No. 07-355

In the Supreme Court of the United States

XIONG HUANG, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that it lacked jurisdiction to review the agency's discretionary denial of petitioner's application for adjustment of status under 8 U.S.C. 1255 (2000 & Supp. V 2005).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-4a) is not published in the Federal Reporter but it is reprinted at 224 Fed. Appx. 554. The decisions of the Board of Immigration Appeals (Pet. App. 6a-9a) and the immigration judge (Pet. App. 10a-21a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 4, 2007. A petition for rehearing was denied on June 14, 2007 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on September 12, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Section 245 of the Immigration and Nationality Act (INA), 8 U.S.C. 1255 (2000 & Supp. V 2005), pro-

vides that the Attorney General may, in his discretion, adjust the status of an alien inspected and admitted into the United States to that of a lawful permanent resident. Several prerequisities must be met, including that the alien must be "admissible to the United States for permanent residence." 8 U.S.C. 1255(a)(2). Even if all of the statutory prerequisities are met, adjustment is not automatic. "The grant of an application for adjustment of status under section 245 is a matter of administrative grace," and the applicant "has the burden of showing that discretion should be exercised in his favor." *In re Patel*, 17 I. & N. Dec. 597, 601 (B.I.A. 1980). Whether a particular applicant warrants a favorable exercise of discretion is a case-specific determination that depends upon whether the applicant has demonstrated that any adverse factors present in his application are "offset * * * by a showing of unusual or even outstanding equities." *In re Arai*, 13 I. & N. Dec. 494, 495-496 (B.I.A. 1970).

Under the INA, certain classes of aliens are inadmissible for permanent residence and thus ineligible for adjustment of status under Section 245. As pertinent here, an alien who attempts to gain an immigration benefit by fraud or willful misrepresentation of a material fact is inadmissible. 8 U.S.C. 1182(a)(6)(C)(i). However, Section 212(i) of the INA grants the Attorney General the discretionary authority to waive the application of that provision "if it is established to the satisfaction of the Attorney General that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien." 8 U.S.C. 1182(i)(1); see 8 U.S.C. 1182(a)(6)(C)(iii). Whether an applicant is eligible for a Section 212(i) waiver is a case-specific de-

termination that depends upon whether he demonstrates that his removal would cause "extreme hardship" to a United States citizen or lawfully resident spouse or parent. *E.g.*, *In re Cervantes-Gonzalez*, 22 I. & N. Dec. 560, 565-566 (B.I.A. 1999).

b. Since 1996, the INA has barred federal-court review of certain decisions made by the Attorney General in immigration cases. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 306, 110 Stat. 3009-607. As pertinent here, the INA provides:

> [N]o court shall have jurisdiction to review * * * any judgment regarding the granting of relief under section * * * 1255 of this title.

8 U.S.C. 1252(a)(2)(B)(i).

In 2005, Congress qualified that jurisdictional bar by providing:

> Nothing in subparagraph (B) * * * which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

8 U.S.C. 1252(a)(2)(D) (Supp. V 2005) (as added by REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 106(a)(1)(A)(iii), 119 Stat. 310).

2. Petitioner is a native and citizen of China who entered the United States illegally in 1994. Pet. App. 11a. In April 1998, the former Immigration and Naturalization Service (INS) initiated removal proceedings, charging petitioner with removability because he is an alien present in the United States without having been

admitted or paroled. *Id.* at 10a-11a; see 8 U.S.C. 1182(a)(6)(A)(i).

Before the immigration judge (IJ), petitioner conceded his removability but sought asylum. Pet. App. 12a. In two separate asylum applications, petitioner claimed that he was involved in the Beijing student democratic movement, that "police were looking for [him] because of a composition he wrote in school," and that he would be persecuted if he returned to China. *Id.* at 16a-17a. Petitioner later admitted, however, that his applications were fraudulent, that he knew they were fraudulent, and that he submitted them in order to remain in the United States long enough to obtain employment authorization. *Id.* at 12a-17a.

Petitioner then married a United States citizen, abandoned his asylum applications, and sought a discretionary adjustment of status under Section 245 based on an approved relative visa petition filed by his wife. Pet. App. 12a-13a, 16a. In order to be eligible for adjustment of status in light of his previous fraud, petitioner also applied for a discretionary waiver of inadmissibility under Section 212(i). *Id.* at 12a. In the alternative, petitioner requested voluntary departure. *Id.* at 13a.

3. a. The IJ found petitioner removable as charged, granted his requests for a waiver of inadmissibility and voluntary departure, and denied his application for adjustment of status. Pet. App. 17a-21a. Reviewing the evidence, the IJ noted that petitioner worked with smugglers to enter the United States using a false passport and that he repeatedly lied to immigration officials about numerous matters, including the circumstances of his entry into the United States and the whereabouts of his brother (who was under an order of deportation). *Id.* at 11a, 13a-14a, 17a-19a. The IJ also found that peti-

tioner filed fraudulent asylum applications in 1994 and 1998 and continued "pursuing his fraudulent asylum claims" until he married a United States citizen and "a new means [for] obtaining permanent resident status became available." *Id.* at 13a. And the IJ noted petitioner's admissions "that he had never been harassed or persecuted by the government of China," but that he "simply left China for economic reasons," *i.e.*, because "[t]here were poor job prospects" there. *Ibid.* In sum, the IJ found that petitioner "has clearly shown a willingness to lie in the past when it serv[es] his purposes, particularly his economic interests." *Id.* at 17a.

The IJ granted petitioner's application for a Section 212(i) waiver of inadmissibility "strictly in the interests of [petitioner's] wife and child," so that petitioner would not be "permanent[ly] bar[red]" from obtaining permanent residence in the United States. Pet. App. 18a. The IJ determined that, despite petitioner's fraudulent behavior, the potential hardship that permanent exclusion could cause his family warranted a Section 212(i) waiver. *Id.* at 18a, 20a.

The IJ then considered whether to exercise his discretion to grant petitioner's application for adjustment of status under Section 245. Pet. App. 18a. He explained that petitioner came to the United States "strictly for economic reasons"; that he entered the United States illegally with the help of smugglers; that he "committed egregious asylum fraud to be able to obtain employment authorization"; and that he lied to immigration officials regarding the whereabouts of his brother. *Id.* at 17a-19a. The IJ also noted that petitioner owns a home and business in the United States, but explained that "the economic equities [petitioner] built up in this country flow directly from the outrageous asylum fraud"

he perpetrated for eight years. *Id.* at 15a, 19a. Moreover, the IJ determined that petitioner did "not seem to be the least bit sorry about his having perpetrated this fraud on the United States government." *Id.* at 19a. After weighing the positive and negative equities, the IJ concluded that petitioner did not warrant a favorable exercise of discretion and denied his application for adjustment of status. *Id.* at 18a-20a. The IJ then granted petitioner voluntary departure. *Id.* at 20a.

b. The Board of Immigration Appeals (BIA) affirmed. Pet. App. 6a-9a. Noting that "[t]he grant of adjustment of status is a matter of discretion and administrative grace," the BIA found "no error" in the IJ's discretionary denial of petitioner's application for adjustment of status. *Id.* at 7a-8a. It noted that petitioner "raise[d] no arguments and list[ed] no facts" on appeal that the IJ had not already considered, instead "merely reiterat[ing] his family ties to the United States and his desire to remain in this country" without "address[ing] the negative factors relied upon by the Immigration Judge in his decision, such as the repeated instances of fraud" petitioner perpetrated. *Ibid.* The BIA found that the IJ considered all of the positive and negative factors and permissibly concluded that petitioner "was undeserving of the relief of adjustment of status as a matter of discretion." *Id.* at 8a.

Finally, the BIA noted that petitioner would be permitted voluntarily to depart the United States within 30 days. Pet. App. 8a. Petitioner has not voluntarily departed the United States.

4. The court of appeals dismissed petitioner's petition for review in an unpublished, per curiam opinion.

Pet. App. 3a-4a.[1] The court of appeals observed that "[a]djustment of status is entirely within the discretion of the Attorney General" and that Congress has generally precluded federal-court review of "decisions executed pursuant to that discretion." *Id.* at 4a; see 8 U.S.C. 1252(a)(2)(B)(i). The court then concluded that it lacked jurisdiction to review petitioner's arguments and dismissed his petition for review. Pet. App. 4a, 5a.

ARGUMENT

Petitioner contends (Pet. 3-4, 6-8) that the court of appeals erred in dismissing his petition for review because, although the BIA's discretionary decision to deny adjustment of status is generally unreviewable under 8 U.S.C. 1252(a)(2)(B)(i), his claim presents a reviewable "question[] of law" under 8 U.S.C. 1252(a)(2)(D). The court of appeals correctly held that it lacked jurisdiction to consider petitioner's challenge to the BIA's discretionary denial of relief, and its decision does not conflict with any decision of this Court or any other court of appeals. Moreover, the decision below is unpublished and non-precedential. Further review is therefore unwarranted.

1. The court of appeals correctly held that it lacked jurisdiction to review petitioner's claim that he merited a discretionary adjustment of status under Section 245. First, the court of appeals correctly recognized that, as a general matter, 8 U.S.C. 1252(a)(2)(B)(i) bars a challenge to a discretionary denial of Section 245 relief. That statutory provision states that "no court shall have

[1] Petitioner initially filed a timely petition for review with the Second Circuit. No. 03-4965 (filed May 30, 2003). Pursuant to a stipulation between the parties, *ibid.* (filed Feb. 18, 2005), the petition was transferred to the Eighth Circuit.

jurisdiction to review * * * any judgment regarding the granting of relief under section * * * 1255 of this title," and petitioner's claim was one for a discretionary adjustment of status under Section 245 of the INA, *i.e.*, 8 U.S.C. 1255. See Pet. 3 (acknowledging that "purely discretionary decisions, including the discretionary denial of adjustment of status, are not subject to judicial review"). That preclusion of judicial review is hardly surprising, because a Section 245 determination is a quintessentially discretionary determination. See 8 U.S.C. 1255(a) ("The status of an alien who was inspected and admitted or paroled into the United States * * * *may be adjusted* by the Attorney General, *in his discretion and under such regulations as he may prescribe*, to that of an alien lawfully admitted for permanent residence." (emphasis added)).

2. Petitioner contends (Pet. 3, 7) that the court of appeals erred in finding that it lacked jurisdiction to consider his claims because he raised a "question[] of law" over which judicial review is permitted under 8 U.S.C. 1252(a)(2)(D). Specifically, petitioner contends (Pet. 6) that his argument is that "the grant of a INA § 212(i) waiver precludes a discretionary denial of adjustment of status on the basis of fraud since the fraud was waived by the waiver," which he characterizes as a legal issue. Petitioner further contends that, because the court of appeals "d[id] not mention the exception under subsection (D) for constitutional issues or questions of law" in finding that it lacked jurisdiction to consider his claim, "[t]he only conclusion that can be drawn" is that the court "erroneously believe[d] that no claim related to the denial of an adjustment of status application can be reviewed by a federal court." Pet. 7. Petitioner is mistaken.

a. As an initial matter, petitioner failed to exhaust his claim that an IJ who grants a discretionary Section 212(i) waiver is required, as a matter of law, to grant discretionary adjustment of status under Section 245. Petitioner's argument to the BIA was that the IJ "abused his discretion" in determining that the equities did not warrant adjustment of status, because the IJ should have placed more weight on the "significant hardship [petitioner's] wife and child would suffer" if he returned to China and less weight on the fact that petitioner "sought to abuse the immigration system." Pet. B.I.A. Br. 4.[2] That argument was a fact-bound challenge to the IJ's exercise of discretion. Petitioner did not contend that the IJ was required to grant Section 245 relief as a matter of law because he had granted a Section 212(i) waiver of inadmissibility. See Pet. App. 7a-8a (BIA notes that on appeal, petitioner "merely reiterate[d] his family ties * * * and his desire to remain in this country while maintaining that he learned from his mistakes," without addressing his "repeated instances of fraud").

Before the court of appeals, petitioner sought to recast his fact-bound claim as a legal argument in order to take advantage of the provision of the INA that permits judicial review of "questions of law." Pet. C.A. Br. 14-17. In response, the government argued that the court of appeals lacked jurisdiction to review petitioner's new

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[2] See Pet. B.I.A. Br. 3 ("The Immigration Judge erred * * * when he failed to consider all of the countervailing equities and hardships to U.S. citizens in making his separate adjudication on the adjustment application."); *ibid.* (arguing that the IJ "ignore[d] and d[id] not analyze the significant equities and hardship to the applicant's family and penalize[d] the applicant by requiring him to travel home to process and obtain an immigrant visa").

claim because petitioner had failed to exhaust it. Gov't C.A. Br. 20-21 (citing 8 U.S.C. 1252(d)(1), which states that a federal court "may review a final order of removal only if * * * the alien has exhausted all administrative remedies available"). The court of appeals apparently agreed, because it held simply that it "lack[ed] jurisdiction to review the Attorney General's discretionary decision to deny an adjustment of status," without specifically addressing petitioner's claim that he raised a "question[] of law." Pet. App. 4a.

The court of appeals' decision was correct, because the INA generally bars review of Section 245 determinations, see 8 U.S.C. 1252(a)(2)(B)(i), and petitioner failed to exhaust the argument that he characterizes as a "question[] of law," see 8 U.S.C. 1252(d)(1). Moreover, because petitioner failed to exhaust his new "legal" claim, and because the court of appeals did not address it, this Court should decline to consider the claim in the first instance.

b. Contrary to petitioner's suggestion, the court below did not hold that "no claim related to the denial of an adjustment of status application can be reviewed by a federal court." Pet. 7. Nowhere in its brief opinion did the court of appeals adopt that categorical legal rule. Instead, the court concluded only that it "lack[ed] jurisdiction" to review the agency's denial of petitioner's adjustment application, Pet. App. 4a, likely because it believed that the only argument petitioner had preserved was his argument that the IJ erred in balancing the equities, a claim clearly barred by 8 U.S.C. 1252(a)(2)(B)(i).

It would be incorrect to infer the categorical rule petitioner asserts from the Eighth Circuit's brief, unpublished opinion, because that court has repeatedly

recognized its authority to consider constitutional claims and questions of law that arise in the context of discretionary determinations by the Attorney General. See, *e.g.*, *Hailemichael* v. *Gonzales*, 454 F.3d 878, 886 (2006); *Suvorov* v. *Gonzales*, 441 F.3d 618, 621 (2006); *Meraz-Reyes* v. *Gonzales*, 436 F.3d 842, 842-843 (2006) (per curiam). Indeed, the courts of appeals (including the Eighth Circuit) have uniformly held both that 8 U.S.C. 1252(a)(2)(B)(i) generally bars review of Section 245 determinations[3] and that 8 U.S.C. 1252(a)(2)(D) permits review of legal questions that arise in the context of discretionary determinations like those under Section 245.[4] Petitioner is thus mistaken in contending (Pet. 3-4, 6-8) that the decision below creates a circuit conflict and "contradict[s] * * * the plain language of the statute" by "overlook[ing] the fact that there are circumstances

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[3] See, *e.g.*, *Bazua-Cota* v. *Gonzales*, 466 F.3d 747, 748 (9th Cir. 2006) (per curiam); *Hailemichael*, 454 F.3d at 886; *Onikoyi* v. *Gonzales*, 454 F.3d 1, 3 (1st Cir. 2006); *Guyadin* v. *Gonzales*, 449 F.3d 465, 468 (2d Cir. 2006); *Hadwani* v. *Gonzales*, 445 F.3d 798, 800 (5th Cir. 2006) (per curiam); *Sokolov* v. *Gonzales*, 442 F.3d 566, 569 (7th Cir. 2006); *Higuit* v. *Gonzales*, 433 F.3d 417, 419 (4th Cir.), cert. denied, 126 S. Ct. 2973 (2006); *Schroeck* v. *Gonzales*, 429 F.3d 947, 950 (10th Cir. 2005); *Zheng* v. *Gonzales*, 422 F.3d 98, 111 (3d Cir. 2005); *Pilica* v. *Ashcroft*, 388 F.3d 941, 945 (6th Cir. 2004); *Gonzalez-Oropeza* v. *United States Att'y Gen.*, 321 F.3d 1331, 1332 (11th Cir. 2003).

[4] See, *e.g.*, *Patel* v. *Gonzales*, 470 F.3d 216, 219 (6th Cir. 2006); *Bazua-Cota*, 466 F.3d at 748; *Hailemichael*, 454 F.3d at 886; *Onikoyi*, 454 F.3d at 3; *Guyadin*, 449 F.3d at 468; *Martinez* v. *United States Att'y Gen.*, 446 F.3d 1219, 1221-1222 (11th Cir. 2006); *Hadwani*, 445 F.3d at 800; *Sokolov*, 442 F.3d at 569; *Higuit*, 433 F.3d at 419; *Schroeck*, 429 F.3d at 951; *Mendez-Reyes* v. *Attorney Gen. of the United States*, 428 F.3d 187, 189 (3d Cir. 2005).

in which a discretionary form of relief can be denied on an improper basis or under an improper legal standard."

Petitioner nonetheless contends (Pet. 3, 4, 6, 8) that the decision below conflicts with other decisions in which courts of appeals have held that they retain jurisdiction over certain challenges to discretionary determinations that raise "questions of law" within the meaning of 8 U.S.C. 1252(a)(2)(D). None of the cases petitioner cites conflicts with the decision below. In *Khan* v. *Gonzales*, 495 F.3d 31, 34-36 (2007), and *Xiao Ji Chen* v. *United States Department of Justice*, 471 F.3d 315, 329 (2006), the Second Circuit stated that it has jurisdiction to consider an argument that the agency applied an incorrect legal standard in making a discretionary determination or an argument that its fact finding was flawed by an error of law. The decision below does not conflict with *Khan* and *Xiao Ji Chen*, because the court of appeals in this case did not hold that it could not review those types of claims; instead, it simply found that it lacked jurisdiction to review petitioner's particular fact-bound claim. Petitioner also cites (Pet. 4) *Ramadan* v. *Gonzales*, 479 F.3d 646 (9th Cir. 2007) (per curiam), but that case is inapposite, because it addressed whether a federal court has jurisdiction to consider the question whether changed circumstances excused the untimely filing of an asylum application, *id.* at 650-656, and this case does not present any question regarding a changed-circumstances determination. Finally, petitioner does not contend that the decision below conflicts with any decision of this Court or presents an issue of such extraordinary importance that this Court's review is warranted. See Sup. Ct. R. 10. Accordingly, this Court should deny review of petitioner's claim.

3. In any event, review is unwarranted because even if the court of appeals had jurisdiction to review petitioner's claim, the claim lacks merit. As petitioner recognizes (Pet. 7), a Section 245 adjustment of status is discretionary, and whether an alien warrants a favorable exercise of discretion depends on the facts of his particular case. *E.g.*, *In re Arai*, 13 I. & N. Dec. 494, 495 (B.I.A. 1970). "Section 245 of the Act reposes with the Attorney General and his delegates the *discretionary* power to grant an adjustment of status. Adjustment of status is, therefore, a matter of administrative grace, not mere statutory eligibility." *In re Marques*, 16 I. & N. Dec. 314, 315 (B.I.A. 1977) (citations omitted). As this Court has recognized in a related context, "[statutory] eligibility in no way limits the considerations that may guide the Attorney General in exercising [his] discretion to determine who, among those eligible, will be accorded grace." *INS* v. *Yueh-Shaio Yang*, 519 U.S. 26, 31 (1996).

Petitioner's claim (Pet. 6) that "the grant of a INA § 212(i) waiver precludes a discretionary denial of adjustment of status on the basis of fraud since the fraud was waived by the waiver" lacks merit. Petitioner cites no legal authority to support his argument, and administrative and judicial precedent compels the contrary conclusion. The grant of a waiver of inadmissibility based on certain underlying conduct simply does not preclude the agency from considering that same conduct in making other discretionary determinations. See *Yueh-Shaio Yang*, 519 U.S. at 30-31 (deciding that the Attorney General has the authority to consider any and all negative factors, including the applicant's initial fraud, in deciding whether or not to grant a discretionary waiver); *In*

re Tijam, 22 I. & N. Dec. 408, 416-417 (B.I.A. 1998) (same).

For example, it is well-settled in the context of former Section 212(c) of the INA that a waiver of inadmissibility does not excuse the underlying conduct itself or preclude courts from relying on that conduct in making other discretionary determinations.[5] As the BIA explained in *In re Balderas*, 20 I. & N. Dec. 389 (1991), a conviction that was a basis for deportability in an initial proceeding could again be alleged as a basis for deportability in a second proceeding, even though the first proceeding was terminated by a grant of relief under former Section 212(c). Although "a grant of section 212(c) relief 'waives' the finding of excludability or deportability," it does not waive "the basis of the excludability itself," and "the crimes alleged to be grounds for excludability or deportability do not disappear from the alien's record for immigration purposes." *Id.* at 391. Several courts of appeals, including the Eighth Circuit, have agreed. See, *e.g., Peralta-Taveras* v. *Attorney Gen.*, 488 F.3d 580, 584-585 (2d Cir. 2007); *Becker* v. *Gonzales*, 473 F.3d 1000, 1003 (9th Cir. 2007); *Amouzadeh* v. *Winfrey*, 467 F.3d 451, 458-459 (5th Cir. 2006); *Munoz-Yepez* v. *Gonzales*, 465 F.3d 347, 350 (8th Cir. 2006); *Rodriguez-Munoz* v. *Gonzales*, 419 F.3d 245, 248 (3d Cir. 2005).

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[5] Former Section 212(c) provided that:

> Aliens lawfully admitted for permanent residence who temporarily proceed abroad voluntarily and not under an order of deportation, and who are returning to a lawful unreliquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to [certain specified grounds for exclusion enumerated in Section 212(a) of the Act, including criminal and related grounds].

8 U.S.C. 1182(c) (1994) (repealed).

That reasoning applies with equal force in the context of Section 212(i) relief. Just as former Section 212(c) relief was available to certain classes of aliens who were to be "excluded from admission into the United States," 8 U.S.C. 1182(a) (1994), Section 212(i) relief is available to a certain class of aliens who are otherwise "ineligible to be admitted to the United States," 8 U.S.C. 1182(a) (2000 & Supp. V 2005). Thus, the grant of a waiver of inadmissibility under Section 212(i) does not, as petitioner implies, somehow eradicate his previous fraud. Rather, the waiver merely has the effect of eliminating the ground of inadmissibility created by petitioner's underlying fraudulent conduct. As the BIA has explained, "the request for a waiver of inadmissibility pursuant to section 212(i) of the Act is a request for prospective relief. It is *not* designed to remedy the past but *only* to affect petitioner's future status with respect to the legality of his presence in the United States." *In re Cervantes-Gonzalez*, 22 I. & N. Dec. 560, 564 (1999) (internal quotation marks and citation omitted; emphasis added).

Here, the IJ concluded that the hardship that removal would cause to petitioner's family warranted a waiver of inadmissibility under Section 212(i) so that petitioner would not be *permanently* barred from becoming a permanent resident. Pet. App. 18a. But the IJ also concluded, under Section 245, that petitioner was undeserving of a discretionary adjustment of status at this time because he showed no remorse for his numerous and recent instances of fraud. *Id.* at 18a-19a. Those decisions were consistent, because the Section 212(i) determination focused on whether the applicant's family members would suffer "extreme hardship" if he returned to China, *In re Cervantes-Gonzalez*, 22 I. & N. Dec. at 565-

566, while the determination whether to grant discretionary relief under Section 245 concerned whether petitioner himself was deserving of admission into the United States as a lawful permanent resident, *In re Arai*, 13 I. & N. Dec. at 495-496. Both determinations, moreover, were well within the IJ's broad discretionary authority.

4. Finally, even if petitioner's claim that the agency was required to grant him a discretionary adjustment of status had merit, this case would be an inappropriate vehicle for addressing it, because petitioner's failure to voluntarily depart means that he can no longer obtain adjustment of status. Before the administrative agency, petitioner requested and was granted 30 days to voluntarily depart the United States in lieu of removal. Pet. App. 7a-8a. Petitioner was specifically notified of the consequences of failing to comply with his voluntary departure order, including that he would "be ineligible" to obtain Section 245 relief "for a period of 10 years." *Id.* at 8a. Nonetheless, petitioner failed to depart within the 30 days allowed by the agency. Therefore, petitioner is statutorily ineligible for adjustment of status. 8 U.S.C. 1229c(d)(1)(B) (Supp. V 2005) ("[i]f an alien is permitted to depart voluntarily * * * and fails voluntarily to depart * * * within the time period specified, the alien," *inter alia*, "shall be ineligible, for a period of 10 years" to receive certain forms of discretionary relief, including adjustment of status); see 8 C.F.R. 1240.26(a). Further review of petitioner's claim is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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