No. 99-961

In the Supreme Court of the United States

ESTANISLAO S. MAPOY, PETITIONER

v.

WILLIAM CARROLL, DISTRICT DIRECTOR, DEPARTMENT OF JUSTICE IMMIGRATION AND NATURALIZATION SERVICE

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 8 U.S.C. 1252(g) (Supp. IV 1998) deprived the district court of jurisdiction under 28 U.S.C. 2241 to review the Attorney General's decision to deny a stay of deportation to petitioner pending action on his motion to reopen his deportation proceeding.

2. Whether petitioner's motion to reopen his deportation proceeding was timely filed.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 185 F.3d 224. The opinion of the district court (Pet. App. 16a-28a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 1999. A petition for rehearing was denied on September 8, 1999. Pet. App. 13a. The petition for a writ of certiorari was filed on December 6, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a native and citizen of the Philippines. He entered the United States in September 1985 as a nonimmigrant visitor and overstayed his tourist visa, remaining in this country illegally. In 1993, the INS issued an Order to Show Cause at petitioner's request, charging him with deportability under 8 U.S.C. 1251(a)(1)(B) for remaining in the United States longer than permitted. At his deportation hearing, petitioner applied for suspension of deportation under 8 U.S.C. 1254(a)(1). The immigration judge (IJ) found petitioner to be deportable, denied his request for suspension of deportation, and ordered him deported to the Philippines, but also granted petitioner the privilege of voluntary departure. On March 8, 1996, the Board of Immigration Appeals (BIA) sustained the IJ's order, and extended the date for petitioner to depart voluntarily to 30 days after its decision. Pet. App. 2a-3a.

On August 15, 1996, petitioner filed a petition for review of the BIA's decision with the United States Court of Appeals for the Ninth Circuit. That court denied the petition for review on May 20, 1997, and denied petitioner's petition for rehearing on July 25, 1997. Pet. App. 3a, 13a; *Mapoy* v. *INS*, 114 F.3d 1194 (9th Cir. 1997) (Table). The Ninth Circuit issued its mandate on August 5, 1997. Pet. App. 3a. Petitioner did not file a petition for a writ of certiorari. The BIA thereafter reset petitioner's date for voluntary departure to 30 days after the issuance of the Ninth Circuit's mandate, or September 4, 1997. Petitioner failed, however, to depart by that date. That failure to depart rendered effective the IJ's alternative order that petitioner be deported to the Philippines. Petitioner was ordered to report for deportation on or about Novem-

ber 14, 1997, *ibid.*, and he surrendered voluntarily into INS custody on November 10, 1997, *id.* at 4a.

Meanwhile, on October 16, 1997, petitioner filed with the BIA a motion to reopen his deportation proceeding. He alleged changed circumstances since his initial deportation hearing, in that he had married a lawful permanent resident alien who would become qualified to become a United States citizen in September 1998, had filed an immediate relative visa petition on his behalf, and was expecting their first child.[1] Pet. App. 4a. Petitioner also requested that the BIA stay his deportation. *Ibid.* On November 10, 1997, the BIA denied the request for a stay of deportation on the ground that the motion to reopen was untimely under 8 C.F.R. 3.2(c)(2), and therefore had little likelihood of success.[2] App., *infra*, 1a. Petitioner also sought a stay of deportation from the INS District Director, who denied the stay. Pet. App. 4a.

2. On November 14, 1997, before the deportation order was executed, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Virginia, requesting that the court enjoin his deportation pending the BIA's decision on his motion to reopen and order him released from detention. Pet. App. 4a-5a. The INS argued in response that the district court's authority to stay the Attorney General's deportation of petitioner was pre-

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[1] Petitioner's child was born on October 30, 1997, and is a United States citizen. Pet. App. 4a.

[2] With certain exceptions not pertinent here, 8 C.F.R. 3.2(c)(2) provides that a motion to reopen a deportation proceeding "must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened."

cluded by 8 U.S.C. 1252(g) (Supp. IV 1998),[3] which provides:

> Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

On November 26, 1997, the district court granted the writ of habeas corpus and enjoined petitioner's deportation pending the disposition of his motion to reopen. Pet. App. 16a-28a. The court ruled that Section 1252(g) did not deprive it of habeas corpus jurisdiction under 28 U.S.C. 2241 to review the BIA's decision to deny a stay of deportation. Pet. App. 19a-20a. It also concluded that a preliminary injunction against petitioner's deportation was justified under the four-part test for such injunctive relief. *Id.* at 20a-25a. Among other things,

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[3] Section 1252(g) was added to the Immigration and Nationality Act (INA) by Section 306(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, Tit. III, 110 Stat. 3009-612. Most of IIRIRA's provisions were made applicable only to removal proceedings commenced on or after April 1, 1997. See IIRIRA § 309(c)(1), 110 Stat. 3009-625. Congress made an exception, however, for Section 1252(g), which was made applicable "without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under [the INA]." IIRIRA § 306(c)(1), 110 Stat. 3009-612; see *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 477-487 (1999). Additionally, although Section 1252(g) itself refers only to "removal" orders, IIRIRA § 309(d)(2) provides that all references in law to "removal" orders are deemed to include exclusion and deportation orders as well. 110 Stat. 3009-627.

the court concluded that petitioner had a likelihood of success on the merits on the question whether his motion to reopen was timely. The court noted that, although petitioner had not filed his motion to reopen within 90 days after the BIA's dismissal of his administrative appeal, he had filed that motion within 90 days after the Ninth Circuit's denial of rehearing on his petition for review. The court concluded that only on the latter date did petitioner's administrative decision become "final" for purposes of the BIA's timely-filing rule. *Id.* at 22a-24a. The court also ordered that petitioner be released from detention on bond. *Id.* at 25a-27a. In a separate order entered on December 1, 1997, the district court ordered the case remanded to the BIA for further consideration of petitioner's motion to reopen. App., *infra*, 2a-3a.

3. The government appealed to the court of appeals. On October 30, 1998, while the government's appeal was pending, the BIA granted petitioner's motion to reopen and remanded the case to the IJ for further proceedings. The BIA stated that it was taking those actions "[b]ecause the District Court ordered that new circumstances be considered in ruling on the motion and because [petitioner] may wish to raise a defense to the Service's arguments that he is barred from relief." App., *infra*, 6a. Petitioner's case remains pending before an IJ.

4. The court of appeals vacated the decision of the district court, and remanded with instructions to dismiss the complaint and habeas corpus petition. The court ruled that Section 1252(g) deprived the district court of jurisdiction to stay petitioner's deportation pending the BIA's resolution of his motion to reopen.

Pet. App. 6a-11a.[4] Relying on this Court's decision in *Reno* v. *American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999) (*AADC*), the court observed that Section 1252(g) applies to three discrete actions of the Attorney General concerning deportation proceedings, including decisions or actions to "execute" removal orders. Pet. App. 7a. The court stressed that petitioner was challenging the BIA's denial of his motion to stay the execution of his deportation order, and was therefore challenging the decision of the Attorney General to execute that order. The claim on habeas corpus "clearly arose from the INS's decision to execute a removal order and is subject to § 1252(g)." *Id.* at 8a.

The court also concluded that Section 1252(g) by its terms deprives the district court of authority to act under any other provision, including the general federal habeas corpus statute, 28 U.S.C. 2241. The court emphasized that Section 1252(g)'s preclusion of district court jurisdiction expressly operates "notwithstanding any other provision of law." Because "[t]he word 'any' is a term of great breadth" which "has an expansive meaning," the court read Section 1252(g) to mean "that all other jurisdiction-granting statutes, including § 2241, shall be of no effect." Pet. App. 9a.

The court rejected petitioner's argument that its construction of Section 1252(g) to preclude jurisdiction under Section 2241 amounted to an impermissible repeal of habeas corpus jurisdiction by implication, in

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[4] The court noted that the BIA had granted the motion to reopen in October 1998, but it also observed that the BIA had done so only in response to the district court's order mandating the BIA's reconsideration of petitioner's case in light of changed circumstances, and that the district court's order was being vacated by the court of appeals. Pet. App. 6a n.4.

conflict with *Felker* v. *Turpin*, 518 U.S. 651 (1996). "In *Felker*," the court noted, "the Supreme Court held that a statute that by its plain terms only removed two types of Supreme Court jurisdiction over second or successive habeas petitions—appellate and certiorari jurisdiction—did not implicitly remove a third—original habeas jurisdiction under § 2241." Pet. App. 10a. "Unlike the statute at issue in *Felker*," the court explained, "§ 1252(g) does not repeal specifically enumerated grounds of jurisdiction to the exclusion of others not listed, but strips all federal jurisdiction from claims arising from the three enumerated actions of the Attorney General with the sweeping clause '[e]xcept as provided in this section and notwithstanding any other provision of law.' Because this clause * * * clearly encompasses habeas jurisdiction under § 2241, it is sufficient to satisfy *Felker*." *Ibid.*

Because its jurisdictional ruling was dispositive of the case, the court of appeals declined to review petitioner's claims on the merits. Pet. App. 12a. The court noted, however, "that the INS had a credible basis to argue" that the BIA's decision sustaining the IJ's order, rather than the court of appeals' denial of rehearing, constituted the final administrative order for purposes of determining the timeliness of petitioner's Motion to Reopen. *Id.* at 12a n.8.

ARGUMENT

1. Petitioner argues (Pet. 14-17) that the court of appeals erred in ruling that 8 U.S.C. 1252(g) (Supp. IV 1998) deprived the district court of habeas corpus jurisdiction under 28 U.S.C. 2241 to review the BIA's denial of his motion to stay deportation. The decision of the court of appeals is correct, and does not conflict

with any decision of this Court or another court of appeals. Further review is therefore not warranted.

The decision below is the only decision of a court of appeals that has addressed, after this Court's decision in *AADC*, whether the denial of a motion to reopen by the BIA is a "decision or action by the Attorney General to * * * execute [a] removal order[]" within the reach of Section 1252(g), and is therefore placed outside the district court's habeas corpus jurisdiction under 28 U.S.C. 2241. Several courts of appeals have addressed a separate question—namely, whether, after enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, the district courts retain authority under 28 U.S.C. 2241 to review statutory and constitutional challenges to the merits of final orders of deportation.[5] That issue, however, is distinct from the present one, because, as this Court made clear in *AADC*, a challenge to the merits of a final order of deportation does not fall within the sets of claims over which district court jurisdiction is precluded by Section 1252(g). See 525 U.S. at 478, 487. At the same time, however, the Court in *AADC* stated that Section 1252(g) was intended to shield from

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[5] See, *e.g.*, *Sandoval* v. *Reno*, 166 F.3d 225, 231-238 (3d Cir. 1999) (holding that district courts retained such authority); *Henderson* v. *INS*, 157 F.3d 106, 118-119 (2d Cir. 1998) (same), cert. denied, 526 U.S. 1004 (1999); *Goncalves* v. *Reno*, 144 F.3d 110, 116-123 (1st Cir. 1998) (same), cert. denied, 526 U.S. 1004 (1999); see also *LaGuerre* v. *Reno*, 164 F.3d 1035 (7th Cir. 1998) (holding that Congress, in AEDPA, divested district courts of authority under 28 U.S.C. 2241 to review challenges to final deportation orders), petition for cert. pending, No. 99-418.

district court review "discretionary determinations" such as a "refusal to stay deportation," to ensure that such claims "will not be made the bases for separate rounds of judicial intervention outside the streamlined process that Congress has designed" in IIRIRA. See 525 U.S. at 485 (referring to *Cheng Fan Kwok* v. *INS*, 392 U.S. 206 (1968)).[6]

Petitioner makes little effort to challenge the court of appeals' conclusion that his challenge to the BIA's refusal to stay his final order of deportation falls within the language of Section 1252(g), as a claim arising from the decision or action of the Attorney General to execute a removal order. Rather, he contends that Section 1252(g) should not be read to repeal by implication the district court's habeas corpus jurisdiction under 28 U.S.C. 2241. Pet. 16. As the court of appeals concluded, however, no repeal "by implication" is at issue here. Pet. App. 9a-10a. The court correctly interpreted the statutory clause "notwithstanding any other provision

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[6] In *Mustata* v. *United States Dep't of Justice*, 179 F.3d 1017 (6th Cir. 1999), the court held that Section 1252(g) did not prevent the district court from entering a stay of deportation because the aliens were challenging their final deportation orders on the merits, based on a claimed denial of due process because of ineffective assistance of counsel, and sought a stay only as a matter of remedy or relief. The aliens sought not only a stay of deportation, but also judicial review of the validity of the deportation orders themselves. See *id.* at 1022 ("the Mustatas' petition makes a claim that their counsel's ineffective performance at their hearing resulted in a deportation order entered against them without due process"). See also *Tefel* v. *Reno*, 180 F.3d 1286, 1298 (11th Cir. 1999) (Section 1252(g) did not divest district court of jurisdiction to entertain action that raised class-wide constitutional challenge to certain statutory eligibility requirements for suspension of deportation, rather than challenging Attorney General's exercise of discretion to execute a particular deportation order).

of law" to provide *expressly* "that all other jurisdiction-granting statutes, including [28 U.S.C.] 2241, shall be of no effect." *Id.* at 9a.

The court of appeals also correctly concluded that this Court's decision in *Felker*, *supra*, presents no obstacle to its construction of Section 1252(g) as ousting the district court's jurisdiction under 28 U.S.C. 2241. Pet. App. 9a-10a. *Felker* concerned a provision that eliminated this Court's authority to entertain appeals and petitions for a writ of certiorari in cases involving successive habeas corpus petitions found to be without merit by a court of appeals. 518 U.S. at 654-658. Because the provision did not state that it affected the Court's authority to entertain original habeas corpus petitions, this Court concluded that it had not repealed by implication the Court's original jurisdiction over such petitions. *Id.* at 660-662.

As the court below concluded, "[u]nlike the statute at issue in *Felker*, section 1252(g) does not repeal specifically enumerated grounds of jurisdiction to the exclusion of others not listed, but strips all federal jurisdiction from claims arising from the three enumerated actions of the Attorney General with the sweeping clause '[e]xcept as provided in this section and notwithstanding any other provision of law.'" Pet. App. 10a. That clause clearly encompasses habeas corpus jurisdiction under 28 U.S.C. 2241, and *Felker*, which involved no such all-encompassing language, is not to the contrary. Section 1252(g), in the context of the amendments made by Congress in IIRIRA, therefore demonstrates an intent to eliminate "separate rounds of judicial intervention outside the streamlined process that Congress has designed" for the three discrete discretionary acts enumerated in that section. *AADC*, 525 U.S. at 485; cf. *Stone* v. *INS*, 514 U.S. 386, 399-400

(1995) (noting that the goal of judicial economy would be frustrated by permitting aliens requesting agency reconsideration to forestall deportation, and multiply proceedings, by postponing court of appeals review of the original deportation order while seeking a collateral stay in district court on habeas corpus).

There also is no merit to petitioner's contention that interpreting Section 1252(g) to preclude district court jurisdiction in this case would violate the Suspension of Habeas Corpus Clause. As noted above (p. 2, *supra*), petitioner has not been denied all judicial review, but in fact received full review by the Ninth Circuit of the final deportation order that he now seeks to reopen. Moreover, preclusion of district court jurisdiction to review the BIA's denial of a stay pending his motion to reopen in order to consider a claim of changed circumstances to warrant suspension of deportation raises no substantial constitutional questions. The Attorney General possesses broad discretion in determining whether to reopen deportation proceedings and whether to award suspension of deportation. See *INS* v. *Rios-Pineda*, 471 U.S. 444, 449 (1985) (motion to reopen); *Jay* v. *Boyd*, 351 U.S. 345, 354 (1956) (suspension of deportation). Indeed, the Court has described the grant of discretionary immigration relief as an "act of grace" akin to "a judge's power to suspend the execution of a sentence or the President's [power] to pardon a convict." *INS* v. *Yueh-Shaio Yang*, 519 U.S. 26, 30 (1996). The Constitution therefore does not require judicial review of the manner in which the Attorney General exercises that discretionary authority.

2. Petitioner also states (Pet. i, 9-10) that his motion to reopen to the BIA was timely filed under 8 C.F.R. 3.2(c)(2).[7] That claim also does not warrant certiorari.

The court of appeals did not reach the timeliness issue. Pet. App. 12a. This Court generally does not address issues not decided by the court of appeals. See *NCAA* v. *Smith*, 525 U.S. 459, 470 (1999). Further, the BIA was plainly justified in construing the applicable regulation, which requires the filing of a motion to reopen within 90 days after "the final administrative decision * * * in the proceeding sought to be reopened," as referring to the BIA's own resolution of the deportation proceeding, rather than the court of appeals' decision on petition for review. See 8 C.F.R. 241.31 ("an order of deportation * * * shall become final upon dismissal of an appeal by the Board of Immigration Appeals"). In any event, even if the question were close, the BIA's interpretation of the regulation should be deemed controlling. See *Auer* v. *Robbins*, 519 U.S. 452, 462 (1997).

Petitioner's assertion that this interpretation of "final administrative decision" would preclude effective judicial review (Pet. 9-10) is meritless, given the INA's explicit provision that an administratively final deportation order (and indeed, *only* a final order) may be appealed to the court of appeals. See 8 U.S.C. 1252(a)(1) (Supp. IV 1998). Because petitioner did not

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[7] Although that claim is identified in the petition's Questions Presented (Pet. i), it is not developed in the petition's section on the reasons for granting the writ, and may therefore be deemed waived. See Sup. Ct. R. 14.2 (requiring that all contentions in support of granting a petition for a writ of certiorari be set forth as provided in Sup. Ct. R. 14.1(h), requiring a "direct and concise argument amplifying the reasons relied on for allowance of the writ").

file his motion to reopen until October 1997, well over 90 days after the BIA's March 1996 order sustaining the IJ's decision, the Board was justified in concluding, in the course of denying a stay, that the motion was untimely.[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
DAVID W. OGDEN
Acting Assistant Attorney General
DONALD E. KEENER
LINDA S. WENDTLAND
JAMES A. HUNOLT
Attorneys

FEBRUARY 2000

[8] That conclusion is not undermined by the fact that the BIA subsequently granted the motion to reopen and remanded peti tioner's case to an IJ. The BIA plainly granted the motion to reopen only because the district court had directed it to do so. See App., *infra*, 6a. The fact that the BIA acceded to the mandate of the district court in this case does not mean that it has retreated from its construction of its own timely-filing regulation.

APPENDIX

U.S. DEPARTMENT OF JUSTICE
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A72 968 812 - San Francisco Date: NOV 10 1997

In re: ESTANISLAO SANGCO MAPOY

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Arnedo S. Valera, Esquire
7799 Leesburg Pike
Suite 900N
Falls Church, Virginia 22043

APPLICATION: Stay of deportation

Counsel for the respondent has applied for a stay of deportation pending consideration by the Board of a motion to reopen. After consideration of all information, the Board has concluded that there is little likelihood that the motion will be granted. The motion has been filed outside the time limits set forth in the regulations. 8 C.F.R. § 3.2(c)(2) (61 Fed. Reg. 18905). Accordingly, the request for stay of deportation will be denied.

ORDER: The request for stay of deportation is denied.

SIGNATURE ILLEGIBLE
FOR THE BOARD

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action 97-1827-A

ESTANISLAO S. MAPOY, PETITIONER/PLAINTIFF

v.

WILLIAM CARROLL, DISTRICT DIRECTOR,
UNITED STATES DEPARTMENT OF JUSTICE,
IMMIGRATION AND NATURALIZATION SERVICE,
DEFENDANT

[Filed: Dec. 1, 1997]

ORDER

For the reasons stated in this Court's November 26, 1997, Order, it is hereby

ORDERED that this case be and is remanded to the Board of Immigration Appeals for the United States Immigration and Naturalization Service for further consideration of petitioner's Motion to Reopen. It is further

ORDERED that this action be removed from this Court's docket. The Clerk is directed to forward copies of this Order to counsel of record.

Entered this 1st day of December, 1997.

\s\ LEONIE M. BRINKEMA
LEONIE M. BRINKEMA
United States District Judge

Alexandria, Virginia

U.S. DEPARTMENT OF JUSTICE
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A72 968 812 - San Francisco Date: OCT 30 1998

In re: ESTANISLAO SANGCO MAPOY

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Arnedo S. Valera, Esquire

ON BEHALF OF SERVICE: Genevieve E. Augustin
Assistant District Counsel

CHARGE:

Order: Sec. 241(a)(1)(B), I&N Act
[8 U.S.C. § 1251(a)(1)(B)]
In the United States in violation of law

APPLICATION: Motion to reopen

The respondent appealed an Immigration Judge's March 6, 1995, decision finding him deportable and denying suspension of deportation under section 244(a) of the Immigration and Nationality Act, 8 U.S.C. § 1254(a), but granting him voluntary departure under section 244(e) of the Act, 8 U.S.C. § 1254(e). On March 8, 1996, the Board dismissed the appeal. The Ninth

Circuit Court of Appeals dismissed the appeal on May 20, 1997. A petition for rehearing was denied on July 25, 1997. The respondent was ordered to report for deportation on November 17, 1997.

On October 16, 1997, the respondent filed a motion for a stay of deportation, for release from custody and to reopen proceedings in order to apply for cancellation of removal/adjustment of status. The respondent filed a supplemental Motion to Reopen on November 10, 1997, for a stay of deportation, a change of venue and to reopen to apply for suspension of deportation. The Service opposes the motion pointing out that the respondent, because he is in deportation proceedings, is not eligible for cancellation of removal, that he is barred from relief of suspension of deportation and adjustment of status under section 242B(e)(2) of the Act, 8 U.S.C. § 1252b(e)(2), as one who failed to depart voluntarily after the expiration of his appeals, and that he is barred from relief as one who remained in the United States in illegal status. The Service also maintains that the has not demonstrated a prima facie case for relief. The Board denied a request for a stay of deportation on November 10, 1997.

The District Court for the Eastern District of Virginia in a decision issued on November 26, 1997, granted a petition for a writ of habeas corpus and issued an injunction barring deportation until the respondent's motion to reopen had been adjudicated by the Board. The Court opined that the motion is not untimely. According to the Service, the decision of the District Court has been appealed to the Fourth Circuit Court of Appeals. On December 1, 1997, the District

Court remanded the record to the Board for reconsideration of the motion to reopen.[1]

The respondent, a 43-year-old native and citizen of the Phillippines, entered the United States on or about September 23, 1985, as a visitor. The Order to Show Cause was issued on August 3, 1993. He married a lawful permanent resident of the United States on November 14, 1996. The respondent's visa petition was approved by the Service on March 27, 1997. They have one United States citizen child board on October 30, 1997. His wife reportedly is eligible to become a United States citizen in September 1998. Because the District Court ordered that new circumstances be considered in ruling on the motion and because the respondent may wish to raise a defense to the Service's arguments that he is barred from relief, the motion will be granted. The record will be remanded to permit the respondent to present his application for relief to an Immigration Judge.

ORDER: The motion to reopen is granted. The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing decision.

FURTHER ORDER: The request for a change of venue to Arlington, Virginia is granted.

FRED W. VACCA
FOR THE BOARD

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[1] The motion to reopen was still pending before the Board at the time of the District Court's order.