04-6142-ag

To Be Argued By:
CAROLYN A. IKARI

==

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 04-6142-ag

BERNABE JUSTO BORJA-ARICHABLA,
Petitioner,

-vs-

ALBERTO R. GONZALES,
ATTORNEY GENERAL OF THE UNITED STATES,
Respondent.

ON PETITION FOR REVIEW FROM
THE BOARD OF IMMIGRATION APPEALS

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BRIEF FOR ALBERTO R. GONZALES ATTORNEY GENERAL OF THE UNITED STATES

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STATEMENT OF JURISDICTION

This Court has jurisdiction under § 242(b) of the Immigration and Nationality Act, 8 U.S.C. § 1252(b) (2005), to review the petitioner's challenge to the BIA's final order dated October 29, 2004, affirming the denial of his application for adjustment of status. The petition was filed on November 29, 2004, and is therefore timely. *See* 8 U.S.C. § 1252(b)(1) (requiring petition to be filed within 30 days of date of final order of removal).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Board of Immigration Appeals ("BIA") correctly affirmed the Immigration Judge's ("IJ") denial of Petitioner's application for adjustment of status when Petitioner's failure to comply with the IJ's grant of voluntary departure rendered him ineligible for adjustment of status pursuant to section 240B(d) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1229c(d)?

2. Whether in any event remand to the agency would be futile because Petitioner's application for adjustment of status based on a labor certification did not include the requisite proof of the prospective employer's ability to pay the certified wage as required by statute?

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 04-6142-ag

BERNABE JUSTO BORJA-ARICHABLA,
Petitioner,

-vs-

ALBERTO R. GONZALES,
Respondent.

ON PETITION FOR REVIEW FROM
THE BOARD OF IMMIGRATION APPEALS

BRIEF FOR ALBERTO R. GONZALES
Attorney General of the United States

Preliminary Statement

Bernabe Justo Borja-Arichabla, a native and citizen of Ecuador, petitions this Court for review of a decision of the Board of Immigration Appeals ("BIA") dated October 29, 2004 (Appendix ("A") 2-3). The BIA affirmed the decision of an Immigration Judge ("IJ") (A 44-50) dated June 13, 2003, denying Petitioner's application for adjustment of status under the Immigration and Nationality Act of 1952, as amended ("INA"), and

ordering him removed from the United States. Petitioner, who had entered the United States in 1993 without benefit of legal immigration status, obtained leave to reopen his immigration proceedings in order to pursue adjustment of his status predicated on his claimed eligibility for a labor-based visa. (A 101-106). The IJ determined that Petitioner's failure to comply with the conditions of his voluntary departure rendered him statutorily ineligible for adjustment of status. (A 46-47). The BIA affirmed on this basis. (A 2-3).

The IJ correctly applied the clear statutory requirements applicable to those removable aliens who successfully seek the privilege of voluntary departure. Failure to comply with the terms of the privilege sets the alien on the same footing as if the privilege had never been obtained. More specifically, failure to voluntarily depart on or before the deadline set by the Immigration Court renders the alien ineligible for conversion to legal immigration status. This aspect of the voluntary departure scheme is not altered or suspended by the lodging or the granting of a motion to reopen immigration proceedings.

Alternatively, even if Petitioner were eligible for adjustment of status, the application must be denied for failure to show that Petitioner would be paid the wage approved by the Department of Labor.

Statement of the Case

On July 20, 1993, Petitioner entered the United States without inspection at Phoenix, Arizona. (A 182-183). On June 19, 2000, a Notice to Appear was issued, charging Petitioner with being a removable alien on the ground of being present in the United States without being admitted or paroled or having entered without legal status as designated by the Attorney General. (A 215).

Petitioner's original hearing was conducted on May 29, 2001, in Hartford, Connecticut. (A 154-164). At the conclusion of that hearing, Immigration Judge ("IJ") Michael Straus denied Petitioner's request for a continuance so that he could pursue a marriage-based adjustment to his status and granted Petitioner's request for voluntary departure to Educador. (A 145-147). Petitioner appealed and on July 22, 2002, the BIA summarily affirmed and ordered that Petitioner would be permitted to voluntarily depart within 30 days. (A 108).

On August 19, 2002, prior to the deadline for voluntary departure, Petitioner moved to reopen his immigration proceedings for the purpose of obtaining labor-based immigration status, as he had recently received notice of an approved Petition For Alien Worker for which Petitioner was the beneficiary. (A 100-106, 179). Although Petitioner's motion to reopen was based on this labor petition, he did not seek a stay of removal or an extension of voluntary departure. (A 100-106). On November 27, 2002, after Petitioner's voluntary departure date, the BIA granted the motion to reopen and remanded to the Immigration Court. (A 90).

Upon remand, on June 13, 2003, IJ Straus held a hearing on Petitioner's application for adjustment of status. (A 62-88). At the conclusion of that hearing, the IJ rendered an oral decision denying Petitioner's request for adjustment of status, denying voluntary departure, and ordering him removed to Ecuador. (A 44-51). The IJ's decision was based on Petitioner's ineligibility to adjust status based on his failure to voluntarily depart and also on two additional, alternative grounds: Petitioner was no longer working for the employer who obtained the labor certificate and Petitioner's application failed to demonstrate that he would be paid the prevailing wage. (A 44-51).

On July 11, 2003, Petitioner filed a timely notice of appeal to the BIA. (A 36-38). On October 29, 2004, the BIA issued its decision affirming the IJ's decision on the ground that Petitioner's failure to voluntarily depart rendered him ineligible to adjust status. (A 2-3).

On November 29, 2004, petitioner filed a timely petition for review with this Court.

Statement of Facts

A. Borja's Entry into the United States

On July 20, 1993, Petitioner entered the United States without inspection at Phoenix, Arizona. (A 182-183).

B. Borja's Original Round Of Removal Proceedings

The Immigration and Naturalization Service issued Petitioner a Notice to Appear on June 19, 2000, charging him with being a removable alien on the ground of being present in the United States without being admitted or paroled or having entered without legal status as designated by the Attorney General. (A 215). Petitioner requested a continuance of his removal hearing in order to pursue adjustment of his immigration status based on his marriage to a U.S. citizen and, in the alternative, requested voluntary departure. (A 156, 158). However, Petitioner's wife did not appear or testify and Petitioner's counsel acknowledged that the wife had withdrawn the spousal petition over one year earlier and had not resubmitted it since. (A 156-158). The IJ held that the INS had carried its burden to prove that Petitioner had been in the United States illegally and denied the request for continuance. (A 145-147). The IJ granted voluntary departure to Ecuador. (A 147).

Petitioner appealed and on July 22, 2002, the BIA summarily affirmed. (A 108). The BIA further ordered that Petitioner would be permitted to voluntarily depart within 30 days and that failure to do so would render him subject to monetary penalty and render him ineligible for a period of 10 years for a number of immigration benefits, including adjustment of status. (A 108).

C. Borja's Motion To Reopen and Application For Adjustment of Status

On August 19, 2002, prior to the deadline for voluntary departure, Petitioner moved to reopen his immigration proceedings for the purpose of obtaining labor-based immigration status. (A 100-106). One week after the BIA affirmed Petitioner's removal order, the Immigration and Naturalization Service had approved a Petition For Alien Worker for which Petitioner was the beneficiary. (A 179). Although Petitioner's motion to reopen was based on this labor petition, he did not seek a stay of removal or an extension of voluntary departure. (A 100-106). The INS did not oppose the motion to reopen. (A 90). On November 27, 2002, after Petitioner's voluntary departure date, the BIA granted the motion to reopen and remanded to the Immigration Court. (A 90).

D. Borja's Removal Hearing

Upon remand, IJ Straus convened a hearing on February 11, 2003. (A 52-61). The question of Petitioner's failure to voluntarily depart and resulting ineligibility for adjustment of status was raised by the Court at that time. The IJ continued the hearing to give Petitioner an opportunity to pay the filing fee and thus formally file his application for adjustment of status and to permit the parties to brief the ineligibility issue. (A 52-61). On February 28, 2003, Petitioner paid the fee, thus filing his application for adjustment of status. (A 182).; *see also* A 58 (Petitioner's counsel asks IJ for papers so application can be "fee'd").

On June 13, 2003, IJ Straus held a hearing on Petitioner's application for adjustment of status at which Petitioner testified and a number of documents were admitted into the record. (A 62-88).

1. Legal Argument by Counsel

The IJ heard oral argument on the ineligibility issue, as neither party filed a brief as requested by the Immigration Court. (A 63-74, 85-87).

The IJ also had a colloquy with Petitioner's counsel whether the documents from the substitute employer fulfilled the requirements for a successor employer to step into the petitioning employer's shoes. (A 83-85).

2. Documentary Submissions

The following documents were admitted into evidence:

Exhibit 1: Notice to Appear (A 215)

Exhibit 2: Respondent's Pleadings Addressing the Notice To Appear (A 199-200)

Exhibit 3: Form I-213, Record of Deportable/Inadmissable Alien dated June 8, 2000 (A 198)

Exhibit 4: Form I-485, Application To Adjust Status stamped "FILED" on February 28, 2003 (A 182-197)

Exhibit 5: Transmittal letter from Department of Labor to Hi-Tech Polishing (A 181)

Exhibit 6: Notice of Action on I-140 Petition for Alien Worker to Hi-Tech Polishing dated July 29, 2002 (A 179)

Exhibit 7: Medical Examination (A 177-178)

Exhibit 8: Form W-2, 2002 Wage and Tax Summary, Perry Technology (A 176)

Exhibit 9: Job confirmation letter from Perry Technology dated June 10, 2003 (A 175)

Exhibit 10: Department of Labor Certification to Hi-Tech Polishing dated January 14, 2002 (A 165-168)

Exhibit 11: Company brochure, Perry Technology (A 169-174)

(A 74-77, 80-81).

3. Borja's Testimony

Petitioner was the only witness at the hearing. (A 78-87). Under questioning from the IJ, Petitioner testified that approximately 16 people worked at his employer, Perry Technology, and that he has worked there full time since 2000. (A 80-81). The judge asked why the job offer letter was not on company letterhead, and Petitioner was not able to explain. (A 80).

The Government attorney asked why the labor certification application was filed by Hi-Tech Polishing while Petitioner worked at Perry Technology. Petitioner explained that Hi-Tech was a former employer of his. (A 81-82). When questioned, Petitioner and his counsel said there was documentary proof of previous employment with Hi-Tech Polishing, but none is marked in the record. (A 82).[2]

E. The Immigration Judge's Decision

At the conclusion of that hearing, the IJ rendered an oral decision denying Petitioner's request for adjustment of status, denying voluntary departure, and ordering him removed to Ecuador. (A 44-51). The IJ's decision was based on Petitioner's ineligibility to adjust status based on his failure to voluntarily depart and also on two additional, alternative grounds: Petitioner was no longer working for the employer who obtained the labor certificate and Petitioner's application failed to demonstrate that he would be paid the prevailing wage. (A 44-51).

The Immigration Court reviewed the record and found that the Petitioner had been subject to the BIA's grant of voluntary departure requiring him to leave the United States within 30 days of July 22, 2002. (A 47). The IJ noted that, while Petitioner did not depart, he did file his motion to reopen based on the approved labor-based

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[2] Petitoner's labor certification application, signed under penalties of perjury, lists three employers from the date of application back to August 1989, none of which are Hi-Tech Polishing. (A 168).

petition prior to his voluntary departure date. (A 46). The Court agreed with the Department of Homeland Security that the filing of the motion to reopen had no effect on the deadline for voluntary departure. (A 47). The IJ concluded that because the motion to reopen had not been granted prior to the departure date, the Court could not reinstate voluntary departure. (A 47). The Court held that, because Petitioner failed to voluntarily depart on time, he was barred from adjustment of status for ten years. (A 47).

The IJ also made findings of fact with regard to the labor-based visa petition. First, he noted that the labor certification was issued to Hi-Tech Polishing, but that Petitioner's job offer letter was from his current employer, Perry Technology. (A 45-46, 48). The IJ also noted that the application to adjust status was submitted to the BIA in conjunction with the motion to reopen, but the actual application was not "filed" until the fee was paid on February 28, 2003. (A 48). He further noted that the wage for the job that was the subject of the labor certification was $14.34 per hour, which, on a full-time basis, would amount to $29,827 per year. (A 49). However, the job offer letter did not specify a wage and Petitioner's actual full-time wage from his proposed employer had been $17,010 per year. (A 49).

The IJ made an alternative finding that Petitioner was otherwise ineligible to adjust status because (1) his petition had not been pending the requisite 180 days for him to substitute Perry Technology for Hi-Tech Polishing as his prospective employer and (2) Petitioner did not establish he would be paid the prevailing wage. (A 48-49).

On July 11, 2003, Petitioner appealed the IJ decision to the BIA. (A 36-38).

F. The BIA's Decision

In his appeal to the BIA, Petitioner presented four arguments: (1) the BIA's earlier granting of his motion to reopen implicitly vacates the grant of voluntary departure or at least insulates Petitioner from the consequences of failing to depart (A 19-21), (2) the rule rendering Petitioner ineligible for adjustment of status based on his failure to depart during the pendency of his motion to reopen violates due process, in light of the limited, relatively short period for the reinstated grant of voluntary departure (A 21-24), (3) 8 C.F.R. § 1003.2 and Due Process compel a different result (A 24-25), and (4) the IJ erred with respect to the prevailing wage finding and Petitioner is entitled to supplement the record on this issue (A 25-28).

On October 29, 2004, the BIA issued its decision affirming the IJ's decision on the ground that Petitioner's failure to voluntarily depart rendered him ineligible to adjust status. (A 2-3).

The BIA agreed with the IJ that the Petitioner's filing of a motion to reopen did not stay the effect of the grant of voluntary departure. (A 3). In granting the motion to reopen, the BIA may have concluded that Petitioner appears to be eligible for relief from removal, but this is not dispositive of the merits of the underlying application for relief, nor does it waive the application of any sanction

for failure to depart. Upon reopening, when the effect of Petitioner's failure to depart was established in the record, it was clear that he was statutorily ineligible for adjustment of status for 10 years (A 3).

On November 29, 2004, petitioner filed a timely petition for review with this Court.

SUMMARY OF ARGUMENT

The privilege of voluntary departure relieves a removable alien of some of the consequences of removal, including future ineligibility for lawful readmission. 8 U.S.C. § 1182(a)(9)(A)(ii). In order to take advantage of these benefits, an alien who requests voluntary departure is bound to leave the United States as promised. If she fails to do so, she is subject to statutory sanctions, including a period of ineligibility for lawful readmission which generally equates to the ineligibility she would have had if removed. 8 U.S.C. § 1229c(d).

Although the mechanism for moving to reopen proceedings is available to aliens granted voluntary departure, *see* 8 U.S.C. § 1229a(c)(6) (2000), the filing of a motion to reopen does not relieve them of the obligation to depart under the voluntary departure scheme. The plain language of the voluntary departure statute dictates that, if an alien fails to depart as required, statutory sanctions are properly imposed, regardless of whether a motion to reopen was pending at the time departure was required. The BIA, whose reasonable statutory interpretations are entitled to deference, has clearly stated that the text, structure, legislative history and purpose of the INA offer

no basis for imposing equitable exceptions to these statutory sanctions. *In re Zmijewska*, 24 I. & N. Dec. 87 (BIA 2007), *on remand from Zmijewska v. Gonzales*, 426 F.3d 99 (2d Cir. 2005). Likewise, this Court has squarely held that neither the filing of a petition for review or a motion for stay of removal with this Court will toll a voluntary departure order. Instead, an alien must obtain an express extension of the departure period from an admnistrative authority designated by statute, or an express stay of voluntary departure from this Court. *Iouri v. Ashcroft*, No. 02-4992(L), __ F.3d __, 2007 WL 1512420 (2d Cir. May 24, 2007). It would be anomalous to adopt a different rule in the context of administrative motions to reopen, the granting of which is discretionary.

Moreover, even if this Court determines that the filing of a motion to reopen relieves an alien of his obligations under a voluntary departure agreement, remand to consider Petitioner's application for adjustment of status is not warranted, because it is futile. Petitioner's application for adjustment of status does not contain any evidence from which it could be concluded that Petitioner would be paid the certified wage, i.e., a wage not detrimental to laborers already in the market, as required by statute. 8 U.S.C. § 1182(a)(5)(A)(i)(II); 8 C.F.R. § 204.5(g)(2). Therefore, Petitioner is not eligible for adjustment of status and this petition should be denied.

ARGUMENT

I. THE BOARD OF IMMIGRATION APPEALS PROPERLY DETERMINED THAT BORJA WAS INELIGIBLE FOR ADJUSTMENT OF STATUS

A. Relevant Facts

The relevant facts are set forth in the Statement of the Facts above.

B. Governing Law and Standard of Review

1. Voluntary Departure

Section 240B of the INA "permit[s] an alien voluntarily to depart the United States at the alien's own expense . . . in lieu of being subject to [removal] proceedings . . . or prior to the completion of such proceedings, if the alien is not deportable" as an aggravated felon or for terrorist activities under the INA. 8 U.S.C. § 1229c. If an alien is permitted to voluntarily depart and fails to do so, the INA provides for a civil monetary penalty of $1,000 to $5,000. *See* 8 U.S.C. § 1229c(d)(1)(A). In addition, any alien who fails to depart "shall be ineligible, for a period of 10 years, to receive any further relief" under various provisions of the INA, including adjustment of status. *Id.*; 8 C.F.R. § 1240.26(a). Section 1229c also requires that "[t]he order permitting an alien to depart voluntarily shall inform the alien of the penalties under this subsection." 8 U.S.C. § 1229c(d)(3).

The authority to permit voluntary departure may be exercised by various agency officials, including district directors, assistant district directors for investigations, assistant district directors for examinations, officers in charge, chief patrol agents, the Deputy Executive Associate Commissioner for Detention and Removal, the Director of the Office of Juvenile Affairs, service center directors, and assistant service center directors for examinations. *See* 8 C.F.R. § 240.25(a). Pursuant to INA regulations, "[v]oluntary departure may not be granted unless the alien requests such voluntary departure and agrees to its terms and conditions." 8 C.F.R. § 240.25(c).

In 1996, Congress made comprehensive amendments to the INA. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Div. C of Pub. L. No. 104-208, § 304(a)(3), 110 Stat. 3009-546, 3009-587, 3009-596 ("IIRIRA"). Prior to IIRIRA, there were no statutory time limits on the period to depart. *See* 8 U.S.C. § 1254(e) (repealed 1996). After the 1996 amendments, the period before the voluntary departure deadline was limited to a maximum of 60 days, when, as in Petitioner's case, the grant of voluntary departure is made at the conclusion of proceedings. 8 U.S.C. § 1229c(b)(2). The period can be extended by the District Director or other local official, but no later than a 120-day limit. 8 C.F.R. §§ 240.25(c), 1240.26(f).

2. Motions To Reopen

The purpose of a motion to reopen is to permit an alien to seek relief from removal based on new facts or evidence. *See Socop-Gonzalez v. INS*, 272 F.3d 1176,

1180 (9th Cir. 2001) (en banc); *Singh v. Gonzales*, 468 F.3d 135, 139 (2d Cir. 2006) ("Motions to reopen are designed to allow consideration of circumstances that have arisen subsequent to the applicant's previous hearing."); *In re Cerna*, 20 I. & N. Dec. 399, 402-03 (BIA 1991). Such motions are "disfavored" in light of the "strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their respective cases." *INS v. Abudu*, 485 U.S. 94, 107 (1988); *see also Ali v. Gonzales*, 448 F.3d 515, 517 (2d Cir. 2006) (per curiam) (noting that motions to reopen are disfavored). The BIA has discretion to deny a motion to reopen, "even if the party moving has made out a prima facie case for relief." 8 C.F.R. § 1003.2(a).

The INA, as amended, and its implementing regulations, establish time and numerical limits on motions to reopen. With respect to timing, the statute provides that a motion to reopen must be filed within 90 days of the date of entry of a final administrative order of removal. 8 U.S.C. § 1229a(c)(6)(C)(I) (2000). *See also* 8 C.F.R. § 1003.2(c)(2). Further, an alien is permitted only one motion to reopen. 8 U.S.C. § 1229a(c)(6)(A) (2000); 8 C.F.R. § 1003.2(c)(2) ("Except as provided in paragraph (c)(3) of this section, a party may file only one motion to reopen deportation or exclusion proceedings . . . . "). *See Wu v. INS*, 436 F.3d 157, 164 (2d Cir. 2006).

Prior to IIRIRA, there was no statutory basis for a motion to reopen. *Dekoladenu v. Gonzales*, 459 F.3d 500, 505 (4th Cir. 2006). However, regulations did permit

motions to reopen, and there was no time limit for making a motion to reopen. *Id*.

3. Adjustment of Status

"Adjustment of status" is a discretionary immigration benefit that affords qualifying aliens the procedural opportunity to obtain lawful permanent resident status from within the United States. *See* 8 U.S.C. § 1255. Specifically, 8 U.S.C. § 1255(a) provides that the Attorney General "may" adjust the status of an alien already present in the United States if, *inter alia*, the alien is in possession of an "immediately available" visa. 8 U.S.C. § 1255(a); *see also id.* § 1255(*i*)(2). An alien may obtain a visa through a qualifying family member's sponsorship, or, as in Petitioner's case, through a qualifying employer's sponsorship. *See* 8 U.S.C. § 1151; *see also id.* §§ 1153-1154; *Drax v. Reno*, 338 F.3d 98, 113-15 (2d Cir. 2003) (describing the "adjustment of status regime" as a multi-step process requiring: (1) an approved immigrant visa that is immediately available; (2) a determination that the alien meets all of the other statutory requirements for adjustment; and (3) a determination that he warrants the favorable exercise of discretion).

4. Standard of Review

"When the BIA issues an opinion, 'the opinion becomes the basis for judicial review of the decision of which the alien is complaining.'" *Yan Chen v. Gonzales*, 417 F.3d 268, 271 (2d Cir. 2005) (quoting *Niam v. Ashcroft*, 354 F.3d 652, 655 (7th Cir. 2004)).

This Court reviews questions of statutory and constitutional interpretation *de novo*, but accords deference to the Board's interpretation of the INA. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424-25 (1999). Every exercise in statutory construction must begin with the words of the statute. *See Mallard v. United States Dist. Court,* 490 U.S. 296, 300-01 (1989). "The text's plain meaning can best be understood by looking to the statutory scheme as a whole and placing the particular provision within the context of that statute." *Saks v. Franklin Covey Co.,* 316 F.3d 337, 345 (2d Cir. 2003).

If "'the statute is silent or ambiguous with respect to the specific issue' before it; . . .'the question for the court [is] whether the agency's answer is based on a permissible construction of the statute.'" *Aguirre-Aguirre*, 526 U.S. at 424 (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984)); *see also INS v. Cardoza-Fonseca*, 480 U.S. 421, 448-49 (1987).

C. Discussion

The BIA correctly concluded that Petitioner was ineligible for adjustment of status due to his failure to fulfill his obligations as a recipient of the voluntary departure benefit. This voluntary departure statute clearly bars any alien from qualifying for adjustment of status for a period of ten years if he or she does not voluntarily depart the United States within the designated time period. 8 U.S.C. § 1229c(d). The ineligibility sanction was imposed in 1990 to stem the tide of aliens who requested and received voluntary departure but then absconded instead of complying with the departure order. *Stone v.*

INS, 514 U.S. 386, 400 (1995); *see Matter of Shaar*, 21 I. & N. Dec. 541 (BIA 1996) (en banc) (evaluating predecessor statute to § 1229c)(d)); *see also Shaar v. INS*, 141 F.3d 953, 956 (9th Cir. 1998) (finding the language of the predecessor to 8 U.S.C. § 1229c(d) at former 8 U.S.C. § 1252b(e)(2)(A) (1994) to be "clear and unambiguous" and that "it is clear that Congress desired to control the untoward delays which had developed in the immigration system, and to expedite proceedings to the extent reasonably possible").

The ineligibility sanction places an alien who fails to voluntarily depart on the same or similar footing as one who did not request voluntary departure and was simply removed. *See* 8 U.S.C. § 1182(a)(9)(A) (most previously removed aliens inadmissible for five or ten years); 8 C.F.R. § 212.2(a) (same).

A motion to reopen does not stay the execution of any decision made in the case. 8 C.F.R. §1003.2(f).[3] If a movant wishes to have their immigration order stayed pending resolution of the motion to reopen, they must take some affirmative step to obtain that stay. *Id*. In the instance of voluntary departure, the alien does not apply to the court but rather needs to make the request of the District Director or other authorized local immigration official. 8 C.F.R. § 1240.26(f).

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[3] By contrast, when appeal is taken to the BIA, the IJ's order is not considered final and therefore the voluntary departure requirement is automatically stayed. 8 C.F.R. § 1003.6(a) (2004).

Because Petitioner failed to seek either relief from or extension of voluntary departure and because his motion to reopen did not automatically stay the effect of his voluntary departure order, by the time his reopened proceeding convened, Petitioner had overstayed his voluntary departure date and was thus ineligible for the very relief upon which his reopening was based. (A 2-4). Petitioner contends this result is error. Pet. Brief at 9-12.

1. The "Exceptional Circumstances" Exception to the Voluntary Departure Penalties Statute Has Been Repealed

Petitioner argues that the failure of the BIA to rule on his motion to reopen prior to the expiration of his voluntary departure period constitutes "exceptional circumstances" excusing his failure to depart. Pet. Brief at 9-11. However, the "exceptional circumstances" exception was eliminated from the voluntary departure statute when it was amended in 1996.

The previous statute read:

> . . . any alien allowed to depart voluntarily . . . who remains in the United States after the scheduled date of departure, *other than because of exceptional circumstances*, shall not eligible for [adjustment of status] for a period of 5 years after the scheduled date of departure.

8 U.S.C. § 1252b(e)(2)(A) (repealed 1996). "Exceptional circumstances" were defined as "exceptional circumstances (such as serious illness of the alien or death

of an immediate relative of the alien, but not including less compelling circumstances) beyond the control of the alien." 8 U.S.C. § 1252b(f)(2) (repealed 1996).

IIRIRA contained many changes to the immigration statutes, including the elimination of the "exceptional circumstances" exception and the addition of the phrase specifying that the penalties apply to any alien who "fails voluntarily to depart." *See In re Zmijewska*, 24 I. & N. Dec. 87, 89 (BIA 2007), *on remand from Zmijewska v. Gonzales*, 426 F.3d 99 (2d Cir. 2005).[4]

Petitioner's removal proceedings were initiated in 2000. The penalty section that applies to Petitioner's proceedings is as follows:

> If an alien is permitted to depart voluntarily under this section and fails voluntarily to depart the United States within the time period specified, the alien shall be subject to a civil penalty of not less than $1,000 and not more than $5,000 and be ineligible for a period of 10 years for any further relief [including adjustment of status].

8 U.S.C. § 1229c(d) (2000).

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[4] In 2006, the failure to depart penalty section was further amended from applying to an alien who "fails voluntarily to depart" to one who "voluntarily fails to depart" and to include protections under the Violence Against Women Act. Pub. L. No. 109-162, § 812, 119 Stat. 2960, 3057 (enacted Jan. 5, 2006). *See In re Zmijewska*, 24 I. & N. Dec. at 91.

Due to this statutory amendment, "exceptional circumstances" are no longer an exception to the imposition of sanctions for failure to depart. *See In re Zmijewska*, 24 I. & N. Dec. at 90-93. Therefore, Petitioner cannot invoke this exception to excuse his failure to comply with his grant of voluntary departure.

2. The Filing of a Motion To Reopen Does Not Automatically Toll the Voluntary Departure Period

When the BIA (or IJ, as the case may be) to whom a motion to reopen is directed fails to rule on a motion to reopen before the movant's voluntary departure date, the alien appears to be foreclosed from obtaining whatever relief was presented in the motion to reopen. *Dekoladenu,* 459 F.3d at 504. This is due to the operation of two different provisions in the immigration laws. Upon voluntarily departing, any pending motion to reopen is deemed withdrawn. 8 C.F.R. § 1003.2(d). On the other hand, if the alien with a pending motion to reopen elects to stay in violation of their voluntary departure obligation, the ineligibility sanction of 8 U.S.C. § 1229c(d) is triggered.[5]

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[5] The grant of a motion to reopen does not automatically vacate the underlying decision, including the effect of a failure to voluntarily depart. *Singh v. Gonzales*, 468 F.3d 135, 136 (2d Cir. 2006).

a. The Court Should Not Impose a Tolling Provision Contrary to the Statutory Text and the BIA's Reasonable Interpretation of That Text

Petitioner argues that his ability to pursue the relief set forth in his motion to reopen must be preserved, and that the best approach for doing so is to construe a motion to reopen as automatically tolling the period for voluntary departure. Pet. Brief at 11-12. However, the tolling approach fails to follow the unequivocal statutory text; fundamentally misunderstands the purpose and function of the voluntary departure benefit; and is inconsistent with the BIA's authoritative interpretation of this section as excluding any possibility of equitable tolling.

Voluntary departure is not a right, but a benefit. *Dekoladenu*, 459 F.2d at 506. "[T]here is no protected liberty interest in the discretionary relief of voluntary departure, nor is there a protected interest in even being considered for the discretionary relief." *United States v. Torres*, 383 F.3d 92, 104-06 (3d Cir. 2004). Voluntary departure can be granted only at the alien's request and upon proof by clear and convincing evidence that the alien has both the means and intent to depart. 8 U.S.C. § 1229c(b)(1)(D); 8 C.F.R. § 240.25(c).

"If adhered to, voluntary departure produces a win-win situation." *Iouri v. Ashcroft*, No. 02-4992(L), __ F.3d __, 2007 WL 1512420, at *4-5 (2d Cir. May 24, 2007) (quoting *Bocova v. Gonzales*, 412 F.3d 257, 265 (1st Cir. 2005)). "[A]liens benefit from voluntary departure

because 'it allows them to choose their own destination points, to put their affairs in order without fear of being taken into custody at any time, to avoid the stigma and various penalties associated with forced removals (including extended detention while the government procures the necessary travel documents and ineligibility for readmission for a period of five or ten years, *see* 8 U.S.C. § 1182(a)(9)(A)), and it facilitates the possibility of return to the United States, for example, by adjustment of status.'" *Thapa v. Gonzales*, 460 F.3d 323, 328 (2d Cir. 2006) (quoting *Lopez-Chavez v. Ashcroft*, 383 F.3d 650, 651 (7th Cir. 2004)). For the Government, it expedites departures and reduces the costs that are typically associated with deporting individuals from the United States. *Id.*; *Azarte v. Ashcroft*, 394 F.3d 1278, 1284 (9th Cir. 2005). This "agreed-upon exchange of benefits between an alien and the Government" is the essence of voluntary departure. *Banda-Ortiz v. Gonzales*, 445 F.3d 387, 389-90 (5th Cir. 2006) (same), *reh. and reh. en banc denied*, 458 F.3d 367 (5th Cir. 2006), *cert. denied*, 127 S. Ct. 1874 (2007).

Some courts have viewed the interplay between the motion to reopen mechanism and the ineligibility sanction as wrongly depriving aliens of the a vehicle to seek reopening. "[W]e find it absurd to conclude that Congress 'intended to allow motions to reopen to be filed but not heard.'" *Azarte*, 394 F.3d at 1289 (quoting *Shaar*, 141 F.3d at 960 (Browning, J., dissenting)).[6] *Compare Kanivets v.*

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[6] Of course, Petitioner's motion to reopen was actually granted. (A 90). Nevertheless, the question presented is (continued...)

Gonzales, 424 F.3d 330, 334-35 (3d Cir. 2005); *Sidikhouya v. Gonzales*, 407 F.3d 950, 952 (8th Cir. 2005); *Ugokwe v. United States Attorney General*, 453 F.3d 1325, 1328 (11th Cir. 2006) *with Dekoladenu*, 459 F.3d at 504 (timely motion to reopen does not toll or excuse sanction for failure to depart), *petition for cert. filed*, 75 U.S.L.W. 3530 (Mar. 22, 2007) (No. 06-1285); *Banda-Ortiz*, 445 F.3d at 388-91 (same).

However, the ability to seek relief from removal via a motion to reopen is not sacrosanct. *See INS v. Doherty*, 502 U.S. 314, 323 (1992) (motions to reopen are disfavored, especially in the removal context where every delay works to the alien's advantage); *Harisiades v. Shaughnessy*, 342 U.S. 580, 586-87 (1952) (there is no fundamental constitutional right for an alien to be in the United States). Treating it as such undermines voluntary departure's principal goal of expediting an alien's exit from the United States. *Banda-Ortiz*, 445 F.3d at 389-90. If a motion to reopen is all that an alien needs to retain the potential benefits of voluntary departure while delaying the actual departure, the *quid pro quo* is lost and aliens are bestowed with an enormous incentive to state a willingness for voluntary departure but then fail to leave as promised. *See Dekoladenu*, 459 F.3d at 506.

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[6] (...continued)
essentially the same, whether it is engaged at the motion to reopen stage or on the merits of the adjustment application: should the ten-year bar to adjustment of status apply to an alien who seeks reopening before the voluntary departure deadline?

Motions to reopen are a mechanism that are generally available to anyone in removal proceedings. 8 U.S.C. § 1229a(c)(6) (2000). By contrast, the voluntary depature privilege is available only to those who apply for it and who satisfy the statutory requirements: one year's continous physical presence in the United States, good moral character for the last five years, no aggravated felony conviction, and the means and intent to depart as promised. 8 U.S.C. § 1229c(b)(1), 8 C.F.R. § 1240.26(c)(1). It is only this subset of persons who have to relinquish the prospect of reopening their immigration proceeding. In other words, the more specific statutory language addressing voluntary departure applicants removes a subset of aliens from the scope of the general rule about reopening. Specific statutory language controls more general language. *American Land Title Ass'n. v. Clarke*, 968 F.2d 150, 157 (2d Cir. 1992). Therefore, "[a] motion to reopen remains available to all aliens, but an alien who requests voluntary departure will forfeit his right to a decision on his motion to reopen if the IJ grants his request." *Dekoladenu*, 459 F.3d at 506.

This is not an "absurd result," as charged by the *Azarte* court, but simply another condition of the trade-off at the core of the voluntary departure mechanism. *See Azarte*, 394 F.3d at 1288-89; *Singh v. Gonzales*, 468 F.3d 135, 140 (2d Cir. 2006) ("One consequence of complying with a voluntary departure order is the forfeiture of the right to file a motion to reopen, because the alien has already left the United States."); *Dekoladenu*, 459 F.3d at 506 (result may be "harsh," but is not "absurd"); *Banda-Ortiz*, 445 F.3d at 390-91; *Alimi v. Ashcroft*, 391 F.3d 888, 892 (7th Cir. 2004) (alien cannot have it both ways: retain voluntary

departure's benefits and the chance litigation will be successful). As this Court observed, "[I]f the alien does not depart promptly, so that the [Government] becomes involved in further and more costly procedures by his attempts to continue his illegal stay here, the original benefit to the [Government] is lost." *Ballenilla-Gonzalez v. INS*, 546 F.2d 515, 521 (2d Cir. 1976) (citations omitted).

This Court described the nature of this bargain between the alien and the Government by quoting from a Fourth Circuit discussion:

> In other words, an alien granted voluntary departure has a choice – leave within the specified time period and retain the benefits afforded, or remain, litigate the claim to the very end, but bear the consequences of having decided not to depart. *See Ngarurih* [*v. Ashcroft*], 371 F.3d [182] at 194 [(4th Cir. 2004)] ("[A]n alien considering voluntary departure must decide whether an exemption from the ordinary bars on subsequent relief is worth the cost of returning to the home country within the period specified. Having made his election, however, the alien takes all the benefits and all the burdens of the statute together.").

Iouri, 464 F.3d at 181.

Moreover, the avoidance of "absurd results" is a doctrine of statutory construction that is triggered only when a statute is ambiguous. *Troll Co. v. Uneeda Doll Co.*, 483 F.3d 150, 160 (2d Cir. 2007). Such is not the case

here. The plain and unambiguous language of the statute does not exempt aliens from the ten-year statutory bar simply because a motion to reopen has been filed. *See Firstland International, Inc. v. USINS*, 377 F.3d 127, 132 (2d Cir. 2004) (explaining that when there is no ambiguity in the statutory language, intent of Congress must be given effect). *Cf. Mardones v. McElroy*, 197 F.3d 619, 625 (2d Cir. 1999) (holding that the plain language of the predecessor statute containing the voluntary departure bar permitted no exceptions other than by reason of "exceptional circumstances"); *Shaar v. INS*, 141 F.3d 953, 956 (9th Cir. 1998) (also construing the predecessor statute and noting, "[o]nly wrenching the words out of their normal channels could result in adding exceptions to [the statutory bar]").

The *Azarte* court sought to avoid a "draconian" result that would "eliminate all possibility of redress if [Petitioners'] circumstances changed." *Azarte*, 394 F.2d at 1289. Petitioner, in this case, faced no such quandary. In the near term, Petitioner's departure would have effectively withdrawn his application to adjust status. 8 C.F.R. § 245.2(a)(4)(ii)(A); *Hadayat v. Gonzales*, 458 F.3d 659, 664 (7th Cir. 2006). However, had Petitioner voluntarily departed on time, he would have been eligible for readmission under normal immigration procedures. *See* 8 U.S.C. §§ 1153(b)(3) (providing for employment-based immigrants), 1181(a) (admitting immigrants with visas), 1182(a)(5) (prohibiting employment-based entry in absence of labor certification); A 179 (notice of approval of Petitioner's labor-based immigrant petition pursuant to 8 U.S.C. § 1153(b)(3), including directions how to use the notice in an application filed from outside the U.S.A.).

In *Zmijewska v. Gonzales*, 426 F.3d 99 (2d Cir. 2005), this Court was called upon to apply the 10-year bar of 8 U.S.C. § 1229c(d) when the facts suggested that equitable relief from the 10-year bar might be appropriate. Zmijewska, like Petitioner, had received voluntary departure and was seeking to reopen her removal hearing to receive adjustment of status based on an offer of employment. *Zmijewska*, 426 F.3d at 101. Apparently, Zmijewska had received bad advice and faulty information on more than one occasion: an immigration agent advised her not to apply for adjustment of status prior to her voluntary departure date, her Board-accredited representative had not informed her of her obligation to depart until after the deadline had passed, and an Immigration Judge told her she did not have to depart if she had been the victim of "exceptional circumstances." *Zmijewska*, 426 F.3d at 101. The BIA addressed Zmijewska's motion to reopen in two separate decisions that included conflicting and ambiguous language, including application of the then-repealed "exceptional circumstances" exception. *Id*. at 102-03. Thus, this Court concluded that remand to the BIA was necessary for it to clarify, based on its analysis of the text, structure, legislative history and purpose of the INA whether equitable exceptions to the 10-year bar, including "exceptional circumstances" could be applied by the courts. *Id*. at 103.

Upon remand, the BIA held that exceptions to the application of the 10-year bar are limited to those arising from the statutory text, i.e., only when the alien "voluntarily fails to depart." *In re Zmijewska*, 24 I. & N.

Dec. 87, 88 (BIA 2007). No "exceptional circumstances" exception or other equitable exceptions are available. *Id*. Rather, the only exceptions to the 10-year bar are those arising from a lack of voluntariness, such as being unaware of the voluntary departure grant or being physically unable to depart. *Id.* at 91-92.[7]

Unlike the alien in *Zmijewska*, Petitioner clearly "voluntarily fail[ed] to depart." He makes no claim that the BIA or his counsel failed to notify him of his departure deadline, nor has he alleged that the IJ misinformed him of the binding nature of his voluntary departure date. (A 163). Choosing to remain despite the potential consequences and the explicit warnings thereof (A 108), Petitioner selected his gambit. He lost.

Thus, the BIA has interpreted § 240B and is entitled to *Chevron* deference. *See Naeem v. Gonzales*, 469 F.3d 33, 38 (1st Cir. 2006) (BIA reliance on *Matter of Shaar* in light of its questionable continuing authority is harmless when BIA's interpretation of the controlling statute is reasonable). This Court should defer to the BIA's interpretation that equitable suspension of the departure sanction is not available; therefore, pendency of a motion to reopen does not excuse Petitioner's failure to depart.

Alternatively, if this Court finds the statute ambiguous and believes that *Zmijewska* provides insufficient guidance

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[7] In *Zmijewska*, the BIA held that the alien's failure to depart in a timely manner was not "voluntary," where her accredited representative notified her of the departure deadline one day *after* it had passed. 24 I. & N. Dec. at 95.

with respect to whether a motion to reopen tolls the voluntary departure period, the Government respectfully submits that a remand to the BIA would be appropriate, to allow the agency an opportunity to offer a more detailed explanation for its ruling in this case. *See, e.g.*, *Zmijewska*, 426 F.3d at 103; *Liu v. U.S. Dep't of Justice*, 455 F.3d 106, 116-18 (2d Cir. 2006) (remanding for detailed explanation of standards for evaluating "frivolousness" of asylum application), *on remand*, *In re Y-L-*, 24 I. & N. Dec. 151 (BIA 2007).

b. Even If Tolling Were Available, Petitioner Cannot Benefit From It in Light of His Failure To Request Relief From His Voluntary Departure Obligation

Even if this Court were inclined to permit equitable tolling of voluntary departure deadlines, this Petitioner should not benefit from such extraordinary relief. Equitable tolling applies only in the "rare and exceptional circumstance[]." *Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000) (quoting *Turner v. Johnson*, 177 F.3d 390, 391-92 (5th Cir. 1999)).

"Equitable tolling is an extraordinary measure that applies only when plaintiff is prevented from filing despite exercising that level of diligence which could reasonably be expected in the circumstances." *Veltri v. Building Service 32B-J Pension Fund*, 393 F.3d 318, 322 (2d Cir. 2004). The party seeking equitable tolling must have acted with reasonable diligence throughout the period he seeks

to toll. *Smith v. McGinnis*, 208 F.3d at 17. Petitioner has not done this.

Petitioner did not make any attempt to have his voluntary departure date extended or otherwise relieve himself of his voluntary departure obligation. Petitioner could have sought extension of the voluntary departure date from the District Director or other local official, but there is no evidence in the record that he did so. 8 C.F.R. § 240.25(c); *see* A 108 (notifying Petitioner of consequences of failure to depart by deadline including any extensions "as may be granted by the district director"). Alternatively, Petitioner could have sought judicial intervention, *see Iouri*, 2007 WL 1512420 at *4-5 (a stay of voluntary departure is not implied but must be explicitly applied for), or coupled his motion to reopen with a request for revocation of voluntary departure. 8 C.F.R. § 240.25(f) (any officer authorized to grant voluntary departure can revoke it). Again, there is no indication he did so. Rather, he apparently presumed that his motion to reopen permitted him to disregard the explicit warnings he received. Petitioner's failure to exercise due diligence with regard to his voluntary departure obligations deprives him of the benefit of equitable tolling. *See, e.g., Iavorski v. U.S. INS*, 232 F.3d 124, 134 (2d Cir. 2000) (alien's apparent abandonment of his immigration case after unsuccessful attempts to contact his attorney renders him ineligble for equitable tolling).

Petitioner cites *Barrios v. Attorney General*, 399 F.3d 272 (3d Cir. 2005), for the proposition that he did not need to seek extension of his voluntary departure: the mere filing of the motion to reopen automatically tolled his

voluntary departure obligation. Pet. Brief at 12. *See also Barroso v. Gonzales*, 429 F.3d 1195, 1207 (9th Cir. 2005) (tolling even in absence of separate motion to stay departure) (following *Desta v. Ashcroft*, 365 F.3d 741 (9th Cir. 2004)). However, this Court has explicitly rejected this view: "'[W]e join the First and Seventh Circuits, both of which have held that an alien who wishes to stay the period for voluntary departure must explicitly ask for such a stay.' *Bocova*, 412 F.3d at 268; *Alimi v. Ashcroft*, 391 F.3d 888, 892-93 (7th Cir. 2004)." *Iouri*, 464 F.3d at 180.

Because Petitioner did not conduct himself with due diligence with respect to his voluntary departure obligation, he is not eligible for equitable tolling.

II. ALTERNATIVELY, THE IMMIGRATION JUDGE PROPERLY REJECTED BORJA'S APPLICATION FOR ADJUSTMENT OF STATUS BECAUSE IT WAS DEFICIENT ON ITS FACE

A. Relevant Facts

The relevant facts are set forth in the Statement of Facts above.

B. Governing Law and Standard of Review

1. Labor-Based Adjustment of Status

One of the ways by which an alien may become eligible for an immigrant visa, and for adjustment of status, is through obtaining employment (or an offer for

employment) in the United States. Obtaining an employment-based visa is a three-step and time consuming process, involving several federal and state agencies. *See Khan v. Attorney General*, 448 F.3d 226, 228 n.2 (3d Cir. 2006) (describing process in detail).

First, in the case of "skilled workers, professionals, and [certain] other workers" ("third-preference" immigrants), an applicant's prospective employer must file an application for a labor certification with the Department of Labor ("DOL"), which refers the petition to the appropriate state-level authority. If the application satisfies certain requirements (for example, that sufficient United States workers are unwilling or unable to perform the job in question and that petitioner has the requisite experience), the state labor office, and thereafter the DOL, will "certify" the labor request. *See* 8 U.S.C. § 1182(a)(5)(A); *see also* 8 U.S.C. § 1153(b)(3)(C) (labor certification required for issuance of third preference visa), 20 C.F.R. §§ 656.1 *et seq.* (DOL regulations governing labor certification). The labor certification process also involves an analysis to determine whether the alien's employment will adversely affect the wages and working conditions of United States workers. 8 U.S.C. § 1182(a)(5)(A)(i)(II).

After the DOL approves the labor certification, the alien's prospective employer must file an I-140 Visa Petition for Prospective Immigrant Employee with the Department of Homeland Security ("DHS") to classify his employee as an immigrant worker under section 203(b) of the INA, 8 U.S.C. § 1153(b). *Khan*, 448 F.3d at 228 n.2. *See* 8 C.F.R. § 204.5(a), (c). This visa petition "constitutes a request to [DHS] that the alien named in the Labor

Certification be classified as eligible to apply for designation within a specified visa preference employment category. If [DHS] approves the Visa Petition and classifies the certified alien as so eligible, the alien is assigned an immigrant visa number by the Department of State." *Id.* (quoting *United States v. Ryan-Webster*, 353 F.3d 353, 356 (4th Cir. 2003) (citing 8 U.S.C. § 1153(b)). *See also Zafar v. United States Att'y. Gen.*, 461 F.3d 1357, 1363 (11th Cir. 2006) ("An employment-based immigrant visa cannot be applied for until the alien has an approved labor certification from the DOL."); 8 C.F.R. § 204.5(a) (requiring that visa petition be "[a]ccompanied by any required individual labor certification").

If the petition is approved, the immigrant worker becomes eligible to receive a visa, though he does not automatically receive one. *See Firstland Intern., Inc. v. United States INS*, 377 F.3d 127, 129 (2d Cir. 2004) ("[T]he INS's approval of an immigrant visa petition is distinct from the issuance of an immigrant visa."); *Joseph v. Landon*, 679 F.2d 113, 115 (7th Cir. 1982) ("An initial approval of a visa petition does not alone give the beneficiary of the petition an immediate right to an immigrant visa.") (internal quotation marks omitted). The number of visa allotments is limited for each employment category pursuant to 8 U.S.C. § 1153(b) and Department of State regulations, and it is the Department of State that actually assigns the visa number. *Liberty Fund, Inc. v. Chao*, 394 F. Supp. 2d 105, 109 (D.D.C. 2005). Because of the limited availability of immigrant visas in the employment-based category, the alien is given a "priority date" based on when his labor certification application was filed. 8 C.F.R. § 204.5(d). The priority date is the date

which the Department of State uses to determine an applicant's place in line for an immigrant visa number. *Id.* Once the applicant's priority date is current, an immigrant visa is "immediately available" and he may apply for adjustment of status. *See* 8 U.S.C. § 1255; 8 C.F.R. § 1245.1(g)(1). The applicant's priority date becomes current when that date is no later than the date shown in the current Department of State Visa Office Bulletin on Availability of Immigrant Visa Numbers or the Bulletin shows that numbers for visa applicants in his category are current. *See Hernandez v. Ashcroft*, 345 F.3d 824, 843 (9th Cir. 2003).

Finally, "after the alien receives a visa number under Form I-140, and if the alien presently resides in the United States . . ., then the alien must file with DHS an Application to Adjust Status (Form I-485). DHS then considers Forms I-140 and I-485 to determine whether to adjust the alien's status to lawful permanent resident." *Khan*, 448 F.3d at 228 n.2; *see* 8 U.S.C. § 1255. If DHS grants the adjustment of status, the alien is permitted to live and work in the United States. *Id.*

Generally, adjustment applications are filed with USCIS. 8 C.F.R. § 1245.2(a)(1). However, for an alien in removal proceedings (other than an arriving alien), any application for adjustment of status must be adjudicated by the immigration judge in those proceedings. 8 C.F.R. § 1245.2(a)(1)(i) ("In the case of any alien who has been placed in deportation or in removal proceedings (other than as an arriving alien), the immigration judge hearing the proceeding has exclusive jurisdiction to adjudicate any application for adjustment of status the alien may file.");

see also 8 C.F.R. § 1245.2(a)(1) ("After an alien, other than an arriving alien, is in deportation or removal proceedings, his or her application for adjustment of status under [INA § 245] shall be made and considered only in those proceedings."). *See also* 8 U.S.C. § 1255(i) (permitting adjustment from illegal status pursuant to labor-based visa upon payment of $1000 filing fee and Attorney General's discretionary finding that the alien is eligible for the visa, admissible, and the visa is immediately available).

2. Scope of Review and Standard of Review

Judicial review is generally confined to the BIA's order. *See, e.g.*, *Abdulai v. Ashcroft*, 239 F.3d 542, 549 (3d Cir. 2001). Thus, ordinarily, arguments that appeared in the IJ's decision but not the BIA's decision may not serve as alternative grounds in this Court's review.

However, an error does not require a remand if the remand would be pointless because it is clear that the agency would adhere to its prior decision in the absence of error. *Xiao Ji Chen v. United States Dep't of Justice*, 434 F.3d 144, 161 (2d Cir. 2006). This principle, known as the principle of futility, relieves the Court of the obligation to remand when doing so would "convert judicial review of agency action into a ping-pong game." *National Labor Relations Board v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n. 6 (1969). Therefore, remand is not required when, disregarding any aspects of the underlying decision that are tainted with error, this Court can confidently predict that the same result would be reached were the matter

remanded. *Xiao Ji Chen*, 434 F.3d at 161; *Li Hua Lin v. United States Dep't of Justice*, 453 F.3d 99, 108 (2d Cir. 2006) (reconciling the formulations of *Lin v. United States Dep't of Justice*, 428 F.3d 391 (2d Cir. 2005), and *Xiao Ji Chen*, 434 F.3d at 144).

C. Discussion

Even if this Court were to disagree with the BIA's application of the bar for failure to voluntarily depart, remand is not called for, as it is certain that the same result would be reached upon remand. Petitioner's underlying application for adjustment of status was deficient as a matter of law in that it failed to satisfy the statutory wage requirement.[8]

Part of the labor certification process is directed toward ensuring that legal employment of the alien will not depress wages or otherwise lower workplace standards for

---

[8] The IJ's other alternative ground, that Petitioner is not allowed to adjust status based on a certificate issued to a different employer, is called into question by a recent BIA decision. In *Matter of Perez Vargas*, 23 I. & N. Dec. 829 (BIA 2005), the Board concluded that Immigration Judges have no authority to determine whether the validity of an alien's approved employment-based visa petition is preserved under section 204(j) of the Act after the alien's change in jobs or employers; this is a determination that can be made only by the Department of Homeland Security. This jurisdictional question is unsettled, as *Perez-Vargas* was reversed on petition for review. *Perez-Vargas v. Gonzales*, 478 F.3d 191 (4th Cir. 2007) (IJ has exclusive jurisdiction to make a 204(j) determination).

other workers similarly employed. *See* 8 U.S.C. § 1182 (a)(5)(A)(i)(II); 20 C.F.R § 656.24(b)(3). Thus, when Hi-Tech Polishing applied to the Department of Labor for the labor certification, it was required to state the wage to be paid and to declare under penalties of perjury that it has the ability to pay the wage stated and that the wage stated equals or exceeds the prevailing wage for workers similarly employed. (A 165-166 (stating an offered wage of $14.34/hour)). *See* 20 C.F.R. § 656.10(c)(3) (requirement for attestation that employer has enough funds available to pay the offered wage).

Even after the certification process, the proponent of an employment-based petition must provide evidence that the prospective employer has the ability to pay the proffered wage. 8 C.F.R. 204.5(g)(2). The petitioner must be able to make this showing from the priority date continuing through the putative adjustment of status. *Id*.

The type of evidence acceptable to demonstrate ability to pay is limited to three types of documents: (1) annual reports, (2) federal tax returns, or (3) audited financial statements. *Id*. Supplementary sources, including profit/loss statements, bank records, or personnel records are permitted in addition to the three primary sources. *Id.*

Petitioner offered four forms of evidence regarding his offer of employment with Perry Technology. First, he had a job offer letter which was not on letterhead and made no mention of what wage the job paid. (A 175). It did, however, state that Petitioner had worked there since 2000 and was presently employed there as a full-time machinist. (A 175). Second, he offered a pamphlet-sized corporate

sales brochure, which does not contain any information about the company's size, revenue, longevity, or customer base. (A 169-174). Third, Petitioner testified that he has worked full-time at Perry Technology since 2000. (A 81). Fourth, Petitioner provided his 2002 W-2. (A 176).

On this record, it is clear that Petitioner does not satisfy the statutory and regulatory requirements for evidence of ability to pay. Petitioner supplied none of the three types of primary evidence required to show ability to pay. Rather, the only ability to pay evidence offered by Petitioner showed that in 2002 he made $17,010.90 in wages for full-time employment with this employer. The job offer certified by the Department of Labor paid $14.34 per hour. (A 165). The IJ calculated that, on a full-time basis, the certified job offer would pay $29,827 per year. (A 49). Thus, Petitioner had been earning far below the wage certified by the Department of Labor. The burden of proof to show eligibility for adjustment is on the alien. 8 U.S.C. § 1361. The evidence offered by Petitioner fails to show that his prospective employer has the ability to pay him $14.34/hour. *See* A 49 (IJ's discussion). To the contrary, the evidence tends to show that Petitioner would not be paid in accordance with the labor certification.

Petitioner's evidence regarding the wage he would actually be paid is undisputably deficient. Because this Court can be "confident that the agency would reach the same result upon a reconsideration cleansed of errors," *see Li Hua Lin*, 453 F.3d at 107, the petition for review should be denied.

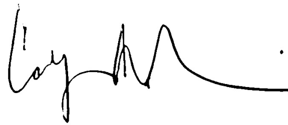
CONCLUSION

For each of the foregoing reasons, the petition for review should be denied.

Dated: June 4, 2007

Respectfully submitted,

KEVIN J. O'CONNOR
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT



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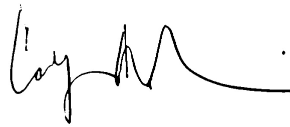
CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 9,885 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification.



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Addendum

8 U.S.C. § 1153. Allocation of immigrant visas

(b) Preference allocation for employment-based immigrants

Aliens subject to the worldwide level specified in section 1151(d) of this title for employment-based immigrants in a fiscal year shall be allotted visas as follows:

. . .

(3) Skilled workers, professionals, and other workers

(A) In general
Visas shall be made available, in a number not to exceed 28.6 percent of such worldwide level, plus any visas not required for the classes specified in paragraphs (1) and (2), to the following classes of aliens who are not described in paragraph (2):
(i) Skilled workers
Qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least 2 years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.
(ii) Professionals
Qualified immigrants who hold baccalaureate degrees and who are members of the professions.
(iii) Other workers
Other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal

nature, for which qualified workers are not available in the United States.

(B) Limitation on other workers
Not more than 10,000 of the visas made available under this paragraph in any fiscal year may be available for qualified immigrants described in subparagraph (A)(iii).

(C) Labor certification required
An immigrant visa may not be issued to an immigrant under subparagraph (A) until the consular officer is in receipt of a determination made by the Secretary of Labor pursuant to the provisions of section 1182(a)(5)(A) of this title.

. . .

8 U.S.C. § 1182 **Inadmissible aliens**

(a) Classes of aliens ineligible for visas or admission

Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

. . .

(5) Labor certification and qualifications for certain immigrants

(A) Labor certification

(i) In general

Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that--

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

. . .

(9) Aliens previously removed

(A) Certain aliens previously removed

. . .

(ii) Other aliens
Any alien not described in clause (i) who--
(I) has been ordered removed under section 240 or any other provision of law, or
(II) departed the United States while an order of removal was outstanding, and who seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

8 U.S.C. § 1229a (2000). **Removal proceedings**

. . .

(c) Decision and burden of proof

(6) Motions to reopen

(A) In general
An alien may file one motion to reopen proceedings under this section.

(B) Contents
The motion to reopen shall state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material.

(C) Deadline
(i) In general
Except as provided in this subparagraph, the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal.
(ii) Asylum
There is no time limit on the filing of a motion to reopen if the basis of the motion is to apply for relief under sections 1158 or 1231(b)(3) of this title and is based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and would not have been discovered or presented at the previous proceeding.
(iii) Failure to appear

The filing of a motion to reopen an order entered pursuant to subsection (b)(5) of this section is subject to the deadline specified in subparagraph (C) of such subsection.

(iv) Special rule for battered spouses and children

The deadline specified in subsection (b)(5)(C) of this section for filing a motion to reopen does not apply--

(I) if the basis for the motion is to apply for relief under clause (iii) or (iv) of section 1154(a)(1)(A) of this title, clause (ii) or (iii) of section 1154(a)(1)(B) of this title, or section 1229b(b)(2) of this title;

(II) if the motion is accompanied by a cancellation of removal application to be filed with the Attorney General or by a copy of the self-petition that has been or will be filed with the Immigration and Naturalization Service upon the granting of the motion to reopen; and

(III) if the motion to reopen is filed within 1 year of the entry of the final order of removal, except that the Attorney General may, in the Attorney General's discretion, waive this time limitation in the case of an alien who demonstrates extraordinary circumstances or extreme hardship to the alien's child.

. . .

8 U.S.C. §1229c. **Voluntary departure**

. . .

(b) At conclusion of proceedings

(1) In general

The Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense if, at the conclusion of a proceeding under section 1229a of this title, the immigration judge enters an order granting voluntary departure in lieu of removal and finds that--
(A) the alien has been physically present in the United States for a period of at least one year immediately preceding the date the notice to appear was served under section 1229(a) of this title;
(B) the alien is, and has been, a person of good moral character for at least 5 years immediately preceding the alien's application for voluntary departure;
(C) the alien is not deportable under section 1227(a)(2)(A)(iii) or section 1227(a)(4) of this title; and
(D) the alien has established by clear and convincing evidence that the alien has the means to depart the United States and intends to do so.

(2) Period

Permission to depart voluntarily under this subsection shall not be valid for a period exceeding 60 days.

(3) Bond

An alien permitted to depart voluntarily under this subsection shall be required to post a voluntary departure bond, in an amount necessary to ensure that the alien will depart, to be surrendered upon proof that the alien has departed the United States within the time specified.

. . .

(d) Civil penalty for failure to depart
(1) In general

Subject to paragraph (2), if an alien is permitted to depart voluntarily under this section and voluntarily fails to depart the United States within the time period specified, the alien--
(A) shall be subject to a civil penalty of not less than $1,000 and not more than $5,000; and
(B) shall be ineligible, for a period of 10 years, to receive any further relief under this section and sections 1229b, 1255, 1258, and 1259 of this title.

(2) Application of VAWA protections

The restrictions on relief under paragraph (1) shall not apply to relief under section 1229b or 1255 of this title on the basis of a petition filed by a VAWA self-petitioner, or a petition filed under section 1229b(b)(2) of this title, or under section 1254(a)(3) of this title (as in effect prior to March 31, 1997), if the extreme cruelty or battery was at least one central reason for the alien's overstaying the grant of voluntary departure.

(3) Notice of penalties

The order permitting an alien to depart voluntarily shall inform the alien of the penalties under this subsection.

. . .

8 U.S.C. § 1255. **Adjustment of status of nonimmigrant to that of person admitted for permanent residence**

. . .

(i) Adjustment of status of certain aliens physically present in United States

(1) Notwithstanding the provisions of subsections (a) and (c) of this section, an alien physically present in the United States--

(A) who--
(i) entered the United States without inspection; or
(ii) is within one of the classes enumerated in subsection (c) of this section;
(B) who is the beneficiary (including a spouse or child of the principal alien, if eligible to receive a visa under section 1153(d) of this title) of--
(i) a petition for classification under section 1154 of this title that was filed with the Attorney General on or before April 30, 2001; or
(ii) an application for a labor certification under section 1182(a)(5)(A) of this title that was filed pursuant to the regulations of the Secretary of Labor on or before such date; and
(C) who, in the case of a beneficiary of a petition for classification, or an application for labor certification, described in subparagraph (B) that was filed after January 14, 1998, is physically present in the United States on December 21, 2000;

may apply to the Attorney General for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence. The Attorney General may accept such application only if the alien remits with such application a sum equalling $1,000 as of the date of receipt of the application, but such sum shall not be required from a child under the age of seventeen, or an alien who is the spouse or unmarried child of an individual who obtained temporary or permanent resident status under section 1160 or 1255a of this title or section 202 of the Immigration Reform and Control Act of 1986 at any date, who--

(i) as of May 5, 1988, was the unmarried child or spouse of the individual who obtained temporary or permanent resident status under section 1160 or 1255a of this title or section 202 of the Immigration Reform and Control Act of 1986;
(ii) entered the United States before May 5, 1988, resided in the United States on May 5, 1988, and is not a lawful permanent resident; and
(iii) applied for benefits under section 301(a) of the Immigration Act of 1990. The sum specified herein shall be in addition to the fee normally required for the processing of an application under this section.

(2) Upon receipt of such an application and the sum hereby required, the Attorney General may adjust the status of the alien to that of an alien lawfully admitted for permanent residence if--

(A) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence; and

(B) an immigrant visa is immediately available to the alien at the time the application is filed.

(3)(A) The portion of each application fee (not to exceed $200) that the Attorney General determines is required to process an application under this section and is remitted to the Attorney General pursuant to paragraphs (1) and (2) of this subsection shall be disposed of by the Attorney General as provided in subsections (m), (n), and (o) of section 1356 of this title.

(B) Any remaining portion of such fees remitted under such paragraphs shall be deposited by the Attorney General into the Breached Bond/Detention Fund established under section 1356(r) of this title, except that in the case of fees attributable to applications for a beneficiary with respect to whom a petition for classification, or an application for labor certification, described in paragraph (1)(B) was filed after January 14, 1998, one-half of such remaining portion shall be deposited by the Attorney General into the Immigration Examinations Fee Account established under section 1356(m) of this title.

. . .

8 U.S.C. § 1252b (repealed 1996). **Deportation procedures**

. . .

(e) Limitation on discretionary relief for failure to appear

. . .

(2) Voluntary departure

(A) In general

Subject to subparagraph (B), any alien allowed to depart voluntarily under section 1254(e)(1) of this title or who has agreed to depart voluntarily at his own expense under section 1252(b)(1) of this title who remains in the United States after the scheduled date of departure, other than because of exceptional circumstances, shall not be eligible for relief described in paragraph (5) for a period of 5 years after the scheduled date of departure or the date of unlawful reentry, respectively.

. . .

8 C.F.R. §204.5 **Petitions for employment-based immigrants.**

(a) General.

A petition to classify an alien under section 203(b)(1), 203(b)(2), or 203(b)(3) of the Act must be filed on Form I-140, Petition for Immigrant Worker. A petition to classify an alien under section 203(b)(4) (asit relates to special immigrants under section 101(a)(27)(C)) must be filed onForm I-360, Petition for Amerasian, Widow, or Special Immigrant. A separate Form I-140 or I-360 must be filed for each beneficiary, accompanied by the applicable fee. A petition is considered properly filed if it is:

(1) Accepted for processing under the provisions of part 103;

(2) Accompanied by any required individual labor certification, application for Schedule A designation, or evidence that the alien's occupation qualifies as a shortage occupation within the Department of Labor's Labor Market Information Pilot Program; and

(3) Accompanied by any other required supporting documentation.

. . .

(g) Initial evidence--

. . .

(2) Ability of prospective employer to pay wage.

Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employerhas the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

. . .

8 C.F.R. §240.25 **Voluntary departure--authority of the Service.**

(a) Authorized officers. The authority contained in section 240B(a) of the Act to permit aliens to depart voluntarily from the United States may be exercised in lieu of being subject to proceedings under section 240 of the Act by district directors, assistant district directors for investigations, assistant district directors for examinations, officers in charge, chief patrol agents, the Deputy Executive Associate Commissioner for Detention and Removal, the Director of the Office of Juvenile Affairs, service center directors, and assistant service center directors for examinations.

. . .

(c) Decision. The authorized officer, in his or her discretion, shall specify the period of time permitted for voluntary departure, and may grant extensions thereof, except that the total period allowed, including any extensions, shall not exceed 120 days. Every decision regarding voluntary departure shall be communicated in writing on Form I-210, Notice of Action--Voluntary Departure. Voluntary departure may not be granted unless the alien requests such voluntary departure and agrees to its terms and conditions.

. . .

8 C.F.R. § 1003.2 **Reopening or reconsideration before the Board of Immigration Appeals.**

(a) General. The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision. A request to reopen or reconsider any case in which a decision has been made by the Board, which request is made by the Service, or by the party affected by the decision, must be in the form of a written motion to the Board. The decision to grant or deny a motion to reopen or reconsider is within the discretion of the Board, subject to the restrictions of this section. The Board has discretion to deny a motion to reopen even if the party moving has made out a prima facie case for relief.

(b) Motion to reconsider.

(1) A motion to reconsider shall state the reasons for the motion by specifying the errors of fact or law in the prior Board decision and shall be supported by pertinent authority. A motion to reconsider a decision rendered by an Immigration Judge or Service officer that is pending when an appeal is filed with the Board, or that is filed subsequent to the filing with the Board of an appeal from the decision sought to be reconsidered, may be deemed a motion to remand the decision for further proceedings before the Immigration Judge or the Service officer from whose decision the appeal was taken. Such motion may be consolidated with, and considered by the Board in connection with the appeal to the Board.

(2) A motion to reconsider a decision must be filed with the Board within 30 days after the mailing of the Board decision or on or before July 31, 1996, whichever is later. A party may file only one motion to reconsider any given decision and may not seek reconsideration of a decision denying a previous motion to reconsider. In removal proceedings pursuant to section 240 of the Act, an alien may file only one motion to reconsider a decision that the alien is removable from the United States.

(3) A motion to reconsider based solely on an argument that the case should not have been affirmed without opinion by a single Board Member, or by a three-Member panel, is barred.

(c) Motion to reopen.

(1) A motion to reopen proceedings shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits or other evidentiary material. A motion to reopen proceedings for the purpose of submitting an application for relief must be accompanied by the appropriate application for relief and all supporting documentation. A motion to reopen proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully explained to him or her and an opportunity to apply therefore was afforded at the former hearing,

unless the relief is sought on the basis of circumstances that have arisen subsequent to the hearing. Subject to the other requirements and restrictions of this section, and notwithstanding the provisions in § 1001.1(p) of this chapter, a motion to reopen proceedings for consideration or further consideration of an application for relief under section 212(c) of the Act (8 U.S.C. 1182(c)) may be granted if the alien demonstrates that he or she was statutorily eligible for such relief prior to the entry of the administratively final order of deportation.

(2) Except as provided in paragraph (c)(3) of this section, a party may file only one motion to reopen deportation or exclusion proceedings (whether before the Board or the Immigration Judge) and that motion must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened, or on or before September 30, 1996, whichever is later. Except as provided in paragraph (c)(3) of this section, an alien may file only one motion to reopen removal proceedings (whether before the Board or the Immigration Judge) and that motion must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened.

(3) In removal proceedings pursuant to section 240 of the Act, the time limitation set forth in paragraph (c)(2) of this section shall not apply to a motion to reopen filed pursuant to the provisions of § 1003.23(b)(4)(ii). The time and numerical limitations set forth in paragraph (c)(2) of this section shall not apply to a motion to reopen proceedings:

(i) Filed pursuant to the provisions of § 1003.23(b)(4)(iii)(A)(1) or § 1003.23(b)(4)(iii)(A)(2);

(ii) To apply or reapply for asylum or withholding of deportation based on changed circumstances arising in the country of nationality or in the country to which deportation has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous hearing;

(iii) Agreed upon by all parties and jointly filed. Notwithstanding such agreement, the parties may contest the issues in a reopened proceeding; or

(iv) Filed by the Service in exclusion or deportation proceedings when the basis of the motion is fraud in the original proceeding or a crime that would support termination of asylum in accordance with § 1208.22(f) of this chapter.

(4) A motion to reopen a decision rendered by an Immigration Judge or Service officer that is pending when an appeal is filed, or that is filed while an appeal is pending before the Board, may be deemed a motion to remand for further proceedings before the Immigration Judge or the Service officer from whose decision the appeal was taken. Such motion may be consolidated with, and considered by the Board in connection with, the appeal to the Board.

(d) Departure, deportation, or removal. A motion to reopen or a motion to reconsider shall not be made by or on behalf of a person who is the subject of exclusion, deportation, or removal proceedings subsequent to his or her departure

from the United States. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion.

(e) Judicial proceedings. Motions to reopen or reconsider shall state whether the validity of the exclusion, deportation, or removal order has been or is the subject of any judicial proceeding and, if so, the nature and date thereof, the court in which such proceeding took place or is pending, and its result or status. In any case in which an exclusion, deportation, or removal order is in effect, any motion to reopen or reconsider such order shall include a statement by or on behalf of the moving party declaring whether the subject of the order is also the subject of any pending criminal proceeding under the Act, and, if so, the current status of that proceeding. If a motion to reopen or reconsider seeks discretionary relief, the motion shall include a statement by or on behalf of the moving party declaring whether the alien for whose relief the motion is being filed is subject to any pending criminal prosecution and, if so, the nature and current status of that prosecution.

(f) Stay of deportation. Except where a motion is filed pursuant to the provisions of §§ 1003.23(b)(4)(ii) and 1003.23(b)(4)(iii)(A), the filing of a motion to reopen or a motion to reconsider shall not stay the execution of any decision made in the case. Execution of such decision shall proceed unless a stay of execution is specifically granted by the Board, the Immigration Judge, or an authorized officer of the Service.

(g) Filing procedures--

(1) English language, entry of appearance, and proof of service requirements. A motion and any submission made in conjunction with a motion must be in English or accompanied by a certified English translation. If the moving party, other than the Service, is represented, Form EOIR-27, Notice of Entry of Appearance as Attorney or Representative Before the Board, must be filed with the motion. In all cases, the motion shall include proof of service on the opposing party of the motion and all attachments. If the moving party is not the Service, service of the motion shall be made upon the Office of the District Counsel for the district in which the case was completed before the Immigration Judge.

(2) Distribution of motion papers.

(i) A motion to reopen or motion to reconsider a decision of the Board pertaining to proceedings before an Immigration Judge shall be filed directly with the Board. Such motion must be accompanied by a check, money order, or fee waiver request in satisfaction of the fee requirements of § 1003.8. The record of proceeding pertaining to such a motion shall be forwarded to the Board upon the request or order of the Board.

(ii) A motion to reopen or a motion to reconsider a decision of the Board pertaining to a matter initially adjudicated by an officer of the Service shall be filed with the officer of the Service having administrative control over the record of proceeding.

(iii) If the motion is made by the Service in proceedings in which the Service has administrative control over the record of proceedings, the record of proceedings in the case and the motion shall be filed directly with the Board. If such motion is filed directly with an office of the Service, the entire record of proceeding shall be forwarded to the Board by the Service officer promptly upon receipt of the briefs of the parties, or upon expiration of the time allowed for the submission of such briefs.

(3) Briefs and response. The moving party may file a brief if it is included with the motion. If the motion is filed directly with the Board pursuant to paragraph (g)(2)(i) of this section, the opposing party shall have 13 days from the date of service of the motion to file a brief in opposition to the motion directly with the Board. If the motion is filed with an office of the Service pursuant to paragraph (g)(2)(ii) of this section, the opposing party shall have 13 days from the date of filing of the motion to file a brief in opposition to the motion directly with the office of the Service. In all cases, briefs and any other filings made in conjunction with a motion shall include proof of service on the opposing party. The Board, in its discretion, may extend the time within which such brief is to be submitted and may authorize the filing of a brief directly with the Board. A motion shall be deemed unopposed unless a timely response is made. The Board may, in its discretion, consider a brief filed out of time.

(h) Oral argument. A request for oral argument, if desired, shall be incorporated in the motion to reopen or reconsider. The Board, in its discretion, may grant or deny requests for oral argument.

(i) Ruling on motion. Rulings upon motions to reopen or motions to reconsider shall be by written order. Any motion for reconsideration or reopening of a decision issued by a single Board member will be referred to the screening panel for disposition by a single Board member, unless the screening panel member determines, in the exercise of judgment, that the motion for reconsideration or reopening should be assigned to a three-member panel under the standards of § 1003.1(e)(6). If the order directs a reopening and further proceedings are necessary, the record shall be returned to the Immigration Court or the officer of the Service having administrative control over the place where the reopened proceedings are to be conducted. If the motion to reconsider is granted, the decision upon such reconsideration shall affirm, modify, or reverse the original decision made in the case.

8 C.F.R. § 1240.26 **Voluntary departure--authority of the Executive Office for Immigration Review.**

(a) Eligibility: general. An alien previously granted voluntary departure under section 240B of the Act, including by the Service under § 1240.25, and who fails to depart voluntarily within the time specified, shall thereafter be ineligible, for a period of ten years, for voluntary departure or for relief under sections 240A, 245, 248, and 249 of the Act.

. . .

(c) At the conclusion of the removal proceedings--

(1) Required findings. An immigration judge may grant voluntary departure at the conclusion of the removal proceedings under section 240B(b) of the Act, if he or she finds that:

(i) The alien has been physically present in the United States for period of at least one year preceding the date the Notice to Appear was served under section 239(a) of the Act;

(ii) The alien is, and has been, a person of good moral character for at least five years immediately preceding the application;

(iii) The alien has not been convicted of a crime described in section 101(a)(43) of the Act and is not deportable under section 237(a)(4); and

(iv) The alien has established by clear and convincing evidence that the alien has the means to depart the United States and has the intention to do so.

(2) Travel documentation. Except as otherwise provided in paragraph (b)(3) of this section, the clear and convincing evidence of the means to depart shall include in all cases presentation by the alien of a passport or other travel documentation sufficient to assure lawful entry into the country to which the alien is departing. The Service shall have full opportunity to inspect and photocopy the documentation, and to challenge its authenticity or sufficiency before voluntary departure is granted.

(3) Conditions. The judge may impose such conditions as he or she deems necessary to ensure the alien's timely departure from the United States. In all cases under section 240B(b) of the Act, the alien shall be required to post a voluntary departure bond, in an amount necessary to ensure that the alien departs within the time specified, but in no case less than $500. The voluntary departure bond shall be posted with the district director within 5 business days of the immigration judge's order granting voluntary departure, and the district director may, at his or her discretion, hold the alien in custody until the bond is posted. If the bond is not posted within 5 business days, the voluntary departure order shall vacate automatically and the alternate order of removal will take effect on the following day. In order for the bond to be canceled, the alien must provide proof of departure to the district director.

. . .

(f) Extension of time to depart. Authority to extend the time within which to depart voluntarily specified initially by an immigration judge or the Board is only within the jurisdiction of the district director, the Deputy Executive Associate Commissioner for Detention and Removal, or the Director of the Office of Juvenile Affairs. An immigration judge or the Board may reinstate voluntary departure in a removal proceeding that has been reopened for a purpose other than solely making an application for voluntarily departure if reopening was granted prior to the expiration of the original period of voluntary departure. In no event can the total period of time, including any extension, exceed 120 days or 60 days as set forth in section 240B of the Act.

. . .

8 C.F.R. § 1245.2 (2006) **Application.**

(a) General--

(1) Jurisdiction.

(i) In General. In the case of any alien who has been placed in deportation proceedings or in removal proceedings (other than as an arriving alien), the immigration judge hearing the proceeding has exclusive jurisdiction to adjudicate any application for adjustment of status the alien may file.

. . .

20 C.F.R. § 656.10 **General instructions.**

. . .

(c) Attestations. The employer must certify to the conditions of employment listed below on the Application for Permanent Employment Certification under penalty of perjury under 18 U.S.C. 1621(2). Failure to attest to any of the conditions listed below results in a denial of the application.

. . .

(3) The employer has enough funds available to pay the wage or salary offered the alien;

20 C.F.R. § 656.24 **Labor certification determinations**.

. . .

(b) The Certifying Officer makes a determination either to grant or deny the labor certification on the basis of whether or not:

. . .

(3) The employment of the alien will not have an adverse effect upon the wages and working conditions of U.S. workers similarly employed. In making this determination, the Certifying Officer considers such things as: labor market information, the special circumstances of the industry, organization, and/or occupation, the prevailing wage in the area of intended employment, and prevailing working conditions, such as hours, in the occupation.

. . .

ANTI-VIRUS CERTIFICATION

Case Name: Borja-Arichabla v. Gonzales

Docket Number: 04-6142-ag

I, Louis Bracco, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **briefs@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 6/4/2007) and found to be VIRUS FREE.

Louis Bracco
Record Press, Inc.

Dated: June 4, 2007