No. 16-146

In the Supreme Court of the United States

SRIRAM RAJASEKARAN, ET AL., PETITIONERS

v.

MARK HAZUDA, DIRECTOR, NEBRASKA SERVICE CENTER, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether district courts have jurisdiction to review allegations by a beneficiary of a visa petition that the notice he received before the Department of Homeland Security revoked approval of the visa petition was insufficiently detailed, and that the opportunity he was given to respond was insufficiently robust, supposedly in violation of 8 C.F.R. 103.2(b)(16), notwithstanding that Congress has precluded judicial review of decisions to revoke approval of a visa petition. See 8 U.S.C. 1155, 1252(a)(2)(B)(ii).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and regulations:

Statutes and regulations—Continued: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-8) is reported at 815 F.3d 1095. The opinion of the district court (Pet. App. 9-63) is not published in the *Federal Supplement* but is available at 2014 WL 11016404.

JURISDICTION

The judgment of the court of appeals was entered on January 29, 2016. A petition for rehearing was denied on April 28, 2016 (Pet. App. 66). The petition for a writ of certiorari was filed on July 27, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress has curtailed judicial review of decisions by the Secretary of Homeland Security that Congress has specified are in his discretion:

> Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review—
>
> (i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or
>
> (ii) any other 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) (emphasis added). "[T]his subchapter" encompasses 8 U.S.C. 1151 through 1381. *Ibid.* Subparagraph (D) provides that subparagraph (B) does not preclude judicial review of "constitutional claims or questions of law" raised in a petition for review of a final order of removal filed in a court of appeals. 8 U.S.C. 1252(a)(2)(D). This case does not arise in that posture. It also does not involve asylum under 8 U.S.C. 1158.

2. Congress has provided the Secretary with broad discretion regarding the admission of aliens to the United States. For alien workers residing in the United States, there is generally a three-step process for becoming a lawful permanent resident through an employer's sponsorship.

First, the employer must request and obtain a certification from the Department of Labor (DOL) that there are no U.S. workers "able, willing, qualified * * * and available" at the time of application for a visa and admission to the United States, and that the alien's employment will not adversely affect wages and working conditions of others similarly employed in the United States. 8 U.S.C. 1182(a)(5)(A)(i).[1]

Second, if DOL approves the labor certification, the employer must obtain approval by U.S. Citizenship and Immigration Services (USCIS) of an immigrant visa petition, known as the Immigrant Petition for Alien Worker, USCIS Form I-140 petition. See 8 U.S.C. 1154(b); see also 8 U.S.C. 1154(a)(1)(E) and (F); 8 C.F.R. 204.5.

Third, if USCIS approves the employer's visa petition, the beneficiary alien may file an application for adjustment of status to that of a lawful permanent resident, which the Secretary of Homeland Security "may" grant. See 8 U.S.C. 1255(a). But that application cannot be granted until an "immigrant visa is immediately available" to the applicant. 8 U.S.C. 1255(a)(3). Alien workers often must wait years to satisfy that requirement, as there are "long queues for the limited number of visas available each year."

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[1] This labor certification requirement does not apply to all alien workers, but no exemption or exception applies here. *E.g.*, 8 U.S.C. 1182(a)(5)(A)(ii).

Scialabba v. *Cuellar de Osorio*, 134 S. Ct. 2191, 2196 (2014) (opinion of Kagan, J.); see 8 U.S.C. 1151(a)(2) and (d), 1152(a)(2) (setting worldwide and country-level caps on immigrant visas).

Congress has provided some "job flexibility" for certain alien workers with adjustment-of-status applications who face long visa queues. See American Competitiveness in the Twenty-first Century Act of 2000, Pub. L. No. 106-313, § 106(c), 114 Stat. 1254 (8 U.S.C. 1154(j), 1182(a)(5)(A)(iv)). Those provisions enable an eligible worker to "port" an I-140 petition from the original petitioning employer to another petitioning employer, without restarting the three-step sponsorship process described above. *Ibid.*; see *Herrera* v. *USCIS*, 571 F.3d 881, 887 (9th Cir. 2009) (discussing porting requirements). In order for the original I-140 petition to remain a valid basis for the alien worker's portability, however, the original petition must have been valid at the time it was granted. *Ibid.*; *In re Al Wazzan*, 25 I. & N. Dec. 359, 367 (A.A.O. 2010).

The Secretary also may, at any time, revoke the prior approval of an immigrant visa petition:

> The Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 1154 of this title.

8 U.S.C. 1155.[2] The Secretary has promulgated regulations governing revocations. See 8 C.F.R. 205.1, 205.2. Revocation is automatic under certain enumer-

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[2] Section 1155 permits revocation of the approval of any kind of visa petition approved under Section 1154, not merely employment-based visas. 8 U.S.C. 1155; see 8 U.S.C. 1154.

ated circumstances, including when the visa petitioner ceases to be in business. 8 C.F.R. 205.1(a)(3)(iii)(D). A USCIS officer may also revoke the approval of a visa petition on any other ground "when the necessity for the revocation comes to [its] attention." 8 C.F.R. 205.2(a).

Before approval is revoked on such a non-automatic basis, the visa petitioner (that is, the employer) is given "written notification of the decision that explains the specific reasons for the revocation." 8 C.F.R. 205.2(c); see 8 C.F.R. 205.2(b). If the officer ultimately decides to revoke a Form I-140 visa petition, the visa petitioner may seek reconsideration, 8 C.F.R. 103.5, and/or file an administrative appeal to the USCIS Administrative Appeals Office (AAO), 8 C.F.R. 205.2(d); see 8 C.F.R. 103.3. That review is de novo. See *Soltane* v. *U.S. Dep't of Justice*, 381 F.3d 143, 145 (3d Cir. 2004); *In re Christo's, Inc.*, 26 I. & N. Dec. 537, 537 n.2 (A.A.O. 2015).

USCIS regulations provide that "the beneficiary of a visa petition" lacks "legal standing" in such proceedings. 8 C.F.R. 103.3(a)(1)(iii)(B); see 8 C.F.R. 103.2(a)(3) ("A beneficiary of a petition is not a recognized party in such a proceeding."). The beneficiary accordingly cannot appeal. The beneficiary also may not appeal the denial of an application for adjustment of status under 8 U.S.C. 1255. 8 C.F.R. 245.2(a)(5)(ii) ("No [administrative] appeal lies from the denial of an application by the director."); see also 8 U.S.C. 1252(a)(2)(B)(i) ("[N]o court shall have jurisdiction to review * * * any judgment regarding the granting of relief under section * * * 1255 of this title.").

3. In 2004, Pacific West Corporation filed an alien labor certification application with the DOL on behalf

of petitioner Sriram Rajasekaran. Pet. App. 13. (To avoid confusion with the visa petitioner Pacific West, this brief refers to the Rajasekarans by name, rather than as petitioners in this Court.) In 2006, DOL approved the labor certification. *Ibid.* Pacific West then filed an I-140 petition with USCIS on behalf of Rajasekaran for the occupation of software engineer, which USCIS approved. *Id.* at 13-14. In 2007, Rajasekaran, his wife, and his minor child filed applications for adjustment of status with USCIS. *Ibid.*

On November 13, 2012, the Director of the USCIS Nebraska Service Center issued Pacific West a Notice of Intent to Revoke the approval of its I-140 immigrant petition. Pet. App. 15. The notice is five pages long and explains USCIS's intent to revoke the approval. 3 C.A.R. 1358-1362; see Pet. App. 15-22 (reproducing portions of the notice). "Upon review of your petition," the notice states, "it does not appear that you were eligible for the benefit sought." 3 C.A.R. 1358. The notice identified five separate issues: (1) "that [Pacific West] is a contract employer and its status is inconclusive"; (2) "actual ownership and management of [Pacific West] is inconclusive"; (3) "records indicate multiple alien worker petitions have been filed on behalf of [Pacific West]"; (4) "[Pacific West]'s financial ability to pay the offered wage in the instant petition and all petitions has not been established; the alien's minimum education and experience requirements cannot be established and verified"; and (5) "there is doubt cast on the bona fide job opportunity in the instant petition." Pet. App. 15 (brackets omitted).

For each of these issues, the notice provided several paragraphs of additional detail. In Issue #4, for

example, the notice stated that an investigation into Pacific West's conduct "confirms fraud occurred." Pet. App. 19. Pacific West "plead[ed] guilty to 18 USC, 1001(a)(3) violations, false statements to a governmental agency, on April 14, 2011 during plea agreement proceedings." *Id.* at 19-20. The notice further stated that, "in the course of the investigation, USCIS officials discovered numerous altered documents, inaccurate information, and questionable signatures in evidence submitted from [Pacific West] * * * and associated companies and individuals identified above." *Id.* at 20.

The notice was sent to Pacific West and its counsel of record. Pet. App. 15. Pacific West did not respond. *Id.* at 22.

Although USCIS regulations do not provide for notice to the beneficiary of the visa petition, see 8 C.F.R. 103.2(a)(3) and (b)(16), 205.2(b) and (c), Rajasekaran received the notice: The law firm that represented Pacific West also represented him. Pet. App. 14, 22. Rajasekaran submitted a lengthy response. See 3 C.A.R. 1363-1733. His response stated, among other things, that Pacific West "is no longer in operation" and that "we are constrained to reply on behalf of the . . . beneficiary, Sriram Rajasekaran, alone." Pet. App. 22 (quoting 3 C.A.R. 1363).

4. On February 7, 2013, the Director of the Service Center revoked approval of Pacific West's I-140 visa petition. 3 C.A.R. 1352-1357; see Pet. App. 22-24 (reproducing portions of the decision). The Director's decision discussed Rajasekaran's submission, see Pet. App. 22-24, but explained that he "ha[d] not sustained th[e] burden" of establishing that the visa petition was valid at the time it was approved, *id.* at 24.

Rajasekaran moved to reopen and reconsider. Pet. App. 24. The Director denied the motion. 3 C.A.R. 1002-1003; see Pet. App. 24-26 (reproducing portions of the decision). The Director's decision stated, among other things, that "the petitioner" (that is, Pacific West) "must respond to USCIS Intent to Revoke, not the beneficiary," and that Rajasekaran's motion "neither provides new evidence, provides precedent decisions to consider, nor establishes that the decision was incorrect based upon the evidence of record at the time." Pet. App. 25-26.

Rajasekaran filed an administrative appeal. Pet. App. 26. On January 30, 2014, the AAO rejected the appeal. 3 C.A.R. 995-997; see Pet. App. 26-33 (reproducing portions of the decision). The AAO stated that "[t]he appeal will be rejected pursuant to 8 C.F.R. § 103.3(a)(2)(v)(A)(1)." Pet. App. 27. That provision requires the AAO to reject "[a]n appeal filed by a person or entity not entitled to file it." 8 C.F.R. 103.3(a)(2)(v)(A)(1). Under USCIS regulations, the AAO explained, "the beneficiary of a visa petition" is not an "*affected party* * * * with legal standing" with respect to a visa petition. Pet. App. 33 (quoting 8 C.F.R. 103.3(a)(1)(iii)(B)). "Based on the foregoing," the AAO further explained, "a beneficiary of a visa petition, or a representative acting on a beneficiary's behalf, is prohibited from filing an appeal." *Ibid.*

In the meantime, the Director denied the Rajasekarans' pending applications for adjustment of status. 3 C.A.R. 357-359; see Pet. App. 34-36 (reproducing portions of the decision). The Director's decision stated that the applications depended on Pacific West's underlying visa petition, which had been revoked for cause. Pet. App. 34. "Since no immigrant

visa petition is currently approved on your behalf, the record contains no basis on which to adjust your status." *Ibid.* The decision further stated that "the underlying immigrant visa petition is not valid for visa portability purposes" because it was revoked for cause. *Ibid.*; see *id.* at 34-36.

On November 15, 2013, the Director granted a motion to reopen and reconsider the applications for adjustment of status, but affirmed the previous decision denying the applications. 3 C.A.R. 335-340; see Pet. App. 37-47 (reproducing portions of the decision). The decision stated that "[t]he application was denied because the underlying Form I-140 was revoked for cause," and that "[o]nce the Form I-140 visa petition was revoked for cause, the basis allowing for adjustment of status was no longer valid and it could not be used for porting at any time." Pet. App. 37, 40.

The Rajasekarans filed an administrative appeal, which the AAO rejected for lack of jurisdiction. 3 C.A.R. 3-4; see Pet. App. 47. The AAO explained that 8 C.F.R. 245.2(a)(5)(ii) "prohibits an appeal from the" denial of the Rajasekarans' applications for adjustment of status. Pet. App. 47.

5. On October 2, 2013, the Rajasekarans filed this action in district court, challenging the denial of their applications for adjustment of status and the revocation of approval of Pacific West's underlying visa petition. Pet. App. 47.

The district court dismissed the suit for lack of jurisdiction. Pet. App. 9-63. The court stated that, under Eighth Circuit precedent, a court lacks jurisdiction to review the revocation of approval of a visa petition because "[r]evoking approval of an I-140 petition" is a "'decision or action of the Attorney Gen-

eral or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the [Secretary's] discretion.'" *Id.* at 48-49 (quoting 8 U.S.C. 1252(a)(2)(B)(ii)); see *Abdelwahab* v. *Frazier*, 578 F.3d 817, 821 (8th Cir. 2009).

The district court rejected the Rajasekarans' argument that the court nonetheless had jurisdiction to review whether USCIS complied with 8 C.F.R. 103.2(b)(16) before revoking approval of the visa petition. Specifically, the Rajasekarans argued that "'USCIS made many vague allegations as to fraud with respect to Pacific West' and, by failing to make 'full disclosure' regarding such allegations, did not provide [the Rajasekarans] a meaningful opportunity to respond," allegedly in violation of Section 103.2(b)(16). Pet. App. 51 (citations omitted). The court stated that, under *Abdelwahab*, a court may review a "predicate legal question that amounts to a nondiscretionary determination underlying the denial of relief." *Id.* at 50 (quoting *Abdelwahab*, 578 F.3d at 821). And it further stated that a question of whether an agency has complied with a regulatory requirement (rather than "a *statutory* limitation") does not qualify as a predicate legal question under *Abdelwahab*, and therefore does not "provide a basis for judicial review." *Id.* at 51; see also *Abdelwahab*, 578 F.3d at 821 & n.6.

The district court also held that it lacked jurisdiction to review the denial of the Rajasekarans' applications for adjustment of status. Pet. App. 53-61; see 8 U.S.C. 1252(a)(2)(B)(i) ("[N]o court shall have jurisdiction to review * * * any judgment regarding the granting of relief under section * * * 1255.").

6. The court of appeals affirmed. Pet. App. 1-8. The court stated that the Rajasekarans "challenge[] the I-140 revocation, alleging USCIS did not comply with the disclosure requirements in 8 C.F.R. § 103.2(b)(16)." Pet. App. 4. The court stated that, under 8 U.S.C. 1252(a)(2)(B)(ii), "an I-140 revocation is generally unreviewable." Pet. App. 4 (citing *Abdelwahab*, 578 F.3d at 821). Relying on circuit precedent, however, the court stated that judicial review is available for a "predicate legal question that amounts to a nondiscretionary determination underlying the denial of relief." *Ibid.* (quoting *Abdelwahab*, 578 F.3d at 821). "Whether an agency exceeds its *statutory* authority is necessarily a predicate legal question," the court stated, whereas "whether an agency exceeds its *regulatory* authority is not necessarily a predicate legal question." *Id.* at 5. The court stated that review of an agency's compliance with its own regulations is circumscribed "where a procedural rule is designed primarily to benefit the agency in carrying out its functions," or where "it is not possible to devise an adequate standard of review for an agency action." *Ibid.* (quoting *Ngure* v. *Ashcroft*, 367 F.3d 975, 982-983 (8th Cir. 2004)).

Applying that standard here, the court of appeals held that the Rajasekarans' claims of non-compliance with Section 103.2(b)(16) were unreviewable. "USCIS notified the lawyer for both Rajasekaran and Pacific West of the reasons for revoking the I-140 petition," the court stated. Pet. App. 5. "Rajasekaran complains that the notice was insufficiently detailed and not addressed to him directly, and that USCIS then revoked Pacific West's I-140 without giving him adequate opportunity to respond to the fraud charges."

Id. at 5-6. But the court concluded that "[t]hese complaints do not overcome Congress's broad prohibition of judicial review in § 1252(a)(2)(B)(ii), nor 'the tradition of agency discretion over internal procedures.'" *Id.* at 6 (quoting *Ngure*, 367 F.3d at 983). The court therefore determined that it "lack[ed] jurisdiction to review the agency's discretionary procedural decisions, such as how to respond to discovery demands by those asserting an interest in the proceedings." *Ibid.*

ARGUMENT

The Rajasekarans seek review of the court of appeals' ruling affirming the dismissal of their suit for lack of jurisdiction. Specifically, notwithstanding that 8 U.S.C. 1252(a)(2)(B)(ii) prohibits judicial review of a decision to revoke approval of a visa petition, the Rajasekarans argue (Pet. i) that courts have jurisdiction "to determine whether USCIS complied with regulatory procedural requirements during the course of visa revocation proceedings." The court of appeals here, however, did not hold that allegations of regulatory non-compliance are always unreviewable. Rather, the court held that *some* allegations of regulatory non-compliance in this context may be reviewable as "predicate legal questions," but that the Rajasekarans' particular allegations about 8 C.F.R. 103.2(b)(16) do not fit the bill. Pet. App. 5. In particular, the court held that it lacked jurisdiction to review whether the notice that was actually provided to a beneficiary prior to revocation was insufficiently detailed, supposedly in violation of Section 103.2(b)(16). No circuit conflict exists on that narrow jurisdictional question, which no other circuit court has squarely addressed. This would also be a particularly poor vehicle for resolving that question, as the Raja-

sekarans' claims regarding Section 103.2(b)(16) would be rejected at the threshold in any event. Further review is unwarranted.

1. a. The court of appeals correctly affirmed the dismissal of the Rajasekarans' suit for lack of jurisdiction, as Sections 1252(a)(2)(B) and 1155 together preclude judicial review of the Secretary's decision to revoke the approval of an immigrant visa petition. Section 1252(a)(2)(B) precludes judicial review of certain enumerated decisions, as well as "any other decision or action" the authority for which is "specified under this subchapter" to be in the "discretion" of the Secretary. 8 U.S.C. 1252(a)(2)(B)(ii). "[R]ead naturally, the word 'any' has an expansive meaning." *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 219 (2008) (citation omitted). Section 1155 is part of the same subchapter as Section 1252(a)(2)(B), and it specifies that the authority to revoke approval of visa petitions is in the Secretary's discretion: It states that the Secretary "may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him." 8 U.S.C. 1155.

Accordingly, as the overwhelming majority of circuit courts to address the question have concluded, judicial review of such decisions is precluded. See *Bernardo ex rel. M & K Eng'g, Inc.* v. *Johnson*, 814 F.3d 481, 482 (1st Cir.) (collecting cases), cert. denied, 136 S. Ct. 2487 (2016). Indeed, the Rajasekarans agree (Pet. 12 & n.8) that decisions to revoke approval of a visa petition under Section 1155 are "actions specified by statute to be within the Attorney General's discretion, and are therefore not subject to [judicial] review." The Rajasekarans accordingly "are not challenging the substantive decision revoking the I-140."

Id. at 12 n.8. And this Court recently denied a petition for a writ of certiorari in a case presenting that question. *Bernardo*, 136 S. Ct. at 2487 (No. 15-1138).

b. The Rajasekarans argue (Pet. 10-12) that the district court nonetheless had jurisdiction over their suit challenging revocation of Pacific West's visa petition, on the theory that Section 1252(a)(2)(B)(ii) does not preclude review of "predicate legal questions," which, they argue, encompasses their allegation that USCIS violated 8 C.F.R. 103.2(b)(16) by providing insufficiently detailed notice before revoking the approval of Pacific West's visa petition, and thereby gave them an insufficient opportunity to respond. This argument lacks merit.

At the outset, Congress has demarcated precisely when legal questions may be subject to judicial review in this context, notwithstanding Section 1252(a)(2)(B). In Section 1252(a)(2)(D), Congress provided that "[n]othing in subparagraph (B) * * * 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). "[C]onstitutional claims or questions of law" accordingly are subject to judicial review notwithstanding Section 1252(a)(2)(B), so long as the alien has been ordered removed from the United States and the alien has duly filed a petition for review of that removal order. *Ibid.* The Rajasekarans have not been ordered removed, however. Their claims therefore do not fit within the statutory framework for judicial review of legal questions that might arise in connection with a discretionary action. Instead, their claims fit squarely

within Section 1252(a)(2)(B)'s prohibition of judicial review.

The Rajasekarans contend (Pet. 12-14) that Section 1252(a)(2)(B) does not apply to allegations that USCIS violated regulations governing the procedures for revocation. But this Court's recent decision in *Kucana* v. *Holder*, 558 U.S. 233 (2010), held that an agency cannot render its authority discretionary (and therefore unreviewable) through regulations, because Section 1252(a)(2)(B) depends on statutory provisions—not agency interpretations—to define its scope. See *id.* at 245-247. *Congress* must "specif[y]" that the decision is discretionary. 8 U.S.C. 1252(a)(2)(B)(ii). The Rajasekarans provide no basis for departing from *Kucana*'s reasoning and making Section 1252(a)(2)(B) depend instead on whether an agency has channeled its discretion via binding regulations. Indeed, if USCIS's compliance with its regulations were subject to judicial review, as the Rajasekarans contend, that would create a perverse incentive for USCIS not to promulgate regulations establishing uniform procedures, and would threaten to swallow the statutory rule that judicial review of revocation decisions is itself precluded.

c. In any event, the Rajasekarans' arguments fail on their own terms. As the court of appeals explained, an agency's compliance with its own regulatory procedures in connection with a discretionary decision is generally unreviewable, except when the regulations are "intended primarily to confer important procedural benefits upon individuals in the face of otherwise unfettered discretion." Pet. App. 5 (quoting *American Farm Lines* v. *Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970)). And courts also consider whether it

is "possible to devise an adequate standard of review for agency action." *Ibid.* (citing *ICC* v. *Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 282 (1987)). Accordingly, judicial review is precluded) "to the extent that * * * agency action is committed to agency discretion by law," 5 U.S.C 701(a)(2), including where "a court would have no meaningful standard against which to judge the agency's exercise of discretion, *Heckler* v. *Chaney*, 470 U.S. 821, 830 (1985).

Under these principles, even if courts might have jurisdiction to review some claims that USCIS has failed to comply with its regulations in revoking a visa petition—notwithstanding Section 1252(a)(2)(B)'s statutory prohibition of review—courts would lack jurisdiction to review the Rajasekarans' particular allegations here because no regulation constrained USCIS's discretion in a way that was relevant to them.

Section 103.2(b)(16) establishes procedures for providing the "applicant or petitioner" with notice and an opportunity to respond in certain contexts. 8 C.F.R. 103.2(b)(16). But Rajasekaran was not the visa "petitioner." Pacific West was. Rajasekaran was instead "the beneficiary," and he therefore lacks "legal standing" in the proceedings before USCIS. 8 C.F.R. 103.3(a)(1)(iii)(B).[3]

"Rajasekaran complains that the notice was insufficiently detailed and not addressed to him directly," and that he was thereby not given "adequate opportunity to respond to the fraud charges" against Pacific West, allegedly in violation of Section 103.2(b)(16).

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[3] The Rajasekarans may argue that, under the new "porting" provisions, see p. 4, *supra*, beneficiaries should be given notice. Any such requirement would be irrelevant here, however, because Rajasekaran did receive notice.

Pet. App. 5-6. But no regulation required that notice be addressed to the beneficiary at all, much less directly, and no regulation addressed how detailed any notice received by a beneficiary must be. Furthermore, no regulation required that the beneficiary be given any opportunity to respond, much less dictated that that the opportunity Rajasekaran actually received here was insufficient. As a result, insofar as the Rajasekarans were concerned, no regulation constrained "the agency's discretionary procedural decisions" in this case. *Id.* at 6. The court of appeals therefore correctly concluded that the Rajasekarans' allegations "do not overcome Congress's broad prohibition of judicial review in § 1252(a)(2)(B)(ii), nor 'the tradition of agency discretion over internal procedures.'" *Ibid.* (quoting *Ngure*, 367 F.3d at 983).

Other circuits have also rejected arguments that notice provided was insufficiently detailed, in violation of 8 C.F.R. 103.2(b)(16)(i), concluding that this argument "misses the mark, and by a lot." *Ogbolumani* v. *Napolitano*, 557 F.3d 729, 735 (7th Cir. 2009).[4] Section 103.2(b)(16)(i) "does not require USCIS to provide, in painstaking detail, the evidence of fraud it finds." *Ibid.*; see *Hassan* v. *Chertoff*, 593 F.3d 785, 789 (9th Cir.) (per curiam) (similar), cert. denied, 561 U.S. 1007 (2010).

2. The Rajasekarans contend (Pet. 14-16) that the court of appeals' decision creates a circuit conflict. See *Mantena* v. *Johnson*, 809 F.3d 721, 728-730 (2d Cir. 2015); *Kurapati* v. *USCIS*, 775 F.3d 1255, 1262 (11th Cir. 2014); see also *Musunuru* v. *Lynch*, 831

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[4] *Ogbolumani* did not involve revocation of approval of a visa petition under Section 1155, and the court held that Section 1252(a)(2)(B)'s jurisdictional bar did not apply. 557 F.3d at 733.

F.3d 880, 887-888 (7th Cir. 2016) (similar), petition for reh'g pending, No. 15-1577 (filed Oct. 19, 2016). The court of appeals did not purport to open a circuit conflict, however. The court cited *Mantena* approvingly for the proposition that revocation of the approval of a visa petition is "generally unreviewable," see Pet. App. 4, and did not cite *Kurapati* at all.[5] *Mantena*, *Kurapati*, and *Musunuru* involved different circumstances, and it is not clear that the outcome of any of those cases would have materially differed if it had arisen in a different circuit.

The Rajasekarans' allegation of a conflict is premised on interpreting the Eighth Circuit's decision here to establish that courts "lack[] jurisdiction to review a claim that an agency failed to follow its regulations in reaching a substantive decision." Pet. 14; see Pet. i. But as the Rajasekarans elsewhere recognize (Pet. 14), the court of appeals did not announce such a categorical rule. Rather, the court stated that allegations of non-compliance with a regulation are "not necessarily" reviewable as "predicate legal question[s]," and that the availability of review depends, among other things, on whether it is possible for courts "to devise an adequate standard of review for an agency action." Pet. App. 5 (citations and quotation marks omitted).

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[5] *Musunuru* was decided after the decision below, and *Musunusu* did not cite the Eighth Circuit's decision. See 831 F.3d at 887-891. The Second Circuit in *Mantena* cited an earlier version of the Eighth Circuit's decision as establishing that regulatory compliance in this context is never reviewable. See 809 F.3d at 729 n.8. The panel here subsequently amended its opinion, adopting the narrower position described above. See Pet. App. 5.

The outcomes in *Mantena*, *Kurapati*, and *Musunuru* appear to be consistent with that proposition, as they involved different allegations and different regulatory provisions. In *Mantena*, *Kurapati*, and *Musunuru*, the beneficiary argued that USCIS had failed to provide notice and an opportunity to be heard by USCIS before revoking approval of the underlying visa petition. *Kurapati*, 775 F.3d at 1260; see *Mantena*, 809 F.3d at 731 ("[N]either Mantena nor [the new employer] were notified."); *Mantena*, 809 F.3d at 730 ("[T]he district court had jurisdiction to determine whether USCIS complied with those procedural requirements, including notice, that were mandated before it could revoke Mantena's employer's I-140 petition."); *Musunuru*, 831 F.3d at 881 ("USCIS sent notice of its intent to revoke the petition to [the visa petitioner] only, even though [it] had gone out of business and Musunuru had long since changed employers."); *Musunuru*, 831 F.3d at 888 ("The pertinent regulation is 8 C.F.R. § 205.2.").

The question whether USCIS was required to provide a beneficiary notice and opportunity to respond before USCIS revoked approval of a visa petition is black-and-white: The beneficiary either had a right to notice and an opportunity to respond, or did not. In *Kurapati*, the Eleventh Circuit remanded the case to the district court to decide that issue. See 775 F.3d at 1262. In *Mantena*, the Second Circuit held only that either the beneficiary or the successor employer must be given notice in a porting case, and remanded to the district court for further proceedings. 809 F.3d at 733-736. And in *Musunuru*, the Seventh Circuit held that the successor employer is entitled to notice. 831 F.3d at 888. No court of appeals, however, has

held that a beneficiary actually *is* entitled to notice prior to revocation in a porting case. There is therefore no circuit conflict on that question, which weighs against review by this Court of that issue.

The question of whether the beneficiary had to be provided any notice or opportunity to respond is also not presented in this case. Here, the beneficiary actually received notice before USCIS revoked approval of the underlying visa petition, and the beneficiary actually had an opportunity to respond to USCIS's notice. See Pet. App. 5-6, 22-24.

The Rajasekarans instead contend that USCIS violated 8 C.F.R. 103.2(b)(16) because the notice they received was insufficiently detailed and, as a result, their opportunity to respond was insufficiently robust. But as the court of appeals correctly recognized, Section 103.2(b)(16) did not constrain "the agency's discretionary procedural decisions" on such matters as "how to respond to discovery demands by those asserting an interest in the proceedings." Pet. App. 6.[6] Section 103.2(b)(16) imposes procedural requirements for the visa "petitioner," not the beneficiary. 8 C.F.R. 103.2(b)(16). And although the visa petitioner must receive notice, *ibid.*, the Rajasekarans' argument regarding the level of detail required under Section 103.2(b)(16) "misses the mark, and by a lot," *Ogbolumani*, 557 F.3d at 735.

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[6] The court in *Mantena* stated that the beneficiary challenged "the sufficiency of notice [to the visa petitioner], a notice that is explicitly required by regulation." 809 F.3d at 730. It is unclear whether Mantena contended, as here, that the notice was insufficiently detailed. In any event, that would be a different question, because it concerns the sufficiency of notice to the visa petitioner, not the beneficiary.

To be sure, *Mantena*, *Kurapati*, and *Musunuru* can be read broadly to suggest that jurisdiction would lie on the facts of this case. For example, in *Mantena*, the Second Circuit stated that, "even if no notice requirements were ultimately found to exist, the district court would still have been wrong to dismiss the case for lack of subject matter jurisdiction." 809 F.3d at 729. "The proper course, under such circumstances," it stated, "would be to find subject matter jurisdiction and then (as the government also argues) find that the plaintiff had no right to the asserted procedural safeguards, and, therefore, had provided no claim upon which relief could be granted." *Id.* at 729-730. And in *Musunuru*, the Seventh Circuit stated that "judicial review is foreclosed by § 1252(a)(2)(B)(i) only if the agency's rationale for denying the procedural request also establishes the petitioner's inability to prevail on the merits of his underlying claim." 831 F.3d at 887 (citation omitted). That standard would not be satisfied on the facts here.

Any tension between these approaches, however, has little or no practical importance in this case, because the Rajasekarans' claims would be rejected at the threshold in any event. Under the approaches in *Mantena*, *Kurapati*, and *Musunuru*, the Rajasekarans' claims would be dismissed on the merits for failure to state a claim. Cf. *Ogbolumani*, 557 F.3d at 735. Under the Eighth Circuit's approach, they were dismissed for lack of jurisdiction. The inquiry is strikingly similar, however: Before dismissing, a court must determine, among other things, whether it is possible for courts "to devise an adequate standard of review for an agency action," *e.g.*, whether the matter is committed to agency discretion by law. Pet.

App. 5 (citations and quotation marks omitted). Under any of these approaches, therefore, a court would review the relevant statutory provisions and regulations and determine whether "the plaintiff had [a] right to the asserted procedural safeguards." *Mantena*, 809 F.3d at 729. And whether labeled as a dismissal on the merits or a dismissal for lack of jurisdiction, the Rajasekarans would equally lose at the threshold.

3. This case in turn would be a poor vehicle for determining whether courts have jurisdiction to review whether notice received by a beneficiary was sufficiently detailed, or whether the beneficiary was afforded a sufficiently robust opportunity to rebut USCIS's allegations prior to revocation of the underlying visa petition, allegedly in violation of 8 C.F.R. 103.2(b)(16), because the answer to that question makes little or no practical difference here. Even if the district court had jurisdiction to determine whether USCIS complied with its regulations here, the Rajasekarans' claims would be dismissed for failure to state a claim because, as the court of appeals correctly held, Pet. App. 5-6, no regulation constrained the agency's discretion with respect to those issues here. Cf. *Ogbolumani*, 557 F.3d at 735.

The Rajasekarans' allegations are also particularly misplaced, as Rajasekaran received notice via his counsel and took advantage of an opportunity to respond. Rajasekaran received a five-page letter from USCIS detailing its concerns, explaining why they had arisen, and identifying documents that could rebut its concerns. 3 C.A.R. 1358-1363; see Pet. App. 15-22 (reproducing portions of the notice). For example, the notice asked for "a statement regarding the proffered

wage in each petition, [to] include evidence such as W-2 wage and tax statements or Forms 1099 for each beneficiary for all relevant tax year(s) including those of the instant petition alien beneficiary." Pet. App. 19. Rajasekaran responded with a 23-page letter and more than 300 pages of exhibits. See 3 C.A.R. 1363-1733. USCIS in turn considered his response on the merits, revoking approval of the visa petition only after concluding that Rajasekaran had failed to establish that the visa petition was valid when it was approved. See Pet. App. 24 ("petitioner [sic] has not sustained that burden"). Rajasekaran thus received more process, not less, than any regulation required.

Finally, this Court recently denied certiorari in *Bernardo*, see pp. 13-14, *supra*, in the context of a circuit conflict on a question of statutory interpretation (not presented here): whether courts may review the substantive decision to revoke approval of a visa petition. 136 S. Ct. at 2487 (No. 15-1138). There is even less need for this Court to step in to resolve the question the Rajasekarans raise. The underlying issue regarding agency procedure could be readily resolved through agency regulations, without this Court's intervention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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