No. 21-596

In the Supreme Court of the United States

iTECH U.S., INC., PETITIONER

v.

UR M. JADDOU, DIRECTOR, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE D.C. CIRCUIT

MEMORANDUM FOR THE RESPONDENT

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

In the Supreme Court of the United States

No. 21-596

iTECH U.S., INC., PETITIONER

v.

UR M. JADDOU, DIRECTOR, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE D.C. CIRCUIT

MEMORANDUM FOR THE RESPONDENT

Petitioner challenges the decision of the Department of Homeland Security (DHS) to revoke, under 8 U.S.C. 1155, the approval of an immigrant visa petition for one of petitioner's employees. See Pet. App. 4a-5a. Section 1155 states that "[t]he Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 1154 of this title." 8 U.S.C. 1155. Petitioner sued in district court under the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, 701 *et seq.*, alleging that DHS's revocation decision was premised on two factual errors. See Compl. ¶¶ 23-24; Pet. App. 4a-5a.

* Director Jaddou is automatically substituted for her predecessor. See Sup. Ct. R. 35.3.

Relying on 8 U.S.C. 1252(a)(2)(B)(ii), the district court dismissed the challenge for lack of jurisdiction. Pet. App. 20a-30a. Section 1252(a)(2)(B) provides as follows:

> Notwithstanding any other provision of law (statutory or nonstatutory), * * * and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review—
>
> (i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or
>
> (ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

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

The court of appeals affirmed the dismissal. Pet. App. 1a-19a. The court rejected petitioner's contention that Section 1252(a)(2)(B)(ii) is limited to discretionary decisions regarding relief from removal, noting that clause (i) refers to "judgment[s] regarding the granting of relief," whereas clause (ii) uses the broader language "any other decision or action." 8 U.S.C. 1252(a)(2)(B); see Pet. App. 11a-12a. And the court found that Section 1155's use of the term "may," 8 U.S.C. 1155, vests the Secretary with discretion over the decision to revoke the approval of a visa petition, reasoning that "a decision may be 'specified . . . to be in the discretion of the [Secretary]' even if the grant of authority to make that

decision does not use the word 'discretion.'" Pet. App. 15a-16a (citation omitted).

In this Court, petitioner renews (Pet. 7-14) its contentions that Section 1252(a)(2)(B)(ii) is limited to decisions about relief from removal and, in any event, that Section 1155 does not vest the decision to revoke approval of a visa petition in the Secretary's discretion. Both of those contentions, however, are refuted by the plain text of the statutory provisions. With respect to the first point, the jurisdictional bar explicitly applies to "any" discretionary decision other than those listed in Section 1252(a)(2)(B)(i), "regardless" of whether it is "made in removal proceedings." 8 U.S.C. 1252(a)(2)(B). And none of the purportedly conflicting circuit decisions cited by petitioner addressed the reviewability of decisions made under Section 1155. See Pet. 4-5. With respect to the second point, as the overwhelming majority of circuits have held, see Pet. 5-6; Pet. App. 22a-23a, Section 1155 contains multiple textual signals sufficient to vest the revocation decision in the Secretary's discretion. See 8 U.S.C. 1155 (providing that the Secretary "may" revoke the approval of an immigrant visa petition "at any time," "for what he deems to be good and sufficient cause"); see also *Kucana* v. *Holder*, 558 U.S. 233, 247 n.13 (2010) (noting that "'may' suggests discretion") (citation omitted). This Court's review of the two questions presented is therefore unwarranted.

Nevertheless, the Court should hold this case pending its decision in *Patel* v. *Garland*, No. 20-979 (argued Dec. 6, 2021). At issue in *Patel* is the scope of the clause that immediately precedes Section 1252(a)(2)(B)(ii). Section 1252(a)(2)(B)(i) insulates from review certain specified forms of discretionary relief, such as adjustment of status. The question presented in *Patel* is

whether that provision bars review of *all* subsidiary determinations underlying a discretionary decision, or rather bars review only of the ultimate, discretionary decision and any subsidiary determinations that are themselves specified to be in the Executive's discretion. Compare Gov't Br. at 15-42, *Patel*, *supra* (No. 20-979), with Court-Appointed Amicus Br. at 22-54, *Patel*, *supra* (No. 20-979). The Court's interpretation of clause (i) in *Patel* may affect the proper interpretation of clause (ii), which this Court has previously recognized as covering "decisions of the same genre, *i. e.*, those made discretionary by legislation." *Kucana*, 558 U.S. at 246-247.

If the Court's decision in *Patel* adopts the broad interpretation that Section 1252(a)(2)(B)(i) bars review of *all* subsidiary determinations underlying a discretionary decision, then it would likely be appropriate to deny the petition for a writ of certiorari in this case. Such a rule would provide no basis for questioning the decision below, which similarly held that factual determinations underlying the Secretary's discretionary decision to revoke approval of an immigrant visa petition are shielded from judicial review. See pp. 2-3, *supra*.

On the other hand, if the Court's decision in *Patel* adopts the narrower interpretation (*i.e.*, that Section 1252(a)(2)(B)(i) bars review of only those discrete determinations that are specified to be in the Secretary's discretion), then it would likely be appropriate to grant the petition for a writ of certiorari in this case, vacate the judgment below, and remand the case for further proceedings. In that scenario, the question on remand would be whether Section 1155 vests the Secretary with discretion over not only the ultimate revocation decision, but also any underlying factual determinations. See 8 U.S.C. 1155 ("The Secretary of Homeland Secu-

rity may, at any time, *for what he deems to be* good and sufficient cause, revoke the approval of any petition.") (emphasis added). The court of appeals did not answer that question in the decision below. If Section 1155 confers discretion over factual determinations, then the court's result was correct even under a narrow reading of Section 1252(a)(2)(B)(ii).

The petition for a writ of certiorari should therefore be held pending this Court's decision in *Patel*, *supra* (No. 20-979), and then disposed of as appropriate in light of that decision.[1]

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

JANUARY 2022

[1] Respondent waives any further response to the petition for a writ of certiorari unless this Court requests otherwise.