No. 10-348

In the Supreme Court of the United States

JIANLIN ZHANG, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly afforded *Chevron* deference to an agency regulation establishing that petitioner is not eligible for the discretionary relief of adjustment of status except through marriage to the United States citizen who applied for a K-1 fiancé's visa on his behalf.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-16) is not published in the *Federal Reporter* but is reprinted in 375 Fed. Appx. 879. The decisions of the Board of Immigration Appeals (Pet. App. 18-19, 21-24) and of the immigration judge (Pet. App. 25-58) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 19, 2010. A petition for rehearing was denied on June 14, 2010 (Pet. App. 64). The petition for a writ of certiorari was filed on September 9, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Adjustment of an alien's status to that of a lawful permanent resident is governed by 8 U.S.C. 1255. Sec-

tion 1255(a) permits the Attorney General, in his discretion and under such regulations as he may prescribe, to adjust the status of an alien who was inspected and admitted or paroled into the United States to that of an alien lawfully admitted for permanent residence. The alien must apply, be eligible for an immigrant visa, and be admissible for permanent residence, and an immigrant visa must be immediately available to the alien at the time the application is filed. Section 1255(c) bars certain categories of aliens, including visa violators, from adjustment of status.

Section 1255(d) specifies the terms under which the Attorney General may grant adjustment of status to an alien who was admitted on a nonimmigrant visa as the fiancé or fiancée of a United States citizen.[1] Pursuant to Section 1255(d), such an alien's status may be adjusted only to that of a *conditional* resident, and only as a result of the alien's marriage to the United States citizen who filed the petition for a fiancé visa. See also 8 U.S.C. 1101(a)(15)(K)(i) (creating nonimmigrant alien classification for fiancés who seek admission solely for the purpose of marriage within 90 days); 8 U.S.C. 1186a (providing for conditional permanent resident status); 8 C.F.R. 214.2(k)(1)-(6) (requirements for application for K-1 fiancé visa). The marriage must be timely per-

[1] Section 1255(d) was enacted as part of legislation to bar, with certain exceptions, adjustment of the status of aliens admitted as nonimmigrant fiancés. See Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, §§ 2(e), 3(b), 100 Stat. 3542; see also Immigration Technical Corrections Act of 1988, Pub. L. No. 100-525, § 7(b), 102 Stat. 2616 (adding the provision permitting adjustment to conditional permanent resident).

formed within 90 days of the alien's entry. 8 C.F.R. 245.1(c)(6)(i); 8 C.F.R. 1245.1(c)(6)(i).[2]

Section 1255(i) permits certain aliens who are present in the United States without having been inspected and admitted or paroled, and certain visa violators, to adjust their status under specified circumstances. That subsection provides that "[n]otwithstanding the provisions of subsections (a) and (c) of this section, an alien physically present in the United States * * * may apply to the Attorney General for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence" under certain conditions. 8 U.S.C. 1255(i)(1). As relevant here, Section 1255(i) permits an alien to apply if he is rendered ineligible for adjustment of status by Section 1255(c); is the beneficiary of an application for a labor certification properly filed on or before April 30, 2001; and was physically present in the United States on December 21, 2000, if the application for labor certification was filed after January 14, 1998. 8 U.S.C. 1255(i)(1)(A)(ii), (B)(ii) and (C). The alien must apply and pay the applicable fee; he must be both eligible to receive an immigrant visa and admissible for permanent residence; and a visa must be immediately available at the time of the application. 8 U.S.C. 1255(i)(1) and (2). Precisely the same eligibility requirements for

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[2] The regulation relevant to this case previously appeared at 8 C.F.R. 245.1(b)(13) (1989). See 53 Fed. Reg. 30,011 (1988). Following the enactment of Section 1255(i), the relevant regulation was moved to its present location. See 59 Fed. Reg. 51,095 (1994); pp. 10-11, *infra*. When the Department of Homeland Security (DHS) was created, responsibility for Section 245.1 was transferred from the Department of Justice to DHS, and a new but identical regulation, 8 C.F.R. 1245.1, was promulgated to cover adjustment-of-status proceedings before immigration judges and the Board of Immigration Appeals.

adjustment of status appear in Section 1255(a), except for having been inspected and admitted or paroled into the United States.[3]

2. a. Petitioner, a native and citizen of China, was last admitted to the United States on January 9, 1995, on a "K-1" nonimmigrant visa, which permits the admission of a fiancé solely for the purpose of marriage within 90 days. He neither married nor departed the United States within 90 days, and he never married the United States citizen listed on his visa. He violated the conditions of his visa by failing to depart within the 90 days, by changing his address without notifying the Attorney General, and by working without authorization. Pet. App. 2.

In February 2001, petitioner married his current spouse, who is a United States citizen but who is not the person listed as the fiancée on the visa under which petitioner was admitted to the United States in 1995. Pet. App. 2. In April 2001, an application for labor certification, with petitioner as the beneficiary, was filed with the Department of Labor.[4] *Id.* at 33.

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[3] Section 1255(i) was originally adopted in 1994 and was amended in 1997. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1995, Pub. L. No. 103-317, § 506(b) and (c), 108 Stat. 1766 (1994); Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, § 111(a) and (b), 111 Stat. 2458 (1997). See also pp. 11-12, *infra* (noting 2000 amendments not relevant here).

[4] To obtain adjustment of status based on employment, a Form I-140 Immigrant Petition for Alien Worker must be submitted on the alien's behalf, attaching the Department of Labor's certification of the labor requirement. Although the Department of Labor certified the labor requirement on behalf of petitioner, Administrative Record 428, United States Citizenship and Immigration Services denied an employment-

b. In 2006, petitioner filed an application for adjustment of status. Pet. App. 33. The application asserted that petitioner was eligible to apply based on the filing of the 2001 application for labor certification and that he was eligible to receive adjustment of status because an immediate-relative visa is available to him. Petitioner is an immediate relative of a United States citizen based on his 2001 marriage. Administrative Record (A.R.) 396.

In September 2006, United States Citizenship and Immigration Services, a component of DHS, denied the application for adjustment of status. Pet. App. 59-63. The application was denied because, under 8 U.S.C. 1255(d) and 8 C.F.R. 245.1(c), petitioner is barred from adjusting his status to that of a lawful permanent resident except by timely marrying the fiancée listed on his visa, which he did not do. Pet. App. 62.

c. Also in September 2006, United States Immigration and Customs Enforcement commenced removal proceedings against petitioner. Pet. App. 26. Petitioner admitted the factual allegations in the Notice to Appear and conceded that he is removable as an alien who is present in the United States in violation of the law (8 U.S.C. 1227(a)(1)(B)), as an alien who failed to maintain the conditions of his status (8 U.S.C. 1227(a)(1)(C)(i)), and as an alien who failed to timely update his registration address (8 U.S.C. 1227(a)(3)(A)). Pet. App. 26-27. Petitioner sought relief in the form of adjustment of status under Section 1255(i). *Id.* at 27-31; A.R. 361-366.[5] Petitioner also applied for voluntary departure under

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based petition on petitioner's behalf in 2005. Pet. App. 33, 35. Petitioner has never obtained an employment-based visa.

[5] Petitioner also sought cancellation of removal under 8 U.S.C. 1229b(b); the denial of that relief is not at issue here.

8 U.S.C. 1229c(b) if he were denied relief from removal. See Pet. App. 25, 56.

d. In September 2007, in a written decision, Pet. App. 25-58, the immigration judge (IJ) found petitioner removable as charged, *id.* at 27, and pretermitted his application for adjustment of status. The IJ ruled that petitioner is not eligible to adjust his status to that of a lawful permanent resident because, having violated the terms of his K-1 visa, he is barred by Section 1255(d) from adjusting his status to that of a lawful permanent resident. *Id.* at 38. The IJ granted petitioner's application for voluntary departure. *Id.* at 56.

3. The Board of Immigration Appeals (BIA) adopted and affirmed the IJ's decision. Pet. App. 20-24. The BIA separately noted its agreement that Section 1255(d) bars K-1 visa holders from adjusting status on any basis other than marriage to the citizen who petitioned on their behalf. *Id.* at 22. That conclusion, the BIA noted, is consistent with several appellate decisions. *Ibid.* (citing *Kalal* v. *Gonzales*, 402 F.3d 948 (9th Cir. 2005), *Markovski* v. *Gonzales*, 486 F.3d 108 (4th Cir. 2007), and *Choin* v. *Mukasey*, 537 F.3d 1116, 1120 n.4 (9th Cir. 2008)).

4. Petitioner did not timely seek judicial review of the BIA's decision, but instead moved the BIA for reconsideration. See Pet. App. 3. The BIA denied reconsideration. *Id.* at 17-19. Petitioner then filed a petition for review of the BIA's decision to deny reconsideration. See generally *Stone* v. *INS*, 514 U.S. 386, 405-406 (1995).

5. The court of appeals denied the petition for review in an unpublished decision. Pet. App. 1-16.

The court of appeals noted that petitioner concededly was barred from obtaining adjustment of status under Section 1255(a), because he did not comply with the re-

quirements set out in Section 1255(d) for a K-1 visa holder to adjust status upon his timely marriage to the fiancée who sponsored the visa. Pet. App. 5-7. Petitioner argued, however, that he could obtain adjustment of status under Section 1255(i) notwithstanding the bar imposed by Section 1255(d). *Id.* at 7. The court of appeals rejected that argument.

The court of appeals noted that the governing regulations, 8 C.F.R. 245.1(c)(6)(i) and 1245.1(c)(6)(i), clearly prohibited petitioner from applying for adjustment of status, because he was admitted to the United States as a nonimmigrant fiancé on a K-1 visa but then did not timely marry the fiancée who filed the visa petition for him. Pet. App. 12-13. Accordingly, for petitioner to prevail, he would have to establish that the regulations were not entitled to *Chevron* deference. *Id.* at 12.

The court of appeals concluded that the regulations permissibly construe the statute and do not contravene the plain statutory language. The court noted that two other courts of appeals had read the statute as the regulations do. Pet. App. 8-9 (citing *Kalal*, *supra*, and *Markovski*, *supra*). Those decisions are based on the prefatory language of Section 1255(i), which provides that the Attorney General may adjust status under that subsection "[n]otwithstanding" the restrictions of "subsections (a) and (c)," but makes no reference to subsection (d), the provision that bars petitioner from seeking adjustment of status. *Id.* at 10-11. Thus, under that reading, "subsection (i) explicitly sets aside two—but not all—of the bases for ineligibility under subsection (a)," so that K-1 visa holders are still "subject to the limitation of subsection (d)." *Id.* at 11; see also *id.* at 9 (a K-1 visa holder must still comply with the "'specific restrictive process for holders of that kind of visa,'" and

8 U.S.C. 1255(i) "did not, on its face, create any exception to th[e] 'carefully crafted scheme that Congress created for the purpose of avoiding marriage fraud'") (quoting *Kalal*, 402 F.3d at 952).

The court acknowledged that petitioner's contrary reading—that Section 1255(d) restricts only adjustment under Section 1255(a), and that adjustment under Section 1255(i) is not adjustment under Section 1255(a)—was not "wholly without merit." Pet. App. 12. But the court of appeals concluded that the statute did not "clear[ly] and unambiguous[ly]" compel that reading, as would be necessary to hold the governing regulations invalid. *Ibid.* Because the statute was ambiguous and the Attorney General's reading was a permissible one, the court of appeals afforded *Chevron* deference to the regulations. *Id.* at 12-13. Petitioner therefore is ineligible to seek adjustment of status. *Id.* at 14.

5. The court of appeals denied rehearing en banc, with no judge calling for a poll. Pet. App. 64.

6. Pursuant to the IJ's order granting voluntary departure, petitioner had until January 8, 2009, to depart from the United States. See Pet. App. 21, 23-24; 8 U.S.C. 1229c(b)(2). We are informed by DHS that petitioner has not departed from the United States.

ARGUMENT

The unpublished decision of the court of appeals is correct and does not conflict with any decision of this Court. Petitioner does not contend that the decision below conflicts with any decision of another court of appeals, and indeed, every published decision on the subject to date has read the statute as the governing regulations do. And for independent reasons, petitioner is

now ineligible for the relief that he seeks. Further review therefore is not warranted.

1. As the court of appeals explained, petitioner can prevail only if the governing regulations are contrary to the plain language of the statute and therefore not entitled to *Chevron* deference. Petitioner contends (Pet. 7) that his reading of the statute is unambiguously correct because the contrary reading "nullifies" Section 1255(i). That contention lacks merit.

Petitioner's submission rests on the language in Section 1255(d) stating that "[t]he Attorney General may not adjust" the status of an alien in his position "under subsection (a) of this section." He contends (Pet. 6, 8-9, 11) that Section 1255(i) creates its own procedure for awarding adjustment of status and that Section 1255(d) does not by its terms restrict applications under Section 1255(i). But if that reasoning were correct, the first words of Section 1255(i)(1)—"Notwithstanding the provisions of subsections (a) and (c) of this section"—would be deprived of any meaning. Section 1255(c), by its terms, specifies classes of aliens to whom "subsection (a) of this section shall not be applicable." If Section 1255(i) created its own adjustment procedure, completely independent of Section 1255(a), then there would be no need to provide that the new procedure is "[n]otwithstanding the provisions of subsections (a) and (c)." But Congress *did* so provide, and it conspicuously did *not* provide that Section 1255(i) would operate "[n]otwithstanding" the procedure for fiancés holding K-1 visas set out in Section 1255(d). See *Kalal* v. *Gonzales*, 402 F.3d 948, 951-952 (9th Cir. 2005); accord *Markovski* v. *Gonzales*, 486 F.3d 108, 110 (4th Cir. 2007).

Furthermore, Section 1255(d) was enacted in 1986 and amended in 1988 as part of repeated and "carefully

designed" efforts by Congress to combat marriage fraud by aliens. *Kalal*, 402 F.3d at 952; see note 1, *supra*. An alien who enters the United States with the avowed intent of marrying a citizen must fully and timely comply with those rules; if he does not, he is ineligible for adjustment, and if he does, he is eligible only for *conditional* adjustment. Petitioner "abided by none of the restrictions, and now suggests that [he] can avoid them entirely—no need to marry h[is] fiancé[e] within 90 days; no need to marry h[er] at all, actually; and no need to obtain a legal CLPR [conditional lawful permanent resident] status as those who follow the law must." *Kalal*, 402 F.3d at 952. The care with which Congress crafted the provisions to prevent immigration through fraudulent marriages further supports the court of appeals' conclusion that petitioner's reading—which would permit the "flouting" of those provisions, *ibid.*—is not unambiguously correct.

2. Petitioner also suggests (Pet. 10) that the court of appeals should not have relied on the regulation to resolve the perceived ambiguity, on the theory that the regulation was not "issued since the passing of the LIFE Act."[6] That contention is incorrect.

As noted above, Section 1255(i) was enacted in 1994. See note 3, *supra*. After Congress adopted that provision, the Department of Justice revised its regulations to implement Section 1255(i) and to address its interaction with the previously existing rules for adjustment of status. The new regulations made clear that "Section [1255(i)] also does not waive several other grounds of ineligibility for adjustment of status under [8 U.S.C.

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[6] Petitioner does not offer any other reason why the regulation would not be subject to deference if the statute is ambiguous.

1255]. * * * An applicant who was admitted to the United States as a K-1 fiance(e) but did not marry the United States citizen who filed the petition * * * is also barred from adjusting status under section [1255]." 59 Fed. Reg. 51,093 (1994). Some pre-existing grounds of ineligibility for adjustment of status were left in 8 C.F.R. 245.1(b); those grounds do *not* apply to aliens applying under Section 1255(i). See 59 Fed. Reg. at 51,095. The regulatory provision at issue here, however—which had been 8 C.F.R. 245.1(b)(13) (1994)—was moved into a new 8 C.F.R. 245.1(c), which provides that aliens in the listed categories "are ineligible to apply for adjustment of status to that of a lawful permanent resident alien under section [1255]," including Section 1255(i). 59 Fed. Reg. at 51,095. That provision was subsequently replicated in 8 C.F.R. 1245.1(c). See note 2, *supra*. Petitioner's characterization of the rule as dating from 1988, before the enactment of Section 1255(i), therefore is inaccurate. In fact, the regulation expressly considered and resolved the question presented here about the intersection of Section 1255(d) and (i).

Although petitioner repeatedly refers to Section 1255(i) as part of a 2000 statute known as the LIFE Act (Pet. 2-3, 4, 5, 6, 7-8, 9-10), that characterization is erroneous. The statute to which petitioner refers is the Legal Immigration Family Equity Act (LIFE Act), Pub. L. No. 106-553, App. B, Tit. XI, 114 Stat. 2762A-142.[7] The LIFE Act itself did not amend Section 1255(i) at all.

Although the related LIFE Act Amendments of 2000, Pub. L. No. 106-554, App. D, Div. B, Tit. XV, 114 Stat. 2763A-324, made some changes to Section 1255(i),

[7] See also Act of Dec. 21, 2000, Pub. L. No. 106-553, § 1(a)(2), 114 Stat. 2762 (enacting the LIFE Act and other legislation by incorporation).

those amendments are not relevant to petitioner's case or to the question presented.[8] The LIFE Act Amendments extended the deadline to file a qualifying application for a labor certification. § 1502(a)(1)(B), 114 Stat. 2763A-324. That extension made petitioner's application timely, but it did not otherwise affect his eligibility for adjustment of status. The LIFE Act Amendments also added Section 1255(i)(1)(C), which requires that the applying alien have been physically present in the United States on the date of enactment of the LIFE Act Amendments. § 1502(a)(1)(D), 114 Stat. 2763A-324. That provision did not affect petitioner at all. Neither change made by the LIFE Act Amendments to Section 1255(i) is at all relevant to the interaction of Section 1255(d) and (i).

3. Petitioner also errs in contending (Pet. 11) that the decision below overlooked the rule that immigration statutes must be interpreted narrowly in favor of aliens in removal proceedings. In the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, Congress has expressly conferred on the Attorney General the authority to resolve ambiguities in the first instance. 8 U.S.C. 1103(a)(1); see *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999). The Attorney General's interpretations are reviewed under the *Chevron* framework. See *ibid.* By contrast, if the mere finding of a statutory ambiguity were sufficient to compel a holding in the alien's favor, the Attorney General would have no such interpretive authority. A court thus properly may consider whether statutory ambiguities should be resolved in favor of the alien only after the court has used every interpretative

[8] See also Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, § 1(a)(4), 114 Stat. 2763 (2000) (enacting the LIFE Act Amendments and other legislation by incorporation).

tool at its disposal, including application of deference principles under *Chevron* and *Aguirre-Aguirre*. The principle petitioner invokes does not establish that a statute is so unambiguous that deference is unwarranted. See *Negusie* v. *Holder*, 129 S. Ct. 1159, 1164 (2009). Thus, in *Negusie*, this Court identified an ambiguity in the INA, but notwithstanding the alien's invocation of the rule of lenity, this Court remanded the case to the BIA to resolve the ambiguity under *Chevron*. See *id.* at 1164, 1167-1168. The court of appeals therefore did not err in resolving any ambiguity by according *Chevron* deference to an on-point regulation.

Even in the criminal context, application of the rule of lenity requires more than "[t]he simple existence of some statutory ambiguity"; it requires a "grievous ambiguity" such that, "after seizing everything from which aid can be derived," the Court "can make no more than a guess as to what Congress intended." *Muscarello* v. *United States*, 524 U.S. 125, 138-139 (1998) (internal quotation marks and citation omitted). If that approach were applicable in the immigration context, there is no such "grievous ambiguity" in Section 1255, especially given the cross-reference in Section 1255(i) to Subsections (a) and (c) but not (d), and the history of Subsection (d). See pp. 9-10, *supra*; accord, *e.g.*, *Markovski*, 486 F.3d at 110 (deeming the answer to the question presented by this case "evident from the plain language of the statute").

4. Even if petitioner had been eligible to seek adjustment of status under Section 1255(i) in removal proceedings, his subsequent conduct has rendered him ineligible for adjustment of status for independent reasons. Petitioner sought and received permission to depart voluntarily. "Voluntary departure * * * allows the

Government and the alien to agree upon a *quid pro quo*." *Dada* v. *Mukasey*, 554 U.S. 1, 11 (2008). By departing voluntarily, the alien both avoids potentially extended detention pending removal and is excused from some of the penalties associated with deportation. The government, in return, gains the benefit of "a prompt and costless departure"—but that benefit is "lost" if the alien "stay[s] in the United States past the departure date," *e.g.*, "to wait out the adjudication" of subsequent motions that do not toll the departure period. *Id.* at 19-20. For that reason, if an alien overstays the voluntary departure period, he is penalized by (inter alia) losing eligibility to seek adjustment of status under Section 1255 for ten years. See 8 U.S.C. 1229c(d)(1)(B); 8 C.F.R. 1240.26(a). There is no exception for adjustment of status under Section 1255(i). See *ibid.*

Petitioner was required to depart by January 8, 2009. We are informed by DHS that he has not done so. See p. 8, *supra*. Nor did petitioner withdraw his request for voluntary departure during the departure period. See *Dada*, 554 U.S. at 21, 22-23. Rather, in his motion for reconsideration, petitioner asked for "suspension" of his "voluntary departure date." A.R. 10. The BIA did not grant the request; such a suspension would allow an alien to retain the benefits of voluntary departure but deprive the government of any corresponding benefit by extending the time well beyond the statutory maximum. See 8 U.S.C. 1229c(b)(2); 8 C.F.R. 1240.26(f); *Dada*, 554 U.S. at 19-20.[9] Petitioner therefore is subject to a ten-

[9] The motion for reconsideration did not itself toll the voluntary departure period. *Dada*, 554 U.S. at 19. In regulations that took effect after petitioner had overstayed his voluntary departure period, the Department of Justice now provides that an alien who files a reconsideration motion within the departure period is deemed to have withdrawn

year prohibition on obtaining adjustment of status. Consequently, even if this Court were to resolve the question presented in his favor, petitioner still could not obtain the relief he seeks.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2010

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his request for voluntary departure and therefore is no longer subject to the penalties for overstaying the voluntary departure period. 8 C.F.R. 1240.26(e)(1); see also *Dada*, 554 U.S. at 20 (noting the pendency of this regulation). The amendment does not apply retroactively to motions that, like petitioner's, were filed before the amendment took effect. See 73 Fed. Reg. 76,935 (2008).