No. 07-798

In the Supreme Court of the United States

SYED IQBAL ALI, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a federal court of appeals lacks jurisdiction under 8 U.S.C. 1252(a)(2)(B)(ii) (Supp. V 2005) to review an immigration judge's denial of an alien's request to continue removal proceedings.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 502 F.3d 659. The decisions of the Board of Immigration Appeals (Pet. App. 19a-24a) and the immigration judge (Pet. App. 25a-29a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 14, 2007. The petition for a writ of certiorari was filed on December 12, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In 1996, Congress amended the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, to expedite the removal of criminal and other illegal aliens from the United States. See Illegal Immigration

Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546. As relevant here, Congress amended the INA to limit judicial review of certain discretionary decisions of the Attorney General. As amended, the relevant section of the INA now provides that no court shall have jurisdiction to review any

> decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

8 U.S.C. 1252(a)(2)(B)(ii).[1] The phrase "this subchapter" refers to Title 8 of the United States Code, Chapter 12, Subchapter II, which is codified at 8 U.S.C. 1151 through 1381 and pertains broadly to immigration matters. See *Van Dinh* v. *Reno*, 197 F.3d 427, 433 (10th Cir. 1999).

b. The Attorney General has promulgated regulations that provide rules of procedure for administrative removal proceedings, in order to "assist in the expeditious, fair, and proper resolution of matters coming before Immigration Judges." 8 C.F.R. 1003.12. Under those rules of procedure, if an alien seeks a continuance of proceedings, "[t]he Immigration Judge may grant a motion for continuance for good cause shown." 8 C.F.R. 1003.29; see 8 C.F.R. 1240.6 ("After the commencement of the hearing, the immigration judge may grant a reasonable adjournment either at his or her own instance

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[1] Unless otherwise noted, all citations to 8 U.S.C. 1252(a)(2)(B)(ii) are to the 2005 Supplement.

or, for good cause shown, upon application by the respondent or the Service.").

"The grant of a continuance is within the IJs' broad discretion." *Zafar* v. *United States Attorney Gen.*, 461 F.3d 1357, 1362 (11th Cir. 2006). To obtain reversal by the Board of Immigration Appeals (BIA) of the denial of a continuance by an immigration judge, an alien must show, *inter alia*, "that the denial caused him actual prejudice and harm and materially affected the outcome of his case." *In re Villarreal-Zuniga*, 23 I. & N. Dec. 886, 891 (B.I.A. 2006) (internal quotation marks omitted).

c. The Attorney General has discretion to adjust an alien's status to that of a lawful permanent resident under certain circumstances. 8 U.S.C. 1255 (2000 & Supp. V 2005). As relevant here, the alien must be "eligible to receive an immigrant visa" and "an immigrant visa [must be] immediately available to him at the time his application [for adjustment of status] is filed." 8 U.S.C. 1255(a). A favorable exercise of discretion to adjust an alien's status is "a matter of grace, not right." *Elkins* v. *Moreno*, 435 U.S. 647, 667 (1978).

d. The INA provides that the Attorney General "may permit" certain removable aliens "voluntarily to depart the United States at the alien's own expense" in lieu of being removed. 8 U.S.C. 1229c(a)(1) and (b)(1). Aliens who are granted voluntary departure and comply with its terms avoid the period of inadmissibility that would otherwise result from departure following entry of an order of removal under 8 U.S.C. 1182(a)(9)(A). See 8 C.F.R. 1241.7 ("an alien who departed before the expiration of [a] voluntary departure period * * * shall not be considered to [have been] deported or removed"). Voluntary departure also permits aliens "to choose their own destination points, to put their affairs in order with-

out fear of being taken into custody at any time, [and] to avoid the stigma * * * associated with forced removals." *Lopez-Chavez* v. *Ashcroft*, 383 F.3d 650, 651 (7th Cir. 2004).

To qualify for permission to depart voluntarily at the close of removal proceedings, an alien must satisfy certain statutory conditions, including "establish[ing] by clear and convincing evidence that [he] has the means to depart the United States and intends to do so." 8 U.S.C. 1229c(b)(1). Even if those conditions are satisfied, the decision whether to permit an alien to depart voluntarily is discretionary with the Attorney General. *E.g.*, *Garcia-Mateo* v. *Keisler*, 503 F.3d 698, 700 (8th Cir. 2007); see generally 8 U.S.C. 1229c (2000 & Supp. V 2005).

The INA and the Attorney General's regulations contain a number of provisions designed to ensure that aliens who have been granted the privilege of voluntary departure actually depart in a timely fashion. The INA strictly limits the period for which a grant of voluntary departure may last. For aliens who are granted that privilege at the conclusion of removal proceedings: "Permission to depart voluntarily * * * shall not be valid for a period exceeding 60 days." 8 U.S.C. 1229c(b)(2). An IJ who grants voluntary departure must "also enter an alternate order [of] removal." 8 C.F.R. 1240.26(d). If the alien does not depart within the time specified in the order granting voluntary departure, the alternate order of removal becomes final and the alien becomes "ineligible, for a period of 10 years," to receive certain forms of discretionary relief, including adjustment of status. 8 U.S.C. 1229c(d)(1)(B) (Supp. V 2005); 8 C.F.R. 1240.26(a).

2. Petitioner, a native and citizen of Pakistan, was admitted to the United States in 1996 as a non-immi-

grant visitor with authorization to remain in the United States for six months. Pet. App. 4a. Petitioner failed to depart the United States when required, and he has remained in this country ever since. *Ibid.*

The former Immigration and Naturalization Service (INS) charged petitioner with being removable as an alien who remained in the United States longer than permitted and failed to comply with the conditions of his visitor's visa. Pet. App. 25a-26a; see 8 U.S.C. 1227(a)(1)(B) (2000 & Supp. V 2005); 8 U.S.C. 1227(a)(1)(C)(i). Petitioner first appeared before an immigration judge (IJ) in March 2003, and his case was continued. Pet. App. 56a-58a.

In November 2003, petitioner again appeared before the IJ and conceded that he was removable as charged. Pet. App. 60a. Petitioner's counsel indicated that petitioner planned to seek adjustment of status when and if his son Zeeshan was naturalized. *Ibid.* Petitioner's counsel suggested that Zeeshan's naturalization application could be approved within a matter of days. *Ibid.* (stating that son's naturalization interview would be scheduled "very soon," "probably within the next few days"). Although the IJ expressed reluctance to continue petitioner's case in light of the fact that petitioner's son had not been naturalized, he nonetheless continued the case until February 2005 to permit petitioner the opportunity to adjust his status. *Id.* at 60a-63a. The IJ specifically warned petitioner that he was required to file all documents supporting his request to adjust status by February 2005. *Id.* at 63a.

At the February 2005 hearing, petitioner requested a further continuance because his son's naturalization application had not yet been approved. Pet. App. 66a. Petitioner's counsel admitted that petitioner was "not

immediately eligible" for adjustment of status because his son had not been naturalized, so that "there is no relief that would be available at this point." *Id.* at 66a-67a. Petitioner's counsel then presented a document that he contended "evidence[d] that" petitioner's son's naturalization application would be "expedited." *Id.* at 66a. In fact, the document suggested to the contrary; it was a form that petitioner's son had submitted to the office of Senator Richard Durbin, seeking the Senator's assistance because his application had been denied on grounds of "poor moral charact[e]r." A.R. 124; see Pet. App. 5a.

The IJ denied petitioner's request for a further continuance. Pet. App. 70a. The IJ noted that he had already "continued the case based on [counsel's] similar assertion a year, about 15 months ago, and [petitioner is] still not ready," *id.* at 69a, and that petitioner was essentially seeking "a permanent continuance" while his son attempted to obtain naturalization, *id.* at 65a. The IJ noted that, by statute, petitioner was eligible to seek adjustment of status only if he "ha[d] a visa immediately available," but petitioner did not have a visa available, even though his case had been continued "for one month short of two years." *Id.* at 70a.

Petitioner then requested voluntary departure in lieu of removal. Pet. App. 72a. Petitioner's counsel stated that petitioner was willing to leave the United States and was able to pay his way to Pakistan. *Id.* at 72a-73a. The IJ granted petitioner voluntary departure, and he noted that if petitioner failed to timely depart, he would be ordered removed. *Id.* at 73a. The IJ also noted that a consequence of failure to depart voluntarily would be that petitioner could not seek adjustment of status for ten years. *Id.* at 57a.

The IJ issued an oral decision further explaining his rulings. Pet. App. 25a-29a. He noted that although regulations "allow for a continuance if there is 'good cause,'" petitioner failed to demonstrate good cause because although he "was already given almost two years to remain in the United States in order to get a head start towards his visa," he still was "not immediately eligible for a visa" and his "prospects of having a visa immediately available to him [we]re unclear and at least possibly months to years away." *Id.* at 28a. The IJ explained that petitioner's recourse was to "return to Pakistan and await his visa as the system was intended." *Ibid.* The IJ then stated that petitioner would be permitted to depart the United States voluntarily by June 28, 2005. *Id.* at 28a-29a.

3. Petitioner appealed to the BIA, which had the effect of rendering the IJ's decision (including its grant of permission to depart voluntarily) nonfinal. See 8 U.S.C. 1101(a)(47)(B)(i) (order "become[s] final" upon affirmance by the BIA or expiration of the time for seeking BIA review); 8 U.S.C. 1229c(b)(1). The BIA affirmed. Pet. App. 19a-24a. It rejected petitioner's contention that the IJ erred in denying his request for a continuance, explaining that petitioner "had ample time to pursue his adjustment application," that "it did not appear that [petitioner] would be eligible to adjust his status in the near future," that petitioner "could apply for consular processing abroad," and that, "therefore, [petitioner] had not presented good cause for a continuance." *Id.* at 21a. The BIA specifically noted that petitioner "had almost 2 years while in removal proceedings before the Immigration Judge to proceed with an adjustment of status application," and that "it also appears * * * that [petitioner's] son may have been denied nat-

uralization for lack of good moral character (or indiscretion) due to a criminal offense." *Id.* at 20a-21a.

The BIA then upheld the IJ's grant of voluntary departure, noting that, by statute, petitioner would be required to depart voluntarily with 60 days of the date of the BIA's order. Pet. App. 23a; see 8 U.S.C. 1229c(b)(2). The BIA specifically warned petitioner that if he failed to depart within that time period, he would be subject to civil penalties and would "be ineligible for a period of 10 years for any further relief under" various sections of the INA, including 8 U.S.C. 1255 (2000 & Supp. V 2005), which addresses adjustment of status. Pet. App. 23a-24a.

The BIA denied petitioner's motion for reconsideration, which also had asked the BIA to extend and stay the period of voluntary departure. Pet. App. 16a-18a. It explained that petitioner "merely reargu[ed] the merits of his appeal" in his reconsideration motion, *id.* at 17a, and it noted that it could not extend the voluntary departure period beyond the time permitted by statute, *id.* at 18a.[2]

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[2] In its initial decision, the BIA stated that petitioner had challenged the IJ's grant of voluntary departure. See Pet. App. 22a (citing petitioner's BIA Br. 3). The BIA was incorrect. In petitioner's initial brief to the BIA (at 3), filed on January 10, 2006, petitioner included in the Statement of Issues Presented the following issue: "Whether The Immigration Judge Was Correct In Granting Respondent Voluntary Departure." A.R. 67. But he did not include any argument in support of the issue, let alone argue that the IJ was *incorrect* in doing so. In what appears to be a largely identical brief filed on June 5, 2006, petitioner stated, in his Summary of the Arguments (at 3), that "The Immigration Judge Was Correct In Granting Respondent Voluntary Departure." A.R. 43. And, by seeking an extension of the voluntary departure period in his motion for reconsideration (A.R. 27), petitioner obviously was not challenging the granting of that relief. Nor does

4. The court of appeals dismissed petitioner's petition for review. Pet. App. 1a-15a. As pertinent here, the court of appeals held that it lacked jurisdiction under 8 U.S.C. 1252(a)(2)(B)(ii) to review the IJ's denial of a continuance, explaining that "Section 1229a(a)(1) confers on immigration judges the plenary authority to conduct removal proceedings," and that authority "necessarily encompasses the discretion to continue the proceedings." Pet. App. 9a. The court also rejected petitioner's argument that the IJ failed to provide any reason for the continuance denial, explaining that "it would have been futile to grant a continuance" because "the only record evidence" before the IJ "concerning Zeeshan's citizenship application indicated that it was denied." *Id.* at 13a.[3]

ARGUMENT

Petitioner seeks review of the court of appeals' determination that 8 U.S.C. 1252(a)(2)(B)(ii) precluded it from reviewing the IJ's denial of his request for a further continuance of his removal proceedings. Pet. i. The courts of appeals have divided on that question, but review would be premature at this time. Moreover, this case would not be a suitable vehicle for addressing the existing tensions in lower court authority. Because petitioner has conceded removability, is now ineligible for the relief of adjustment of status that he previously sought, and could not in any event show that the IJ

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petitioner raise any such issue in this Court.

[3] The court of appeals also rejected petitioner's argument that he was targeted for removal by the National Security Entry-Exit Registration System based on his religion and ethnicity, Pet. App. 14a, and petitioner does not renew that argument in his petition for a writ of certiorari.

abused his discretion in denying a continuance, petitioner cannot ultimately succeed on the merits of his challenge to the removal order. The petition therefore should be denied.

1. a. The federal courts of appeals are in conflict regarding whether they have jurisdiction under the INA to review an IJ's denial of a continuance. In the decision below, the Seventh Circuit joined the Eighth and Tenth Circuits in holding that 8 U.S.C. 1252(a)(2)(B)(ii) precludes review of an IJ's discretionary decision to deny a request for a continuance in removal proceedings. See Pet. App. 3a, 7a-11a; *Onyinkwa* v. *Ashcroft*, 376 F.3d 797, 799 (8th Cir. 2004); *Yerkovich* v. *Ashcroft*, 381 F.3d 990, 995 (10th Cir. 2004). Those courts have reasoned that an IJ's decision to grant or deny a request for a continuance is a "decision or action * * * the authority for which is specified under" the relevant subchapter of the INA (8 U.S.C. 1151-1381) to be in the discretion of the Attorney General, 8 U.S.C. 1252(a)(2)(B)(ii), because it is based on regulations that the Attorney General promulgated to implement 8 U.S.C. 1229a(a) and (b), the statutory provisions authorizing IJs to conduct removal proceedings, and that in turn specify that the power to grant continuances is within the discretion of IJs. Pet. App. 9a-10a; *Yerkovich*, 381 F.3d at 993; *Onyinkwa*, 376 F.3d at 799.

The majority of circuit courts have reached a contrary conclusion. The First, Second, Third, Fourth, Fifth, and Eleventh Circuits have all concluded that a decision by an IJ to grant or deny a continuance is not a decision "the authority for which is specified" under the relevant subchapter of the INA "to be in the discretion of the Attorney General," 8 U.S.C. 1252(a)(2)(B)(ii), because an IJ's discretionary authority to act on a motion

for a continuance is specified in a regulation, not a statutory provision within the relevant subchapter itself. See *Lendo* v. *Gonzales*, 493 F.3d 439, 441 n.1 (4th Cir. 2007); *Alsamhouri* v. *Gonzales*, 484 F.3d 117, 122 (1st Cir. 2007); *Zafar* v. *United States Attorney Gen.*, 461 F.3d 1357, 1360 (11th Cir. 2006); *Khan* v. *Attorney Gen. of the United States*, 448 F.3d 226, 232-233 (3d Cir. 2006); *Ahmed* v. *Gonzales*, 447 F.3d 433, 436-437 (5th Cir. 2006); *Sanusi* v. *Gonzales*, 445 F.3d 193, 198-199 & n.8 (2d Cir. 2006) (per curiam).[4] The Sixth Circuit has reached the same result through a different analysis, concluding that "Section 1252(a)(2)(B)(ii) only applies to the portions of subchapter II left to the Attorney General's discretion, not the portions of subchapter II that leave discretion with IJs in matters where IJs are merit decision-makers that are subject to [the courts of appeals'] review." *Abu-Khaliel* v. *Gonzales*, 436 F.3d 627, 632, 634 (2006).

b. As the government concluded over a year ago, after reexamining its prior position on the issue, the majority position represents the better reading of the statute. See generally Gov't C.A. Br., *Alsamhouri*, *supra*, discussed at pp. 12-13, *infra*. The relevant statutory text requires that the "authority" for the "decision or action" at issue—here, the denial of a continuance—be

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[4] Although the Ninth Circuit has not issued a published decision addressing whether the INA bars judicial review of an IJ's discretionary denial of a continuance, it has agreed with the majority position in unpublished, nonprecedential opinions. See *Lim* v. *Mukasey*, No. 05-74594, 2007 WL 4562133, at *1 (Dec. 28, 2007); *Martinez* v. *Gonzales*, 166 Fed. Appx. 300 (2006); see also *Medina-Morales* v. *Ashcroft*, 371 F.3d 520, 528 (9th Cir. 2004) (holding that Section 1252(a)(2)(B)(ii) does not preclude federal-court review of an IJ's denial of a motion to reopen).

"specified under this subchapter [Subchapter II of Chapter 12 of Title 8] to be in the discretion of the Attorney General." 8 U.S.C. 1252(a)(2)(B)(ii). Nothing in the relevant statutory "subchapter," however, mentions continuances, or "specifie[s]" that they may be granted "in the discretion of the Attorney General." Rather, an IJ's authority to continue a case derives from regulations promulgated to implement statutory provisions that broadly authorize IJs to conduct removal hearings, but do not specifically authorize them to grant or deny continuances. See, *e.g.*, 8 U.S.C. 1229a(a)(1). Given the general presumption in favor of judicial review, *INS* v. *St. Cyr*, 533 U.S. 289, 298 (2001), and the terms of Section 1252(a)(2)(B)(ii), the government agrees with the majority of circuit courts that an IJ's discretionary decision to deny a continuance is not covered by the jurisdictional bar in 8 U.S.C. 1252(a)(2)(B)(ii). The government did not argue otherwise to the court below. See Gov't C.A. Br. 8 n.4; Gov't C.A. Supp. Br. 3-8.

2. As discussed above, the courts of appeals are divided with respect to the underlying question upon which petitioner seeks review. Despite petitioner's contrary assertion, Pet. 16, this Court's plenary consideration is not warranted at this time, because the conflict in lower-court authority may well resolve itself without this Court's intervention, and because the issue concerns a narrow issue of reviewability that is unlikely to affect the outcome of many cases.

Prior to December 2006, the government had taken the position that 8 U.S.C. 1252(a)(2)(B)(ii) precludes federal-court review of an IJ's denial of a continuance. In December 2006, in response to a petition for rehearing in *Alsamhouri* v. *Gonzales*, the government reconsidered its position and concluded that the view of the

majority of the courts is correct. See Gov't C.A. Br. at 7-13, *Alsamhouri*, *supra*. In *Alsamhouri*, the First Circuit initially had held that it "ha[d] no jurisdiction over whether the denial of a continuance was an abuse of discretion." *Alsamhouri* v. *Gonzales*, 458 F.3d 15, 16, withdrawn on petition for reh'g, 471 F.3d 209, 210 (2006). In response to the government's change in position, the First Circuit reversed course, "adopt[ed] the majority rule," and held that it "ha[d] jurisdiction to review [a] denial of a continuance." *Alsamhouri*, 484 F.3d at 122. The Eighth Circuit, which has also adopted the minority position, has suggested that it may well reconsider its holding in light of the government's recent change in position. See *Ikenokwalu-White* v. *Gonzales*, 495 F.3d 919, 924 n.2 (2007) (suggesting that "it may be appropriate for our court to revisit this issue en banc," but noting that the "present case is [not] the most appropriate vehicle for doing so").

In its decision in this case, the Seventh Circuit acknowledged the Attorney General's recent change in position, but stated that it "disagree[d]" with the Attorney General's view. Pet. App. 2a. The opinion further stated that it had "been circulated among all judges of th[at] Court in regular active service" and that "[a] majority did not favor rehearing en banc on the question of whether the jurisdiction-stripping provision, 8 U.S.C. § 1252(a)(2)(B)(ii), applies to continuance decisions of immigration judges"; the opinion also noted, however, that four judges had voted to rehear the case en banc. *Id.* at 3a n.1.

Other developments in the Seventh Circuit since the issuance of the decision below suggest that the court may be willing to revisit the question presented en banc. On December 10, 2007, the Seventh Circuit issued an

order directing the government to respond to a petition for rehearing en banc in *Potdar* v. *Keisler*, 505 F.3d 680 (2007). The threshold question raised by that petition is whether the panel erred in concluding that "it lacked jurisdiction under * * * [8 U.S.C.] 1252(a)(2)(B)(ii) to review a denial of a continuance requested by [the alien] to enable him to pursue an application for adjustment of status." Pet. for Reh'g at 1, *Potdar*, *supra*. On February 11, 2008, the government filed a response, in which it urged en banc rehearing on the issue of its jurisdiction over continuance denials. Resp. to Pet. for Reh'g at 8-13, *Potdar*, *supra* (Response).[5] There accordingly is some prospect that the Seventh Circuit may reconsider its ruling on the question presented. It would thus be prudent for this Court to decline to resolve the disagreement in the circuit courts at this time.

There is, moreover, no pressing need for review by this Court, because the issue concerns a narrow aspect of judicial review in the courts of appeals affecting only one procedural aspect of the conduct of removal proceedings. The IJ's denial of a motion for a continuance is reviewable by the BIA only for abuse of discretion and

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[5] The government's response, however, did note that there is a factual question in *Potdar* about whether the motion the IJ denied was actually a motion for a continuance. The panel in *Potdar* had held that the petitioner's motion to the IJ, which was styled a motion to terminate exclusion proceedings, "amounted to a request for a continuance" because it "requested only an opportunity to pursue [adjustment of status] through appropriate administrative channels." 505 F.3d at 684-685. The government argued in its response to the rehearing petition that the panel erred in deeming the motion to terminate a motion for a continuance, Response at 6-8, but that if the court of appeals declines to revisit that issue, then the court should grant rehearing en banc on the question whether it has jurisdiction to review a continuance denial, *id.* at 8-13.

requires a showing of substantial prejudice. The scope of any judicial review would be at least as deferential. The question whether such judicial review is available therefore is likely to affect the outcome of very few cases, as this case amply demonstrates: The IJ manifestly did not abuse his discretion in denying a motion for a continuance here. See pp. 15-16, *infra*. Nor is this case unusual in that respect: In fact, *all* of the previously cited decisions that found judicial review authorized, see pp. 10-11 & note 4, *supra*, *also* concluded that the denial of the alien's request for a continuance did not constitute grounds for overturning the IJ's decision. See *Lendo*, 493 F.3d at 442; *Alsamhouri*, 484 F.3d at 122; *Zafar*, 461 F.3d at 1362; *Khan*, 448 F.3d at 235; *Ahmed*, 447 F.3d at 438; *Sanusi*, 445 F.3d at 200; *Abu-Khaliel*, 436 F.3d at 634; *Lim*, 2007 WL 4562133, at *1; *Martinez*, 166 Fed. Appx. at 300. Review therefore is not warranted at this time.

3. Even if the issue were presently ripe for and warranted this Court's review, this case would be an unsuitable vehicle for resolving it.

First, the claim upon which petitioner sought to obtain review in the court of appeals—that the IJ abused his discretion in denying petitioner's request for a continuance—is meritless. Petitioner has conceded removability, Pet. App. 60a, and he has no entitlement to stay in this country illegally. See *Elkins* v. *Moreno*, 435 U.S. 647, 667 (1978). As the BIA explained, Pet. App. 20a-23a, the IJ provided sufficient explanation for his decision to deny petitioner's request for a further continuance. The BIA noted that the IJ had stated that petitioner "had ample time to pursue his adjustment application"; that there was no indication that petitioner "would be eligible to adjust his status in the near future" in

light of the denial of his son's naturalization application; and that petitioner "could apply for consular processing abroad" in the event that his son's naturalization application was approved. *Id.* at 21a. Because the IJ gave "a rational explanation" for his refusal to grant a continuance, and because that decision did not constitute an "inexplicabl[e] depart[ure] from established policies, or * * * rest[] on an impermissible basis," no abuse of discretion could be established here. *Castaneda-Suarez* v. *INS*, 993 F.2d 142, 146 (7th Cir. 1993) (quoting *Cordoba-Chaves* v. *INS*, 946 F.2d 1244, 1246 (7th Cir. 1991)).[6]

Second, petitioner is now ineligible to obtain the ultimate relief he seeks—adjustment of status—because he has overstayed his period of voluntary departure. In proceedings before the administrative agency, petitioner requested voluntary departure in lieu of removal pursuant to 8 U.S.C. 1229c(b)(1), and the BIA ultimately granted him 60 days, or until September 25, 2006, to depart the United States voluntarily in lieu of removal. Pet. App. 22a-24a, 28a-29a, 72a. The decisions of both the IJ and the BIA specifically warned petitioner of the consequences of failing to comply with his voluntary departure order, including the consequence that he would be ineligible to seek discretionary adjustment of status for a period of ten years. *Id.* at 23a-24a, 28a-29a, 57a. Petitioner posted his voluntary departure bond with the agency, thereby assuming the "privileges and penalties

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[6] Petitioner's son Zeeshan was naturalized on January 15, 2008. That does not, however, change the fact that, at the time of petitioner's motion for a continuance, petitioner had no relief available in the foreseeable future. See Pet. App. 13a ("developments [since the IJ's decision] are beside the point," because "[a]t the time the BIA reviewed the denial of the continuance, the only record evidence concerning Zeeshan's citizenship application indicated that it was denied").

related to * * * voluntary departure." *In re Diaz-Ruacho*, 24 I. & N. Dec. 47, 50 (B.I.A. 2006).

On September 21, 2006, four days before his voluntary departure period was to expire, petitioner was granted a temporary stay of his voluntary departure period by the Seventh Circuit. See Order, *Ali* v. *Gonzales*, No. 06-3240 (Sept. 21, 2006). However, the court of appeals then denied his requests for a further stay of voluntary departure on October 16, 2006.[7] Petitioner has since failed to depart the United States voluntarily.[8] As a result, petitioner is statutorily ineligible for adjustment of status. 8 U.S.C. 1229c(d)(1)(B) (Supp. V 2005) (providing that "if an alien is permitted to depart voluntarily * * * and voluntarily fails to depart * * * within the time period specified, the alien," *inter alia*, "shall be ineligible, for a period of 10 years" to receive certain forms of discretionary relief, including adjustment of status); see 8 C.F.R. 1240.26(a) (same); see *Ngarurih* v. *Ashcroft*, 371 F.3d 182, 194 (4th Cir. 2004) (finding that "Congress provided for certain penalties to attach when an alien overstays his voluntary departure period."). Because petitioner is statutorily ineligible for the underlying relief that he seeks, his case is not a suitable vehicle for resolving the question whether 8 U.S.C. 1252(a)(2)(B)(ii) precludes judicial review of the denial of a continuance. Further review is therefore unwarranted.

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[7] On October 31, 2006, petitioner moved the court of appeals to reconsider its October 16, 2006, order denying his stay requests. See *Ali* v. *Gonzales*, No. 06-3240. The court did not adjudicate that motion prior to its dismissal of petitioner's petition for review.

[8] On January 9, 2008, petitioner applied for an emergency stay of removal before this Court. See *Ali* v. *Mukasey*, No. 07A583. This Court denied petitioner's request on January 15, 2008.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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