No. 04-256

In the Supreme Court of the United States

FELIX ILKECHUKWU ASIKA, PETITIONER

v.

JOHN D. ASHCROFT, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
DIMPLE GUPTA
DONALD E. KEENER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the five-year limitations period that applies to actions by the Attorney General to rescind the erroneous grant of an adjustment of status to an alien, 8 U.S.C. 1256(a), also constrains the Attorney General's authority to commence removal proceedings against an alien, 8 U.S.C. 1229a.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and regulations:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 362 F.3d 264. The order of the Board of Immigration Appeals (Pet. App. 14a-15a) and the opinion of the immigration judge (Pet. App. 16a-26a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 2004. A petition for rehearing was denied on May 24, 2004 (Pet. App. 27a). The petition for a writ of certiorari was filed on August 23, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On April 14, 1979, petitioner entered the United States on a non-immigrant student visa. On May 27, 1981, at approximately the same time that his student visa expired, petitioner married Paula Aliniece, an American citizen. The same year, Aliniece petitioned for a visa on petitioner's behalf, and petitioner simultaneously applied to adjust his status to that of a lawful permanent resident. Pet. App. 2a. Petitioner separated from his wife after two years of marriage. *Id.* at 18a.

On June 16, 1987, while his application for adjustment of status was still pending, petitioner applied to the Immigration and Naturalization Service (INS) for temporary resident status under the 1986 amnesty program.[1] See 8 U.S.C. 1255a (1988). On January 21, 1988, the INS denied his application for temporary status based on petitioner's failure to supply supporting documentation. On February, 17, 1988, petitioner filed an administrative appeal. On June 22, 1989, while the administrative appeal was pending, petitioner filed an application with the INS to adjust his status from temporary resident—a status that he did not possess and that the INS had denied him—to that of a lawful permanent resident. Although petitioner was not in fact a temporary resident when he applied for adjustment of status, the INS erroneously approved petitioner's

[1] On March 1, 2003, the INS ceased to exist as an agency within the Department of Justice and its enforcement functions were transferred to the Department of Homeland Security (DHS). Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135. Because the events at issue in this case predate that reorganization, this brief continues to refer to the INS.

application and granted him the status of a lawful permanent resident. Pet. App. 2a.

On September 21, 1995, six years after the INS had erroneously granted him an adjustment of status, petitioner applied for naturalization. In the course of reviewing petitioner's application for naturalization, the INS discovered that it had erred in granting petitioner's 1989 application for adjustment of status. The INS also discovered that it had not acted on the 1981 visa application filed by petitioner's now-estranged wife or on petitioner's accompanying application for adjustment of status. After efforts to contact petitioner's estranged wife proved unsuccessful, the INS denied her visa petition and petitioner's accompanying application for adjustment of status. On May 13, 1997, the INS denied petitioner's application for naturalization based on: (i) the denials of the 1981 visa application and the accompanying application for adjustment of status, and (ii) the realization that petitioner should not have been granted permanent resident status in 1989. Pet. App. 3a.

2. On August 19, 1997, the INS instituted removal proceedings against petitioner. The INS charged petitioner with being removable as an alien who, "at the time of [his] * * * adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time." 8 U.S.C. 1227(a)(1)(A). In particular, the INS charged that petitioner was inadmissible on two grounds: (i) that his 1989 application for adjustment of status did not include a required certification from the Secretary of Labor, see 8 U.S.C. 1182(a)(5)(A)(i); and (ii) that his application did not include "a valid unexpired immigrant visa," 8 U.S.C. 1181(a)(7)(A)(i)(I). Pet. App. 3a & n.2.

In response, petitioner argued before the immigration judge (IJ) that the INS was barred from removing him because more than five years had passed from the time that the INS had erroneously granted him an adjustment of status. Petitioner based that argument on Section 246(a) of the Immigration and Naturalization Act of 1952 (INA), which states:

> If, at any time within five years after the status of a person has been otherwise adjusted * * * to that of an alien lawfully admitted for permanent residence, it shall appear to the satisfaction of the Attorney General that the person was not in fact eligible for such adjustment of status, the Attorney General shall rescind the action taken granting an adjustment of status to such person and cancelling removal in the case of such person if that occurred and the person shall thereupon be subject to all provisions of this chapter to the same extent as if the adjustment of status had not been made. Nothing in this subsection shall require the Attorney General to rescind the alien's status prior to commencement of procedures to remove the alien under section 1229a of this title, and an order of removal issued by an immigration judge shall be sufficient to rescind the alien's status.

8 U.S.C. 1256(a). Although the terms of that provision impose a five-year limitations period only on actions to "rescind" an erroneous grant of adjustment of status, petitioner argued that the limitations period also applies to actions by the INS to *remove* an alien if the asserted basis for removal is that the alien had received an erroneous adjustment of status. Pet. App. 3a-4a.

On June 23, 1998, the IJ issued an opinion rejecting petitioner's argument. Pet. App. 16a-26a. The IJ relied

on the Attorney General's longstanding position that the five-year limitations period prescribed by Section 246(a) applies only to actions to rescind the grant of an adjustment of status, not to actions to remove the alien. *Id.* at 20a. On the merits, the IJ held that petitioner was subject to removal because he "was not in possession of a valid, unexpired immigrant visa at the time of adjustment of status." *Id.* at 21a. The IJ therefore ordered petitioner removed from the United States. *Id.* at 25a-26a. On February 26, 2003, the Board of Immigration Appeals (BIA) affirmed the IJ's decision without opinion. *Id.* at 14a-15a.

3. The court of appeals affirmed in a per curiam opinion. Pet. App. 1a-13a. The court explained that the Attorney General had long held that Section 246(a)'s five-year limitations period does not apply to deportation or removal proceedings. *Id.* at 8a (citing *In re S—*, 9 I. & N. Dec. 548 (Att'y Gen. 1962)).[2] Accordingly, the court examined whether the Attorney General's interpretation was controlling under the principles of deference prescribed by *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

a. The court first held that Section 246(a) "does not speak directly to the interplay between the Attorney General's authority to rescind an adjustment of status and his authority to deport," and that the provision "provides no express guidance whatsoever on the more narrow question of whether the five-year limitation on rescission actions must also apply to deportation

[2] Before the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, the INA provided separately for "deportation" and "exclusion" of aliens. In IIRIRA, Congress combined the two procedures under the common heading of "removal proceedings." See 8 U.S.C. 1229a.

actions, in those cases where the same grounds that justify deportation would also support rescission of status." Pet. App. 9a. The court rejected petitioner's argument that the Attorney General's interpretation effectively nullified Section 246(a) by permitting rescission of an alien's status through removal proceedings despite the lapse of the five-year period. The court explained that Section 246(a)'s "five-year limitation on rescission actions plays an important, if limited, role" under the Attorney General's construction, because, insofar as the INA itself is concerned, "rescission proceedings are subject to few, if any, procedural protections," see 8 U.S.C. 1256, whereas "deportation proceedings * * * are subject to extensive procedural regulations set forth in" the INA, 8 U.S.C. 1229a. Pet. App. 10a. Section 246(a) therefore "provides an important safeguard to aliens like [petitioner], who have been in the country for more than five years after their status has been erroneously adjusted, by forcing the Attorney General to establish their deportability through the more rigorous procedures of removal * * * rather than the less procedurally-onerous process of rescission." *Ibid.*

b. The court next held that the Attorney General's interpretation of Section 246(a) is reasonable. Pet. App. 11a-13a. The court explained that "the extension of section 246(a)'s five-year limitation to deportation proceedings would create an apparent anomaly," because it would "limit[] to five years the Attorney General's authority to deport those aliens who received lawful permanent residence status through adjustment, but not those who gained such status upon entering the country." *Id.* at 12a. The court found that it was "not unreasonable for the Attorney General to read the [INA] to avoid such disparate treatment of aliens."

Ibid. The court also determined that it was "entirely reasonable for the Attorney General to interpret the statute to have limited his ability to utilize the less formal rescission process to the five-year period after an alien has received an adjustment, but not to have placed such a limitation on his ability to effect removal proceedings." *Id.* at 12a-13a.

ARGUMENT

Although the opinion of the court of appeals conflicts with a previous decision of the Third Circuit, *Bamidele* v. *INS*, 99 F.3d 557 (1996), this Court's review is unwarranted. The issue has not arisen with sufficient frequency to merit this Court's exercise of discretionary review, the court of appeals' opinion in this case is correct, and the Third Circuit's contrary opinion predated intervening statutory amendments that fortify the inapplicability of Section 246(a)'s five-year limitations period to removal proceedings.

1. a. The court of appeals correctly held that Section 246(a)'s five-year limitations period does not apply to removal proceedings. Before Congress's enactment of the INA in 1952, the statutes governing deportation of aliens prescribed a five-year limitations period within which to initiate deportation proceedings from the time that the alien became deportable. See *Oloteo* v. *INS*, 643 F.2d 679, 682-683 & n.7 (9th Cir. 1981). When Congress enacted the INA in 1952, Congress eliminated any limitations period from the provisions governing deportation proceedings. See *ibid.*; 8 U.S.C. 1251 (1988). Congress also, however, separately provided for the first time in Section 246(a) for actions by the Attorney General to rescind the erroneous grant of an adjustment of status to an alien, and Congress specified in that provision that the newly-instituted rescission

authority was subject to a five-year limitations period. 8 U.S.C. 1256(a).

The Attorney General soon determined that the five-year limitations period for rescission actions did not apply to deportation proceedings. *In re S—*, 9 I. & N. Dec. 548 (Att'y Gen. 1962). The Attorney General explained that a contrary reading would entail the anomalous conclusion that aliens who initially enter the country as nonimmigrants and subsequently become lawful permanent residents through an adjustment of their status while in the United States would be immune from deportation after the lapse of the five-year period, whereas aliens who initially enter the country as lawful permanent residents would be subject to deportation at any future time, with no five-year limitation. *Id.* at 553-554; see 8 U.S.C. 1256(a) (applying limitations period where status as lawful permanent resident results from "adjustment of status").

The Attorney General recognized that the five-year limitations period for rescission actions "may be of little practical value" to many aliens because, even if an alien were insulated from rescission of status after the five-year period, "the same conduct nevertheless [could] be utilized independently as a ground for his deportation or exclusion." *In re S—*, 9 I. & N. Dec. at 555.[3] The Attorney General reasoned in that regard that the "rescission procedure apparently resulted from congressional recognition that a means more informal and expeditious than deportation was needed to correct mistakes made

[3] In certain situations, the rescission of an erroneous grant of adjustment of status would not result in removal, as where the alien, at the time of rescission, maintains lawful residence in the United States on an unexpired student or worker visa, and the alien thereafter validly obtains an adjustment of status.

in granting permanent residence to nonimmigrants through adjustment of status, "because experience had "shown that such mistakes were more likely to occur where eligibility for permanent resident status was determined by government officers located in the United States who did not ordinarily have the first-hand information available to American consuls located in a prospective immigrant's native country." *Id.* at 555 n.8. Accordingly, the Attorney General concluded that "the significance which Congress attached to the five-year limitation was that it cut off the availability of a procedure which, although to all intents and purposes would establish deportability, *permitted* the Attorney General to act more informally and expeditiously than he could in a deportation proceeding." *Ibid.*[4]

Ever since the 1962 decision in *In re S—*, the Attorney General has adhered to the view that Section 246(a)'s limitations period for rescissions does not bar commencement of removal proceedings beyond the five-year period, including in those cases where the grounds for removing the alien would also have been grounds for rescission in a timely rescission action. See *In re Belenzo*, 17 I. & N. Dec. 374 (Att'y Gen. 1981). In cases in which the INS sought to deport such an alien

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[4] The Attorney General noted "in passing that while Congress may have *permitted* the Attorney General to make use of more informal procedures in rescission, in practice under the governing regulation there is little difference between the safeguards afforded an alien in deportation and that afforded him in rescission." 9 I. & N. Dec. at 556 n.8 (citing 8 C.F.R. 246.12(a) and (b) (1962)); see Pet. App. 10a n.7 ("That the *INS* has chosen *in its discretion* to provide additional procedural protections to aliens in rescission proceedings reveals nothing about whether Congress relied on the *statutory* disparity in procedures for rescission and removal in enacting section 246(a)."). See generally 8 C.F.R. Pt. 246.

within five years of the erroneous grant of an adjustment of status, however, the INS was required (until the IIRIRA's amendments to Section 246(a) became effective in 1997, see pp. 11-12, *infra*) to rescind the alien's status before commencing deportation proceedings. See *Choe* v. *INS*, 11 F.3d 925, 928-929 n.4 (9th Cir. 1993); *In re Saunders*, 16 I. & N. Dec. 326 (BIA 1977).

The Attorney General's conclusion that Section 246(a) does not bar commencement of removal proceedings beyond the five-year period is entitled to deference under the principles articulated by this Court in *Chevron*. Petitioner argues (Pet. 18-19) that the Attorney General's interpretation is not entitled to deference because "[s]tatutes of limitation and the policies underlying them are matters squarely within the competence of the judiciary." That argument was correctly rejected by the court of appeals. See Pet. App. 11a-12a n.8. Deference is appropriate here because the interpretation of the limitations period in Section 246(a) directly affects the agency's execution of the INA. Section 246(a) does not pertain to the time period within which an alien aggrieved by agency action can seek *judicial* review, but it instead relates to time period within which the *agency* itself can carry out its responsibilities under the INA by conducting removal proceedings. Congress has committed the adjudication of such matters under the statutory scheme to the Attorney General, and *Chevron* deference therefore applies. See *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424- 425 (1999); compare *Adams Fruit Co.* v. *Barrett*, 494 U.S. 638, 649-650 (1990) (declining to defer to agency's interpretation concerning availability of private right of action in court to enforce Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. 1854, because statute vests judiciary

rather than agency with authority to adjudicate private right of action).

b. As part of IIRIRA's revisions to the INA that became effective in 1997, Congress amended Section 246(a) in a manner that makes clear that rescissions under that provision are wholly distinct from removal proceedings under 8 U.S.C. 1229a. In particular, IIRIRA added a sentence to Section 246(a) that directs: "Nothing in this subsection shall require the Attorney General to rescind the alien's status prior to commencement of procedures to remove the alien under section 240 of this title, and an order of removal issued by an immigration judge shall be sufficient to rescind the alien's status." IIRIRA § 378, 110 Stat. 3009-649; see 12 U.S.C. 1256(a). The amendment makes clear that the Attorney General may commence removal proceedings without regard to whether the alien's status has been rescinded (including, contrary to the preexisting rule, see *Choe*, 11 F.3d at 928 n.4, where removal proceedings are initiated within the five-year limitations period for rescissions).

Petitioner errs in focusing exclusively (Pet. 8, 12, 19-20) on the portion of the added language stating that an "order of removal" is "sufficient to rescind the alien's status," 8 U.S.C. 1256(a), which petitioner mistakenly reads to suggest that Congress intended to require identical treatment of rescissions and removals with respect to the five-year limitations period. Contrary to petitioner's understanding, however, the language on which petitioner relies simply makes clear that a removal order is sufficient to effect a rescission of status notwithstanding the absence of a distinct rescission action, thereby reconfirming the preceding language directing that "[n]othing in this subsection" requires the Attorney General "to rescind the alien's status

prior to commencement of procedures to remove the alien." *Ibid.* And because IIRIRA makes explicit that the Attorney General is not required to rescind the alien's status before commencing removal proceedings, it follows that the lapse of the limitations period for rescissions does not constrain the Attorney General's authority to initiate removal proceedings. This conclusion thus confirms the Attorney General's longstanding interpretation, formally announced in 1962. Surely if Congress had meant to overturn that longstanding interpretation, as petitioner maintains, it would have expressly so provided.[5]

2. The Third Circuit concluded in *Bamidele* v. *INS*, 99 F.3d 557 (1996), that the INS was barred from initiating deportation proceedings against an alien after the lapse of Section 246(a)'s five-year limitations period where the grounds for deporting the alien relate solely to the erroneous grant of an adjustment of status. That result conflicts with the result below and with the Ninth Circuit's decision in *Monet* v. *INS*, 791 F.2d 752, 754 (1986). Further review is nonetheless unwarranted.

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[5] For another reason as well, petitioner errs in relying on the language stating that "an order of removal issued by an immigration judge shall be sufficient to rescind an alien's status." 8 U.S.C. 1256(a). Petitioner's reading would require concluding not merely that removal proceedings must be *commenced* before the lapse of the five-year limitations period, but that an IJ must have "issued" an "order of removal" within the five-year period. *Ibid.*; see Pet. 12-13 & n.9. Congress could not have intended to permit the Attorney General to rescind an alien's status as long as the Attorney General noted the error within the five-year period, but nevertheless to bar the Attorney General from removing the alien unless an IJ has already issued a removal order within the five-year period.

a. As an initial matter, the question of the applicability of the five-year limitations period for rescissions in Section 246(a) to the context of removal proceedings has not recurred with frequency. The issue arises only where: (i) there has been an erroneous adjustment of status, (ii) the sole grounds for removal relate to the erroneous adjustment of status, and (iii) the removal is sought beyond the five-year limitations period for rescinding the adjustment of status. The issue has been squarely implicated in four courts of appeals' opinions —the decision below, the Third Circuit's decision in *Bamidele*, and the Ninth Circuit's decisions in *Monet*, 791 F.2d at 754, and *Biggs* v. *INS*, 55 F.3d 1398, 1401 & n.3 (1995). In the government's experience, the issue has not arisen with frequency in administrative proceedings. Two reported administrative rulings squarely raise the issue. See *In re S—*, 9 I. & N. Dec. at 548; *In re Belenzo*, 17 I & N. Dec. at 374.

b. In addition, the Third Circuit's decision in *Bamidele*—the only court to reach a result contrary to the opinion below—was issued before IIRIRA's amendments to Section 246(a) explicitly prescribed that the Attorney General is not required to rescind an alien's status before commencing removal proceedings. It is unclear whether the Third Circuit would reach the same result after those amendments. Indeed, the Third Circuit specifically observed that it was "express[ing] no opinion as to whether" any "subsequent amendments to the Act" (the INA) "would make someone in Bamidele's position deportable." 99 F.3d at 565.[6]

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[6] The Third Circuit issued its decision on November 1, 1996. The IIRIRA's amendments to Section 246(a) became effective on April 1, 1997.

The Third Circuit's reasoning in *Bamidele* indicates that IIRIRA's amendments to Section 246(a) might cause the court to reconsider its conclusion in that case. The alien in *Bamidele* argued that "proceedings to rescind the adjustment of status granted him by the INS are a prerequisite to initiating deportation proceedings." 99 F.3d at 562. The Third Circuit agreed with that argument, reasoning that, "where deportation is based on an attack on the adjustment itself, as here," the adjustment "must be attacked directly, and within the 5 years." *Id.* at 564 (internal quotation marks omitted). That reasoning is directly contradicted by IIRIRA's amendments to Section 246(a), which specifically establish that rescission is *not* a prerequisite to removal proceedings. See 8 U.S.C. 1256(a). As a result, even if the question presented by this case otherwise merited this Court's review, it is not clear that the Third Circuit now would continue to adhere to the position it adopted in *Bamidele*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General

PETER D. KEISLER
Assistant Attorney General

DIMPLE GUPTA
DONALD E. KEENER
Attorneys

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