

No. 10-920

In the Supreme Court of the United States

ANA ROSA OCHOA, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly rejected petitioner's challenge to the Board of Immigration Appeals' denial of her motion to reopen immigration proceedings.

(I)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 604 F.3d 546. The opinion of the Board of Immigration Appeals (Pet. App. 28a-30a) denying petitioner's motion to reopen is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 15a) was entered on May 5, 2010. A petition for rehearing was denied on September 20, 2010 (Pet. App. 18a-19a). On December 6, 2010, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including January 18, 2011, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, the Attorney General, in his discretion, may cancel the removal of an alien who is found to be removable. 8 U.S.C. 1229b (2006 & Supp. III 2009). The discretion of the Attorney General to grant relief from removal is akin to “a judge’s power to suspend the execution of a sentence, or the President’s to pardon a convict.” *INS v. Yueh-Shaio Yang*, 519 U.S. 26, 30 (1996) (citation omitted). To obtain cancellation of removal, the alien must demonstrate both that she is statutorily eligible for such relief and that she warrants a favorable exercise of discretion. See, *e.g.*, *Guled v. Mukasey*, 515 F.3d 872, 879-880 (8th Cir. 2008). The alien bears the burden of proving eligibility for cancellation of removal. 8 U.S.C. 1229a(c)(4)(A)(i); 8 C.F.R. 1240.8(d).

To demonstrate statutory eligibility for cancellation of removal, an alien who is not a lawful permanent resident must show that she has been physically present in the United States for a continuous period of at least ten years; that she has been a person of good moral character during that period; that she has not been convicted of certain listed crimes; and (as particularly relevant here) “that removal would result in exceptional and extremely unusual hardship to the alien’s spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.” 8 U.S.C. 1229b(b)(1). To demonstrate “exceptional and extremely unusual hardship,” the alien must show that the hardship to a qualifying relative is “substantially beyond the ordinary hardship that would be expected when a close family member leaves this country.” *In re Monreal-*

Aguinaga, 23 I. & N. Dec. 56, 62 (B.I.A. 2001) (internal quotation marks omitted).

In addition to satisfying the statutory eligibility requirements, an applicant for cancellation of removal must establish that she warrants such relief as a matter of discretion. *In re C-V-T-*, 22 I. & N. Dec. 7 (B.I.A. 1998). Whether an applicant warrants discretionary cancellation of removal is a case-specific determination made by “balanc[ing] the adverse factors evidencing the alien’s undesirability as a permanent resident with the social and humane considerations presented in his [or her] behalf to determine whether the granting of . . . relief appears in the best interest of this country.” *Id.* at 11 (quoting *In re Marin*, 16 I. & N. Dec. 581, 584 (B.I.A. 1978)).

b. An alien may file a motion to reopen removal proceedings based on previously unavailable, material evidence. 8 U.S.C. 1229a(c)(7)(B); 8 C.F.R. 1003.2(c). Such a motion is to be filed with the immigration judge (IJ) or the Board of Immigration Appeals (Board), depending upon which was the last to render a decision in the matter. 8 C.F.R. 1003.2(c) (Board), 1003.23(b) (IJ). The alien must “state the new facts that will be proven at a hearing to be held if the motion is granted” and must support the motion “by affidavits or other evidentiary material.” 8 U.S.C. 1229a(c)(7)(B); 8 C.F.R. 1003.2(c)(1), 1003.23(b)(3). When the motion to reopen is filed with the Board, it “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.” 8 C.F.R. 1003.2(c)(1); see 8 C.F.R. 1003.23(b)(3) (IJ). An alien is entitled to file only one such motion to reopen, and it generally must be filed within 90 days of entry of the

final order of removal. 8 U.S.C. 1229a(c)(7)(A) and (C)(i); 8 C.F.R. 1003.2(c)(2), 1003.23(b)(1).

Motions to reopen removal proceedings are “disfavored” because “[t]here is a 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 * * * cases.” *INS v. Abudu*, 485 U.S. 94, 107 (1988). The IJs and the Board have discretion in adjudicating a motion to reopen, and they may “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) (Board); see 8 C.F.R. 1003.23(b)(3) (IJs); see also *INS v. Doherty*, 502 U.S. 314, 323 (1992).

The IJ or the Board may reopen an alien’s case *sua sponte* at any time. 8 C.F.R. 1003.2(a) (“The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision.”), 1003.23(b)(1) (similar for IJ). The Board “invoke[s] [its] *sua sponte* authority sparingly, treating it not as a general remedy for any hardships created by enforcement of the time and number limits in the motions regulations, but as an extraordinary remedy reserved for truly exceptional situations.” *In re G-D-*, 22 I. & N. Dec. 1132, 1133-1134 (B.I.A. 1999).

2. Petitioner is a native and citizen of Mexico. Pet. App. 2a. She entered the United States illegally in December 1991. *Ibid.*; Administrative Record (A.R.) 285. She has two United States citizen children and one child who was born in Mexico. A.R. 244.

In 2004, U.S. Immigration and Customs Enforcement (ICE) charged petitioner with being removable as an alien present in the United States without having been admitted or paroled. A.R. 414-415; see 8 U.S.C.

1182(a)(6)(A)(i). Petitioner conceded removability but sought cancellation of removal under 8 U.S.C. 1229b(b)(1) and voluntary departure under 8 U.S.C. 1229c. See Pet. App. 2a; A.R. 256, 269, 322-328.

After a hearing, the IJ determined that petitioner was removable as charged, denied her application for discretionary cancellation of removal, and granted her application for voluntary departure. A.R. 243-250. The IJ determined that petitioner is ineligible for cancellation of removal because she failed to show that her removal would result in “exceptional and extremely unusual hardship” to her two United States citizen children, a prerequisite under 8 U.S.C. 1229b(b)(1)(D). A.R. 246-247.

The IJ explained that “cancellation of removal is an extraordinary form of relief not intended by Congress for most alien[s] who find themselves in removal proceedings,” and that the “exceptional and extremely unusual hardship” standard requires the applicant to demonstrate that her qualifying relative “would suffer hardship that is substantially beyond that which would ordinarily be expected to result from the alien’s deportation.” A.R. 246-247 (citing, *inter alia*, *In re Monreal-Aguinaga*, *supra*). In this case, the IJ continued, although petitioner “asserted that her son, Guillermo, was found to have high levels of lead” at age two and that “he receives counseling at his school for learning disabilities,” she “has not submitted any evidence to either corroborate these assertions or to develop them as exceptional and extremely unusual hardship factors.” A.R. 248. The IJ noted that “[t]he record does not establish that these conditions are new or that corroborative evidence could not have been previously obtained.” *Ibid.* (footnote omitted). Finally, the IJ observed that peti-

tioner did not present “any evidence regarding economic, political or social conditions in Mexico” to support her hardship claim, or evidence to show that the emotional or psychological impact of petitioner’s departure on her qualifying relatives would constitute exceptional and extremely unusual hardship. A.R. 248-249. Considering the hardship factors “cumulatively,” the IJ concluded that the hardship caused by petitioner’s removal would not exceed the normal economic and social disruptions involved when any alien is removed. A.R. 249.

The IJ then granted petitioner’s application for voluntary departure, informing petitioner that she would be required to depart the United States by March 10, 2006, and if she did not, she “would not be eligible for certain forms of relief under the Immigration Law”—including “cancellation of removal”—“for 10 years.” A.R. 249-250, 312.

3. The Board dismissed petitioner’s appeal. A.R. 198-199. The Board “agree[d]” with the IJ that petitioner was ineligible for cancellation of removal “because she failed to show that her removal would result in exceptional and extremely unusual hardship to her qualifying relatives, namely her two United States citizen children.” A.R. 198. The Board determined that petitioner’s evidence of hardship “falls short of the exceptional and extremely unusual standard set forth * * * in the [INA].” *Ibid.* The Board also rejected petitioner’s argument that the IJ should have continued the case so she could submit additional evidence of hardship, explaining that the IJ “correctly determined that [petitioner] had been given ample time to present evidence of any health conditions.” *Ibid.* Indeed, the Board noted that “even now on appeal, [petitioner] has provided

no evidence in support of her contention” that her son would suffer hardship because of health conditions. *Ibid.*

The Board then observed that petitioner had been granted voluntary departure, and informed her that she was required to voluntarily depart the United States within 60 days of the Board’s order, and that if she failed to so depart, she would “be ineligible for a period of 10 years for any further relief under” the INA, including cancellation of removal. A.R. 198-199. To the best of the government’s knowledge, petitioner has not voluntarily departed the United States.

4. Petitioner did not seek judicial review of her final removal order. Instead, she filed a motion to reopen proceedings with the Board, contending that her previous attorney had rendered ineffective assistance by failing to obtain and present evidence corroborating her claims about her son’s lead poisoning. Pet. App. 22a-27a. Although petitioner filed her motion to reopen within 90 days of the Board’s order, her motion did not cite the standards for motions to reopen based on new, material, and previously unavailable evidence, 8 U.S.C. 1229a(c)(7)(B), 8 C.F.R. 1003.2(c)(1); instead, it requested that the Board reopen her case “on their own motion to Reopen” under 8 C.F.R. 1003.2(a). Pet. App. 22a.

The Board denied the motion. Pet. App. 28a-30a. In response to petitioner’s argument that “information regarding her son’s lead poisoning should have been included in the original submission by her attorney,” the Board noted that petitioner herself “admitted that she did not think the lead poisoning was necessary to her case and therefore, she did not say anything to her attorney about it.” *Id.* at 29a. Further, the Board ex-

plained, the documents petitioner submitted with her motion to reopen “indicate that [her son’s] lead levels have diminished and at the last lead level reading in 2002, his levels were in the normal range.” *Ibid.* Accordingly, the Board determined that petitioner failed to show that her prior attorney was ineffective. *Ibid.*

In addition, the Board noted that the documents petitioner sought to present in support of her application for cancellation of removal did not constitute new evidence that was “unavailable or could not have been discovered or presented at her former hearing,” Pet. App. 30a, and that petitioner therefore failed to meet the prerequisites for reopening under *In re Coelho*, 20 I. & N. Dec. 464 (B.I.A. 1992). Pet. App. 29a-30a.

5. The court of appeals dismissed petitioner’s petition for review. Pet. App. 1a-14a. The court noted that, on its face, it was not clear whether petitioner’s motion to reopen was seeking reopening on the basis of “new, material and previously unavailable evidence” under 8 C.F.R. 1003.2(c), or *sua sponte* reopening, *i.e.*, reopening on the Board’s own motion under 8 C.F.R. 1003.2(a). Pet. App. 6a. The court noted that the Board appeared to treat the motion as a timely motion seeking reopening based on new evidence, although it ultimately found the Board’s treatment to be “unclear.” *Ibid.* Reviewing petitioner’s filing itself, the court determined that it sought *sua sponte* reopening, not reopening based on new evidence, because it cited 8 C.F.R. 1003.2(a), which addresses *sua sponte* reopening, and specifically “requested that the [Board] reopen ‘on their own motion.’” Pet. App. 6a; see *id.* at 8a.

Because petitioner sought *sua sponte* reopening, the court determined that it lacked jurisdiction to review the Board’s decision. Pet. App. 6a-8a. Relying on its prior

decision in *Tamenut v. Mukasey*, 521 F.3d 1000 (8th Cir. 2008) (per curiam) (en banc), the court held that the Board’s decision whether to exercise its discretionary authority to reopen proceedings *sua sponte* under 8 C.F.R. 1003.2(a) “is committed to agency discretion by law” under the Administrative Procedure Act, 5 U.S.C. 701(a)(2). Pet. App. 6a-7a (quoting *Tamenut*, 521 F.3d at 1005). The court explained that “there is no law to apply” because the court has no meaningful standard against which to judge the agency’s exercise of discretion, and *sua sponte* reopening is therefore unreviewable by the courts of appeals. *Id.* at 7a-8a (citing *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)).

In the alternative, the court of appeals held that even if it could review the Board’s denial of petitioner’s motion to reopen, it would “dismiss nonetheless” because the Board “acted within its discretion” in finding that petitioner “failed to meet her heavy burden and in denying her motion to reopen.” Pet. App. 8a n.4 (internal quotation marks omitted).

Judge Colloton concurred in part and dissented in part, stating that he would treat petitioner’s motion as a timely motion seeking reopening based on new evidence, rather than a motion seeking *sua sponte* reopening, and that he would hold that the Board abused its discretion in denying the motion. Pet. App. 8a-14a.

6. Petitioner sought panel rehearing and rehearing en banc, which the court of appeals denied. Pet. App. 16a-17a, 19a.

ARGUMENT

Petitioner contends (Pet. 15-34) that the court of appeals erred in dismissing her challenge to the Board’s denial of her motion to reopen. The court of appeals’

decision is correct, and it does not conflict with any decision of this Court or of another court of appeals. In any event, this case would present a poor vehicle to consider the questions presented, because petitioner's failure to depart the United States voluntarily means that she likely cannot obtain the relief she ultimately seeks—discretionary cancellation of removal. Further review is therefore unwarranted.

1. The court of appeals correctly rejected petitioner's challenge to the Board's denial of her motion to reopen. The court held that it could not review a Board determination not to reopen a case *sua sponte*, Pet. App. 6a-8a, and that even if it could review the denial of petitioner's motion, the Board's decision was not an abuse of discretion because petitioner failed to justify reopening, *id.* at 8a n.4. The court was understandably uncertain about how to characterize petitioner's motion to reopen. Although the motion was timely filed, petitioner specifically requested (*id.* at 22a) that the Board reopen her case "on their own motion" under 8 C.F.R. 1003.2(a), which provides that "[t]he Board may at any time reopen or reconsider *on its own motion* any case in which it has rendered a decision." Petitioner did not cite the statutory or regulatory provisions addressing timely motions to reopen, see 8 U.S.C. 1229a(c)(7)(B); 8 C.F.R. 1003.2(c)(1), and she did not attempt to explain how she met the standards for reopening set out in those provisions, *i.e.*, that she provided new, material evidence that was previously unavailable. Under those circumstances, the court of appeals took petitioner at her word, treated her motion as a request for *sua sponte* reopening, and then held (based on settled precedent) that the Board's denial of *sua sponte* reopening is unreviewable.

Whether petitioner’s motion filing with the Board is construed as a request for *sua sponte* reopening under 8 C.F.R. 1003.2(a) or a motion seeking reopening based on new, material, and previously unavailable evidence under 8 C.F.R. 1003.2(c), the court of appeals’ decision is correct.

a. To the extent that petitioner’s filing is understood as having sought *sua sponte* reopening, the court correctly held that the Board’s denial of *sua sponte* reopening is not judicially reviewable. Relying on its prior en banc opinion in *Tamenut v. Mukasey*, 521 F.3d 1000 (8th Cir. 2008) (per curiam), the court explained that the decision whether to reopen removal proceedings *sua sponte* is unreviewable because it is committed to the Board’s discretion by law. Pet. App. 6a. As the court explained, under the Administrative Procedure Act, judicial review is not available when “agency action is committed to agency discretion by law,” 5 U.S.C. 701(a)(2), and that is true with respect to *sua sponte* reopening, because the decision whether to reopen a case is entirely discretionary and there are no meaningful standards or guidelines to review the Board’s decision. Pet. App. 6a-8a; see *Tamenut*, 521 F.3d at 1003 (explaining that “review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency’s exercise of discretion” (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985))). Furthermore, unlike the statutory and regulatory provisions allowing an alien to file one motion to reopen, the regulation permitting the Board to reopen a case on its own motion establishes a procedural mechanism for the Board itself in aid of its own internal administration. It does not confer any privately enforceable rights on an alien. See *Lenis v. United States Att’y Gen.*, 525 F.3d

1291, 1294 (11th Cir. 2008) (the regulation permitting *sua sponte* reopening “merely provides the [Board] the discretion to reopen immigration proceedings as it sees fit”) (citation omitted). Accordingly, the Board’s decision whether to reopen proceedings *sua sponte* is committed to agency discretion by law and is not reviewable by a court.

Petitioner contends (Pet. 11-12, 21-25) that the court of appeals’ holding that Board determinations not to reopen a case on its own motion are unreviewable cannot be reconciled with this Court’s recent decision in *Kucana v. Holder*, 130 S. Ct. 827, 834 (2010). She is mistaken, because *Kucana* did not address judicial review of a denial of *sua sponte* reopening. The question in *Kucana* was one of statutory interpretation: whether 8 U.S.C. 1252(a)(2)(B)(ii), which states that no court shall have jurisdiction to review any action of the Attorney General “the authority for which is specified under this subchapter to be in the discretion of the Attorney General,” applies to actions the discretionary authority for which is specified in *regulations*, rather than the relevant statutory subchapter. 130 S. Ct. at 831. The Court concluded that Section 1252(a)(2)(B)(ii) does not bar judicial review of determinations that are made discretionary by regulation, such as determinations on an alien’s motion to reopen. *Id.* at 836-837.

In the decision below, the reviewability of the Board’s decision did not depend on Section 1252(a)(2)(B)(ii), the statutory provision at issue in *Kucana*. Instead, the court of appeals held that the Board’s decision not to reopen a case *sua sponte* is unreviewable because it is committed to agency discretion by law, an issue that was not addressed in *Kucana*. Pet. App. 6a-8a. Indeed, the *Kucana* Court specifically

stated that it “express[ed] no opinion on whether federal courts may review the Board’s decision not to reopen removal proceedings *sua sponte*,” although it did note that eleven courts of appeals had held that “such decisions are unreviewable because *sua sponte* reopening is committed to agency discretion by law.” 130 S. Ct. at 839 n.18 (citing *Tamenut*, 521 F.3d at 1003-1004). Contrary to petitioner’s contention (Pet. 22), *Kucana*’s “logic” does not lead to the conclusion that denials of *sua sponte* reopening are reviewable, because that question turns on whether the regulations confer private rights and whether there are meaningful standards to guide agency decisionmaking, while the issue in *Kucana* was one of the interpretation of the language of a statutory provision, 8 U.S.C. 1252(a)(2)(B)(ii).

Petitioner suggests (Pet. 2) that even if decisions not to reopen *sua sponte* generally are unreviewable because they are committed to agency discretion by law, her challenge to the Board’s denial of reopening turns on “application of familiar * * * legal standards concerning ineffective assistance of counsel.” Petitioner did not present that argument to the court of appeals, and this Court should not consider it in the first instance. Petitioner did not address the reviewability of denials of *sua sponte* reopening in her brief to the court of appeals, and her petition for rehearing argued only that her motion was not one seeking *sua sponte* reopening; that the Board abused its discretion in denying her motion to reopen; and that the court’s holding that denials of *sua sponte* reopening are unreviewable is inconsistent with *Kucana*. C.A. Pet. for Reh’g 6-15. Notably, petitioner did not argue that there is an exception to the general rule that decisions not to reopen *sua sponte* are unreviewable when the challenge involves the “application of

familiar * * * legal standards.” Accordingly, this case raises no issue about exceptions to the general rule that denials of *sua sponte* reopening are unreviewable.¹

b. Alternatively, if petitioner’s motion to reopen is treated as a timely filed motion to reopen based on new, material, and previously unavailable evidence under 8 C.F.R. 1003.2(c), the court’s decision also would be correct. That is because the court held in the alternative that the Board did not abuse its broad discretion in denying the motion to reopen since petitioner failed to

¹ In any event, petitioner is mistaken in suggesting there is such an exception to the general rule. It is true that the INA defines certain limitations on judicial review in 8 U.S.C. 1252(a)(2)(A)-(C)—such as the limitation at issue in *Kucana*—and then provides in 8 U.S.C. 1252(a)(2)(D) that “[n]othing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review.” Petitioner does not rely on Section 1252(a)(2)(D) in her petition, but it would not aid her in any event. Section 1252(a)(2)(D) does not apply here by its plain text. It provides a rule of construction for certain provisions of the INA that “limit[] or eliminate[] judicial review.” 8 U.S.C. 1252(a)(2)(D). Board determinations not to reopen *sua sponte* are not made unreviewable due to a provision in Section 1252(a) or elsewhere in the relevant chapter of the United States Code. Instead, they are unreviewable as committed to agency discretion by law, both because the regulations allowing the Board to reopen or reconsider a case on its *own* motion create no privately enforceable right, and because there are no judicially manageable standards to evaluate the agency’s exercise of its own internal discretion. See pp. 11-12, *supra*.

Even assuming that Section 1252(a)(2)(D) applies to matters that are committed to agency discretion by law, petitioner does not raise any colorable legal issue. Her disagreement with the Board is not one about the meaning of a statute or regulation; instead, she quarrels with the Board’s application of legal standards to the facts of her particular case. See, e.g., *Higuít v. Gonzales*, 433 F.3d 417, 420 (4th Cir.), cert. denied, 548 U.S. 906 (2006).

meet her heavy burden of demonstrating that she suffered prejudice as a result of the acts or omissions of her previous counsel. Pet. App. 8a n.4.

It is well-established that the denial of a timely motion for reopening is reviewed for abuse of discretion. See, e.g., *Kucana*, 130 S. Ct. at 834; *INS v. Doherty*, 502 U.S. 314, 323 (1992). “An abuse of discretion occurs if a decision is without rational explanation, departs from established policies, invidiously discriminates against a particular race or group, or where the agency fails to consider all factors presented by the alien or distorts important aspects of the claim.” *Feleke v. INS*, 118 F.3d 594, 598 (8th Cir. 1997).

The Board did not abuse its discretion in concluding that petitioner failed to demonstrate ineffective assistance of counsel that prejudiced her case. The Board reviewed the evidence petitioner presented and concluded that she suffered no prejudice. Petitioner herself admitted that “she did not think the lead poisoning issue was necessary to her case” and that “she did not say anything to her attorney about it.” Pet. App. 29a. Further, after the IJ denied her claim of exceptional and extremely unusual hardship, petitioner did not augment the record with documentation that would support her claim. A.R. 198 (noting that “[e]ven now on appeal, [petitioner] has provided no evidence in support of her contention”). As the Board explained, the documents petitioner submitted with her motion to reopen did not show the requisite hardship; indeed, those documents showed that her son’s “lead levels have diminished and at the last lead level reading in 2002, his levels were in the normal range.” Pet. App. 29a. Further, even if those documents had substantiated her son’s medical issues, petitioner did not show that her son would suffer “excep-

tional and extremely unusual hardship” if she were removed, 8 U.S.C. 1229b(b)(1)(D), by, for example, demonstrating that taking her son to Mexico would exacerbate his medical issues, or that his learning disabilities could not be addressed in Mexican schools. Although petitioner alleged that she was prejudiced by her attorney’s failure to present such evidence in her motion to reopen, Pet. App. 26a, she did not substantiate that claim. Because petitioner did not demonstrate a reasonable probability that she would have received cancellation of removal if her former counsel had submitted the evidence at her hearing, the Board did not abuse its discretion in denying the motion to reopen. See *Obleshchenko v. Ashcroft*, 392 F.3d 970, 972 (8th Cir. 2004).

c. Petitioner asserts (Pet. 34) that the court of appeals’ construction of her filing with the Board as a request that the Board’s exercise its *sua sponte* reopening authority is not plausible. This contention is open to debate, given that petitioner invoked the Board’s *sua sponte* authority and cited 8 C.F.R. 1003.2(a), rather than the provisions governing a motion based on new, material, and previously unavailable evidence, 8 U.S.C. 1229a(c)(7)(B) and 8 C.F.R. 1003.2(c)(1). (Indeed, even the judge who believed the Board’s decision was reviewable characterized petitioner’s motion as “not clear” and “grammatically incoherent.” Pet. App. 10a (Colloton, J., concurring in part and dissenting in part).) But it ultimately does not matter, because the court of appeals considered both possible constructions of petitioner’s submission, and its decision to uphold the Board’s denial of reopening is correct. As petitioner herself acknowledges (Pet. 30), the court of appeals “stated that it would have reached the same result even if” petitioner’s motion were properly characterized as

one seeking reopening for new, material, previously unavailable evidence under 8 C.F.R. 1003.2(c).

2. Contrary to petitioner’s contention (Pet. 15-30), the decision below does not conflict with any decisions from other circuits regarding whether denials of *sua sponte* are judicially unreviewable. The courts of appeals have uniformly held that denials of *sua sponte* reopening are not reviewable. Indeed, in *Tamenut*, the Eighth Circuit joined the “[t]en courts of appeals” that had found “no meaningful standard against which to judge the agency’s exercise of discretion” and had “held that the BIA’s decision whether to reopen proceedings on its own motion is committed to agency discretion by law.” 521 F.3d at 1004 (citing *Luis v. INS*, 196 F.3d 36, 40 (1st Cir. 1999); *Ali v. Gonzales*, 448 F.3d 515, 518 (2d Cir. 2006) (per curiam); *Calle-Vujiles v. Ashcroft*, 320 F.3d 472, 474-475 (3d Cir. 2003); *Doh v. Gonzales*, 193 Fed. Appx. 245, 246 (4th Cir. 2006) (per curiam); *Enriquez-Alvarado v. Ashcroft*, 371 F.3d 246, 248-250 (5th Cir. 2004); *Harchenko v. INS*, 379 F.3d 405, 410-411 (6th Cir. 2004); *Pilch v. Ashcroft*, 353 F.3d 585, 586 (7th Cir. 2003); *Ekimian v. INS*, 303 F.3d 1153, 1159 (9th Cir. 2002); *Belay-Gebbru v. INS*, 327 F.3d 998, 1000-1001 (10th Cir. 2003); *Anin v. Reno*, 188 F.3d 1273, 1279 (11th Cir. 1999) (per curiam)); see also *Mosere v. Mukasey*, 552 F.3d 397, 401 (4th Cir.), cert. denied, 130 S. Ct. 137 (2009).²

² The courts of appeals that have addressed the issue post-*Kucana* (including the Eighth Circuit in this case) have adhered to the view that denials of *sua sponte* reopening are unreviewable. See *Mejia-Hernandez v. Holder*, 633 F.3d 818, 823-824 (9th Cir. 2011); *Neves v. Holder*, 613 F.3d 30, 35 (1st Cir. 2010) (per curiam), petition for cert. pending, No. 10-1030 (filed Feb. 14, 2011); *Gor v. Holder*, 607 F.3d 180, 188 (6th Cir. 2010), petition for cert. pending, No. 10-940 (filed Jan. 18,

Petitioner contends (Pet. 16-18) that there is disagreement in the circuits because some courts would make an exception to this general rule for challenges to denials of *sua sponte* reopening that raise “questions of law.” But the court in this case did not opine on that question. The court held that denials of *sua sponte* reopening are unreviewable, and it did not separately address whether that general rule would apply when an alien raises a question of law. Pet. App. 6a-8a. Petitioner did not argue for any such exception before the court of appeals or explain how her case raised a discrete legal question that would fit the exception. See pp. 13-14, *supra*. Accordingly, this case does not raise the question whether a Board decision not to reopen a case *sua sponte* is reviewable when it raises a question of law.³

3. Petitioner contends (Pet. 30-34) that the court of appeals’ decision conflicts with this Court’s decision in

2011); *Ozeiry v. Attorney Gen.*, 400 Fed. Appx. 647, 649-650 (3d Cir. 2010) (unpublished); *Gashi v. Holder*, 382 Fed. Appx. 21, 22-23 (2d Cir. 2010) (unpublished); *Jaimes-Aguirre v. United States Att’y Gen.*, 369 Fed. Appx. 101, 103 (11th Cir. 2010) (unpublished).

³ In any event, it is far from clear that there is disagreement in the circuits on this point. The decisions of the Fourth and Sixth Circuits petitioner cites (Pet. 17) as evidence of a purported conflict state that decisions not to reopen *sua sponte* are unreviewable, but like the decision below, they say nothing about whether there should be an exception for challenges that raise “questions of law.” See *Mosere*, 552 F.3d at 400-401; *Gor*, 607 F.3d at 186-187. Moreover, even if some courts reviewed decisions not to reopen *sua sponte* that raised “questions of law,” petitioner’s case does not raise such an issue. By her own characterization (Pet. 2, 16), petitioner’s case involves the application of settled legal principles to the particular facts of her case, not a question of the meaning of a law or regulation. See also pp. 13-14 & note 1, *supra*.

SEC v. Chenery Corp, 332 U.S. 194 (1947). In *Chenery*, the Court explained that “a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency.” *Id.* at 196. In petitioner’s view, the court of appeals’ construction of her motion to reopen as a request for *sua sponte* reopening violates that rule. See Pet. 30-34. Petitioner is mistaken, for essentially three reasons.

First, the court of appeals considered petitioner’s submission *both* as one requesting *sua sponte* reopening and as one moving for reopening based on new, material, and previously unavailable evidence. The court determined that a decision not to reopen *sua sponte* was unreviewable, Pet. App. 6a-8a, and that a denial of a motion seeking reopening based on new evidence was not an abuse of discretion because petitioner failed to carry her burden to justify reopening, *id.* at 8a n.4. Thus, this is not a case in which a court attempted to usurp “the domain which Congress has set aside exclusively for the administrative agency,” *Chenery*, 332 U.S. at 196; instead, the court was understandably uncertain about the import of petitioner’s filing with the Board and therefore covered all of the bases in its ruling. That is a far cry from the interference in agency decision-making envisioned in *Chenery*.⁴

Second, “the *Chenery* doctrine is not applied inflexibly,” and it “does not require a remand to the agency if it is clear that the agency would have reached the same

⁴ Moreover, because the court of appeals ruled in the alternative and did review the reasoning set out by the Board, its decision does not conflict with the decisions of other courts (see Pet. 33-34) in which the courts remanded matters to the agency.

ultimate result had it considered the new ground.” *Fleshman v. West*, 138 F.3d 1429, 1433 (Fed. Cir.) (internal quotation marks and citation omitted), cert. denied, 525 U.S. 947 (1998); see *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969). In this case, the Board reviewed the record, including the documents submitted with the motion to reopen, and concluded that petitioner failed to demonstrate ineffective assistance of counsel that prejudiced her case. Pet. App. 29a. There is no reason to believe that the Board’s conclusion would have been different if the case had been remanded. Whether to reopen a case *sua sponte* is entrusted to the discretion of the Board. 8 C.F.R. 1003.2(a). The Board “invoke[s] [its] *sua sponte* authority sparingly, treating it not as a general remedy for any hardships created by enforcement of the time and number limits in the motions regulations, but as an extraordinary remedy reserved for truly exceptional situations.” *In re G-D-*, 22 I. & N. Dec. 1132, 1133-1134 (B.I.A. 1999). In light of the fact that the Board found no ineffective assistance of counsel here, there is no reason to believe its decision would change if the case were remanded and it considered a request for *sua sponte* reopening.

Finally, this would be a poor case for considering the reach of *Chenery*, because any *Chenery* issue petitioner identifies is one of her own making. Petitioner’s filing with the Board was confusing on its face: although it was timely filed, it requested that the Board reopen the case “on their own motion” and invoked the regulation governing *sua sponte* reopening. Pet. App. 22a. Moreover, petitioner made no attempt to show new, material, and previously unavailable evidence in the motion, as generally would be required for granting a timely motion to reopen. Under those circumstances, the court

was uncertain and attempted to cover all of the bases in assessing petitioner's claims.

4. This case would be a poor vehicle to consider the question presented in any event, for several reasons. First, it is not clear whether petitioner was requesting *sua sponte* reopening or moving for reopening based on new, material, and previously unavailable evidence. The question petitioner attempts to present about the reviewability of denials of *sua sponte* reopening arises only if her filing actually was one seeking *sua sponte* reopening. Because that was unclear below, and because the court of appeals ruled in the alternative, there is no occasion for the Court to reach out to decide a question about reviewability that need not actually be decided in this case.

Similarly, the second question petitioner attempts to present again is complicated by the lack of clarity in her motion to the Board. Any *Chenery* issue is a direct consequence of the fact that petitioner's filing was unclear. For that reason, the Court should not reach out to address the second question petitioner attempts to present.

Finally, petitioner would be extremely unlikely to obtain the relief she ultimately seeks—discretionary cancellation of removal—because she has overstayed her period of voluntary departure. As petitioner acknowledges (Pet. 4), in proceedings before the administrative agency, petitioner requested voluntary departure in lieu of removal pursuant to 8 U.S.C. 1229c(b)(1), and the Board ultimately granted her 60 days from the date of her removal order to depart the United States voluntarily in lieu of removal. A.R. 198-199. The decisions of both the IJ and the Board specifically warned petitioner of the consequences of failing to comply with

her voluntary departure order, including the consequence that she would be ineligible to seek discretionary cancellation of removal for a period of ten years. A.R. 198-199, 249-250, 312.

To the best of the government's knowledge, petitioner did not voluntarily depart the United States within the time permitted. That failure to abide by the agency's orders makes it very unlikely she could obtain cancellation of removal. The INA provides that an alien who is permitted to depart voluntarily but fails to do so is ineligible for cancellation of removal for a period of ten years. See 8 U.S.C. 1229c(d)(1)(B). Although the Board has decided that the categorical bar does not apply to an alien who was granted voluntary departure prior to 2009 and did not post a voluntary departure bond, *In re Diaz-Ruacho*, 24 I. & N. Dec. 47, 50-51 (B.I.A. 2006), and petitioner may well fit into that category, at the very least, the failure to abide by the agency's orders would be a significant negative equity weighing against a grant of discretionary cancellation of removal. See *INS v. Rios-Pineda*, 471 U.S. 444, 451 (1985); *Diaz-Ruacho*, 24 I. & N. Dec. at 51; see also, *e.g.*, *In re C-V-T-*, 22 I. & N. Dec. 7, 11 (B.I.A. 1998) (applicant for cancellation must show she warrants relief as a matter of discretion, which depends on a balancing of positive and negative equities). Accordingly, petitioner likely cannot obtain cancellation of removal in any event. Further review is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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