not warranted because of the "interplay" between Section 1182(d)(3)(A)(ii) and Section 1182(d)(14), statutory interpretation requires consideration of "the broader context of the statute as a whole." *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997).

Petitioner next argues that deference is inappropriate because the Board "d[id] not even address the purported statutory ambiguity that the Ninth Circuit invoked to justify that deference." Pet. 29. But, as the court of appeals recognized, Pet. App. 8, the Board interpreted Section 1182(d)(3)(A)(ii) and governing regulations in *Khan*, which the Board relied upon in this case, see Pet. App. 19, reiterating its longstanding view that the authority of immigration judges to grant waivers under that provision "is limited to when an inadmissible nonimmigrant alien seeking admission at a port of entry has been denied a waiver and has been placed in exclusion or removal proceedings where a waiver request has been renewed before the Immigration

Judge." *Khan*, 26 I. & N. Dec. at 802; see *id.* at 804 (explaining that its interpretation could apply nationwide because "the Seventh Circuit[] * * * did not expressly determine that the language in [Section 1182(d)(3)(A)(ii)] was unambiguous").

Petitioner also disagrees with the Board's interpretation of the Department of Justice's regulations as limiting the authority of immigration judges to issue Section 1182(d)(3)(A)(ii) waivers to specific circumstances not applicable here, suggesting that 8 C.F.R. 1003.10(a) broadens the power of immigration judges beyond the limits set out in 8 C.F.R. 1212.4(b) and 1235.2(d). Pet. 33-35. But Section 1003.10(a) simply addresses the "[a]ppointment" of immigration judges, providing that immigration judges are attorneys "appoint[ed]" by the Attorney General "to conduct specified classes of proceedings * * * as the Attorney General's delegates." 8 C.F.R. 1003.10(a). The "[p]owers" of immigration judges are described in Section 1003.10(b), which limits the judges to "exercis[ing] the powers and duties delegated to them by the [INA] and by the Attorney General through regulation." 8 C.F.R. 1003.10(b). The INA does not delegate any power over Section 1182(d)(3)(A)(ii) waivers directly to immigration judges, and the Attorney General's regulations are limited to specific circumstances inapplicable here. See pp. 14-16, *supra*. The Board's view that the regulatory authorization to grant Section 1182(d)(3)(A)(ii) waivers pursuant to specific procedures excludes the authority of immigration judges to act beyond those constraints should be upheld because it is based on a "reasonable reading" of the regulation. *Kisor*, 139 S. Ct. at 2419.

2. Petitioner's case does not present a conflict warranting this Court's intervention. Relying on decisions

of the Seventh and Eleventh Circuits, petitioner contends (Pet. 18-25) that the courts of appeals are divided over the implementation of the statutory scheme. But the aliens in those decisions were differently situated than petitioner. Nor has either circuit conclusively determined that the Board's contrary views are not entitled to deference.

a. Each of the decisions petitioner cites as conflicting with the decision below (Pet. 18-23) addressed an alien who had not previously been lawfully admitted to the United States. See *L.D.G.* v. *Holder*, 744 F.3d 1022, 1026 (7th Cir. 2014); *Baez-Sanchez* v. *Barr*, 947 F.3d 1033, 1034 (7th Cir. 2020) (*Baez-Sanchez II*); *Meridor* v. *U.S. Att'y Gen.*, 891 F.3d 1302, 1304 (11th Cir. 2018); Gov't Br. at 13, *Baez-Sanchez* v. *Sessions*, 872 F.3d 854 (7th Cir. 2017) (No. 16-3784); Gov't Br. at 4-6, *Meridor*, *supra* (No. 15-14569). By contrast, petitioner, like the aliens whose waiver requests were addressed by the Third Circuit in *Sunday* and by the Board in *Khan*, was lawfully admitted into the United States. See A.R. 1485; *Sunday*, 832 F.3d at 212; *Khan*, 26 I. & N. Dec. at 797. That difference is significant: both the court of appeals in this case and the Third Circuit in *Sunday* determined that Section 1182(d)(3)(A) did not apply because the aliens, who had "already lawfully entered," were not "seeking admission" into the United States. Pet. App. 7 (citation omitted); *Sunday*, 832 F.3d at 214. The analysis may come out differently for an alien who has no prior lawful admission. See 8 U.S.C. 1225(a)(1). Neither the Seventh nor the Eleventh Circuit addressed the Section 1182(d)(3)(A) language referencing "seeking admission." See *L.D.G.*, 744 F.3d at 1030-1032; *Baez-Sanchez* v. *Sessions*, 872 F.3d 854, 856 (7th Cir. 2017) (*Baez-Sanchez I*); *Meridor*, 891 F.3d at 1307.

b. Moreover, review by this Court would be premature because, aside from failing to address the statutory language that the court of appeals and the Third Circuit deemed significant, neither the Seventh nor Eleventh Circuit has foreclosed deference to the Board on the question presented.

In *L.D.G.*, which predated the Board's decision in *Khan*, the Seventh Circuit concluded that immigration judges are authorized to grant inadmissibility waivers to U-visa applicants because the grant of specific authority over such waivers to the Secretary of Homeland Security had not "effected a partial implied repeal" of the Attorney General's power under Section 1182(d)(3)(A). *L.D.G.*, 744 F.3d at 1030. But, although the Seventh Circuit purported to base its conclusion on "the plain language" of Section 1182(d)(3)(A), it did not address the language in that provision referring to aliens seeking admission. *Id.* at 1030-1032. Just as significantly, the Seventh Circuit recognized that the statutory scheme was "ambiguous," observing that its analysis was "the best we can make of an ambiguous statutory scheme." *Id.* at 1031. The Board subsequently observed that *L.D.G.* recognized statutory ambiguity and left room "for agency discretion," allowing the Board to apply its ruling "to cases nationwide," including cases in the Seventh Circuit. *Khan*, 26 I. & N. Dec. at 805.

After the Board issued its decision in *Khan*, the Seventh Circuit again addressed the question of immigration judge authority over inadmissibility waivers for U-visa applicants. *Baez-Sanchez I*, 872 F.3d at 855-856. But the Seventh Circuit took the view that "the parties' arguments about the effects of *Chevron* and *Auer* are premature," explaining that it would address questions about "the scope of the agency's discretion" after the

Board addressed "essential issues." *Id.* at 856 (citations omitted); see *ibid.* (deeming itself unable to reach the question whether "the power to grant a waiver of inadmissibility may be exercised only in favor of an alien who has yet to enter the United States"). On remand, the Board failed to address the issues specified by the court, and the Seventh Circuit ruled against the government on the basis of what it found to be the Board's "defiance of [its] remand order." *Baez-Sanchez II*, 947 F.3d at 1035. The court explained that it would "deem all of the legal questions settled" for purposes of the case before it, holding only that immigration judges have the power to grant inadmissibility waivers "[f]or the purposes of *this* proceeding," and observing that the government and the Board would be "free to maintain, in some other case, that [the court's] decision is mistaken." *Id.* at 1036-1037.

Because the Seventh Circuit had previously deemed the statutory scheme "ambiguous," *L.D.G.*, 744 F.3d at 1031, and resolved *Baez-Sanchez* on case-specific considerations that left the Board free to conclude in a future case that the court's conclusion was erroneous, the Seventh Circuit could decide to revisit the authority of immigration judges to grant inadmissibility waivers to U-visa applicants. See *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967 (2005). In particular, the Seventh Circuit made clear that it may defer to a subsequent Board decision that identifies a law that "transferred to the Secretary the Attorney General's power to waive inadmissibility" or authority for the proposition that "the power to waive inadmissibility may be exercised only in favor of aliens who apply from outside the United States." *Baez-Sanchez II*, 947 F.3d at 1035. To be sure, the Ninth Circuit in this case

considered the Board's decision in *Khan* sufficient to answer those questions, Pet. App. 5, and the Third Circuit considered the statutory scheme sufficiently clear even before considering deference principles, *Sunday*, 832 F.3d at 215. But that disagreement, which would be rendered academic by a further Board decision, does not warrant this Court's review.

Petitioner also cites (Pet 22-23) the Eleventh Circuit's decision in *Meridor*, which concluded that immigration judges have authority to grant U-visa inadmissibility waivers. 891 F.3d at 1307. But in reaching that conclusion, the Eleventh Circuit relied on the Seventh Circuit's decisions "[w]ithout independent analysis." Pet. App. 8; see *Meridor*, 891 F.3d at 1307. And while it deemed the Board's decision in *Khan* "unpersuasive for the reasons set forth in *Baez-Sanchez*," *Meridor*, 891 F.3d at 1307 n.8, it did not hold that the statutory scheme was unambiguous or preclude the possibility that a subsequent decision by the Board would support a different result.

3. In any event, this case would be an unsuitable vehicle for addressing the question presented. Regardless of whether immigration judges have concurrent jurisdiction to grant inadmissibility waivers to U-visa applicants, the Board properly denied petitioner's second and third motions as untimely and number-barred.

Petitioner's order of removal became final in 2013, but he did not ask that an immigration judge grant him a waiver until his second and third motions to reopen before the Board, which were filed in 2015 and 2016, respectively. "Motions for reopening of immigration proceedings are disfavored." *INS* v. *Doherty*, 502 U.S. 314, 323 (1992). Here, the Board correctly concluded that the motions were time-barred. Pet. App. 18, 21;

8 U.S.C. 1229a(c)(7)(C)(i) (requiring a motion to reopen to be filed within 90 days of the final order of removal). The Board also correctly concluded that the motions were number-barred because petitioner had previously filed a motion to reopen, and the applicable regulations limit an alien to one such motion. Pet. App. 18, 20-21; 8 C.F.R. 1003.2(c)(2). Petitioner did not identify any statutory or regulatory exceptions to either the time or numerical limits on motions. Pet. App. 21.

Petitioner argued that those time and numerical limitations should be equitably tolled because his counsel was ineffective in failing to seek an inadmissibility waiver before the immigration judge. See Pet. App. 21. But even if petitioner were correct that immigration judges have concurrent jurisdiction to grant U-visa waivers, he would not be able to establish that his counsel was ineffective in failing to seek such a waiver. First, as the Board found, petitioner's failure to seek a waiver before the immigration judge did not prejudice his ability to seek a waiver from USCIS. *Id.* at 23. Second, given that the authority of an immigration judge to grant such a waiver is (at best) unclear, petitioner cannot establish that his counsel's performance in failing to seek such a waiver was deficient. Finally, even after obtaining new counsel, petitioner did not raise the waiver issue in his first motion to reopen, instead waiting more than two years to ask the Board to reopen his proceedings on that basis. A.R. 147. Because petitioner chose to pursue his waiver application first before USCIS, the time and numerical limits cannot be excused. See *Thorsteinsson* v. *INS*, 724 F.2d 1365, 1368 (9th Cir.), cert. denied, 467 U.S. 1205 (1984).

What is more, even if petitioner's second and third motions to reopen were not time- and number-barred,

the Board would have no obligation to remand to the immigration judge to address the inadmissibility waiver, because even if immigration judges had concurrent authority to grant such a waiver, that does not mean that an "[immigration judge] *must* adjudicate inadmissibility waivers even after the [judge] has issued a final order of removal." *Chavez-Romero* v. *United States Att'y Gen.*, 817 Fed. Appx. 919, 924 (11th Cir. 2020) (per curiam) (affirming Board's decision not to remand to the immigration judge). That is especially so because the grant of an inadmissibility waiver would not lift the basis for removal. See p. 16, *supra*.

Finally, petitioner has not provided any reason to believe that the waiver determination would come out differently before an immigration judge. USCIS denied petitioner's waiver after a careful review of the record, which petitioner had the opportunity to supplement. See p. 8, *supra*. It entertained two motions for reconsideration. See pp. 8-10, *supra*. Yet each time, it reached the same conclusion: that petitioner had not presented "sufficiently persuasive evidence of [his] rehabilitation" and that "the equities are simply outweighed by the adverse matters" in petitioner's case. A.R. 73. While petitioner seeks to make his argument once again, he has offered no reason that the analysis would come out differently, nor can he explain why an immigration judge's judgment as to this U-visa prerequisite should trump that of USCIS. For those reasons as well, the Court should deny the petition for a writ of certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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