No. 10-1030

In the Supreme Court of the United States

KELMER DA SILVA NEVES, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
STACEY I. YOUNG
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals erred in holding that the Board of Immigration Appeals' decision not to exercise its discretionary authority to reopen petitioner's immigration proceedings *sua sponte* is unreviewable.

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1-13) is reported at 613 F.3d 30. A prior relevant decision of the court of appeals (Pet. App. 18-21) is reported at 568 F.3d 41. The decision of the Board of Immigration Appeals (Pet. App. 22-24) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 2010 (Pet. App. 2). A petition for rehearing was denied on December 2, 2010 (Pet. App. 25-26). The petition for a writ of certiorari was filed on February 14, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that the Secretary of Homeland Security and the Attorney General may, in their discretion, grant asylum to an alien who demonstrates that he is a "refugee." 8 U.S.C. 1158(b)(1)(A). The INA defines a "refugee" as an alien who is unwilling or unable to return to his country of origin "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A). The applicant bears the burden of demonstrating that he is eligible for asylum. 8 U.S.C. 1158(b)(1)(B)(i); 8 C.F.R. 1208.13(a), 1240.8(d). Once an alien has established asylum eligibility, the decision whether to grant or deny asylum is left to the discretion of the Attorney General or the Secretary of Homeland Security. 8 U.S.C. 1158(b)(1).

Withholding of removal is available if the alien demonstrates that his "life or freedom would be threatened" in the country of removal "because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3)(A). In order to establish eligibility for withholding of removal, an alien must prove a "clear probability of persecution" upon removal, a higher standard than that required to establish asylum eligibility. *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 430 (1987). Persecution must be at the hands of the government or by an entity that the government is unwilling or unable to control. *In re Pierre*, 15 I. & N. Dec. 461, 462 (B.I.A. 1975).

b. The INA also provides that the Attorney General and the Secretary of Homeland Security may, in their discretion, adjust the status of an alien inspected and

admitted into the United States to that of a lawful permanent resident. 8 U.S.C. 1255 (2006 & Supp. III 2009). Several prerequisities must be met, including that the alien must be "eligible to receive an immigrant visa" and "admissible to the United States for permanent residence," and that "an immigrant visa [must be] immediately available to [the alien] at the time his application [for adjustment] is filed." 8 U.S.C. 1255(a)(2) and (3), 1255(i)(2)(A) and (B).

Even if all of the statutory prerequisities are met, adjustment of status is not automatic. "The grant of an application for adjustment of status under [8 U.S.C. 1255] is a matter of administrative grace," and the applicant "has the burden of showing that discretion should be exercised in his favor." *In re Patel*, 17 I. & N. Dec. 597, 601 (B.I.A. 1980). See also, *e.g.*, *Elkins* v. *Moreno*, 435 U.S. 647, 667 (1978) (Adjustment of status is "a matter of grace, not right."). Whether a particular applicant warrants a favorable exercise of discretion is a case-specific determination that depends upon whether the applicant has demonstrated that any adverse factors present in his application are "offset * * * by a showing of unusual or even outstanding equities." *In re Arai*, 13 I. & N. Dec. 494, 495-496 (B.I.A. 1970).

c. 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).

If the alien fails to file a timely motion to reopen, he may suggest to the IJ or Board that his case should be reopened *sua sponte*. The IJ or the Board may exercise discretion to 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 ex-

traordinary 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 Brazil. Pet. App. 19. The former Immigration and Naturalization Service charged him with being removable as an alien who remained in the United States beyond the time permitted. Administrative Record (A.R.) 115; see 8 U.S.C. 1227(a)(1)(B). Petitioner conceded that he is removable but sought asylum, withholding of removal, and voluntary departure. A.R. 115-116.

After a hearing, an IJ found petitioner removable as charged and denied his applications for asylum, withholding of removal, and voluntary departure. A.R. 115-121. Petitioner had contended that he would be subject to persecution in Brazil because he was threatened and beaten by a nightclub owner when he worked as an investigator for the state-owned electric company. A.R. 116-117. The IJ found that petitioner was not a credible witness based on his demeanor and the implausibility of his story. A.R. 118. The IJ further determined that "even if everything [petitioner] testified to is * * * believed," petitioner failed to carry his burden of showing eligibility for asylum or withholding of removal. A.R. 119. The IJ explained that petitioner "worked for the government of Brazil" and "[c]learly * * * does not fear any harm from the government," and that there was no evidence to suggest that petitioner would be harmed in Brazil "on account of one of the five statutory grounds." *Ibid.* The IJ also denied petitioner's request for voluntary departure because petitioner had not satisfied one of the statutory prerequisites for that privilege (one year of physical presence in the United States). A.R. 120.

The Board dismissed petitioner's appeal. A.R. 85. The Board explained that petitioner "appear[ed] to have * * * abandoned" his appeal and that the Clerk's Office's "[e]fforts * * * to reach [petitioner] by mail have been unsuccessful" and that it "lack[s] an address to which mail can effectively be sent." *Ibid.* The Board stated that it would send its decision to petitioner's last known address and that, if petitioner filed a timely motion to reconsider, it would consider reinstating the appeal. *Ibid.* The Board also stated that, "[p]ursuant to the Immigration Judge's order," petitioner would be permitted to voluntarily depart from the United States within 30 days. *Ibid.*

3. In August 2003, nearly two years after the Board dismissed his appeal, petitioner filed a motion to reopen his immigration proceedings. A.R. 57-65. He contended that his first attorney had been ineffective by failing to pursue his appeal before the Board and that a second attorney he had secured had been ineffective because that attorney had failed to notify the Board that he was the new counsel of record and had failed to obtain an approved labor certification for petitioner, which would have been a basis for seeking adjustment of status. A.R. 58-63. Petitioner contended that, as a remedy for his attorneys' errors, he should be granted voluntary departure. A.R. 63-64.

The Board denied the motion to reopen. A.R. 51. It explained that the motion to reopen was untimely, because under 8 C.F.R. 1003.2(c)(2), such a motion must be filed within 90 days of the Board's decision. *Ibid.* The Board then determined that petitioner's ineffective assistance of counsel claim did not excuse his untimely filing. *Ibid.* The Board explained that, "[d]espite [the] assertions against two individuals he claims acted as his

representatives, [petitioner] appeared pro se on appeal and the record contains no evidence that a representative had any involvement in this case after the removal hearing." *Ibid.* In any event, the Board determined, equitable tolling of the 90-day deadline was not available because petitioner did not exercise due diligence in seeking reopening. *Ibid.* The Board explained that petitioner "admits that he learned of the Board's prior order in August, 2002," yet did not file his motion to reopen until a year later, in August 2003. *Ibid.* Finally, the Board declined to reinstate the voluntary departure order, noting that the IJ had found petitioner ineligible for that privilege and that the Board's prior statement regarding voluntary departure thus had been "made in error." *Ibid.* Petitioner did not seek further review of that decision by the Board.

4. In June 2006, almost five years after the Board's initial decision, petitioner filed a second motion to reopen proceedings. A.R. 7-17. Petitioner contended that reopening was justified so that he could seek adjustment of status under 8 U.S.C. 1255(i) based on his assertion that he was the beneficiary of an approved labor certification. A.R. 17. Petitioner argued that the time and numerical limitations for motions to reopen should not bar his motion because his prior attorneys (including his third attorney, who filed the first motion to reopen) had been ineffective, and that his third attorney had failed to advise him that his prior motion to reopen had been denied. A.R. 11, 14-15, 39. Petitioner further alleged that it was not until June 2006 that he learned that the Board had denied his first motion to reopen in December 2003. *Ibid.* In the alternative, petitioner requested that the Board exercise its discretionary authority to reopen his case *sua sponte*. A.R. 11.

The Board denied petitioner's second motion to reopen. Pet. App. 22-24. The Board observed that petitioner's motion was "untimely and number-barred" under 8 C.F.R. 1003.2(c)(2), and it again determined that petitioner failed to show that he exercised due diligence that would justify equitable tolling. Pet. App. 22. In particular, the Board noted that although petitioner alleged that he frequently contacted his attorney's office between the time the motion to reopen was filed in 2003 and when he learned of its denial in 2006, he did not "provide[] the dates that he contacted his former attorney's office from 2003 to 2006, or who he spoke to when he contacted the office." *Id.* at 23. The Board also noted that, although petitioner asserted that the employee in his attorney's office who failed to notify him of the Board's action had been fired, petitioner failed "to identify the particular employee responsible for notifying" him. *Ibid.* Thus, the Board determined, petitioner had "not provided sufficient specific, relevant information to corroborate his generalized assertion of due diligence." *Ibid.* Finally, the Board declined to exercise its discretionary authority to reopen petitioner's case on its own motion. *Id.* at 23-24.

5. The court of appeals dismissed petitioner's petition for review in a per curiam opinion. Pet. App. 18-21. The court held that petitioner's second motion to reopen was both untimely and number barred under 8 U.S.C. 1229a(c)(7) and 8 C.F.R. 1003.2(c)(2). Pet. App. 19. The court then observed that, even if equitable tolling applied to those limitations (a question it did not decide), the Board had determined that tolling was not warranted because petitioner failed to demonstrate due diligence. *Id.* at 20. The court determined that, based on its prior precedents, it lacked jurisdiction under

8 U.S.C. 1252(a)(2)(B) to review the Board's factual determination that he failed to exercise due diligence, where, as the court found to be the case here, the challenge did not raise any constitutional or legal claim. Pet. App. 20-21 (citing *Ouk* v. *Mukasey*, 551 F.3d 82, 83-84 (1st Cir. 2008); *Fustaguio Do Nascimento* v. *Mukasey*, 549 F.3d 12, 18-19 (1st Cir. 2008); and *Boakai* v. *Gonzales*, 447 F.3d 1, 4 (1st Cir. 2006)).[1]

Because petitioner had not filed a timely motion to reopen under 8 U.S.C. 1229a(c)(7), petitioner had argued in the alternative that the Board should reopen his case *sua sponte*. Pet. C.A. Br. 13-15. Relying on its prior precedent, the court held that the Board's decision not to reopen a case *sua sponte* was unreviewable. Pet. App. 21 (citing *Peralta* v. *Holder*, 567 F.3d 31 (1st Cir. 2009), and *Luis* v. *INS*, 196 F.3d 36 (1st Cir. 1999)).

6. Petitioner filed a petition for a writ of certiorari. With respect to the question whether the court of appeals had jurisdiction to review the Board's determination that petitioner failed to exercise due diligence, the government argued that the court of appeals erred and recommended that the Court grant the petition, vacate the decision below, and remand to the court of appeals for further consideration in light of *Kucana* v. *Holder*, 130 S. Ct. 827 (2010). 09-650 Br. in Opp. 10, 11-14, 20. With respect to the question whether the Board's decision not to reopen petitioner's case *sua sponte* was judicially reviewable, the government argued that the court

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[1] The court of appeals did not pass on petitioner's ineffective assistance of counsel claim: it noted that, because the Board's denial of reopening was based on lack of due diligence, that claim was not before the court, and it determined, in any event, that petitioner had waived any such argument. Pet. App. 20 n.1.

of appeals' decision was correct and consistent with the unanimous view of the courts of appeals. *Id.* at 17-19.

This Court granted the certiorari petition, vacated the decision below, and remanded the case to the court of appeals for further consideration in light of *Kucana* v. *Holder*, *supra*. 130 S. Ct. 3273 (2010).

7. On remand, the court of appeals denied the petition for review in a per curiam opinion. Pet. App. 1-13. The court considered the effect of *Kucana* on its prior decision, and concluded that it had jurisdiction to review the Board's determination that equitable tolling of the time and number limitations on motions to reopen was not warranted because petitioner failed to exercise due diligence. *Id.* at 7-8. The court then determined, on the merits, that the Board had not abused its discretion in deciding that those limitations would not be equitably tolled. *Id.* at 10-13.

The court also reaffirmed its earlier holding that the Board's decision not to exercise its discretion to reopen proceedings *sua sponte* was unreviewable. Pet. App. 8-9. The court explained that "*Kucana* does not affect the subsidiary holding in our earlier opinion that federal courts lack jurisdiction to review the [Board's] decision to exercise or decline to exercise its *sua sponte* authority to reopen proceedings," *id.* at 9, because *Kucana* concerned a specific statutory provision that precludes judicial review in certain circumstances, 8 U.S.C. 1252(a)(2)(B)(ii), while decisions to deny *sua sponte* reopening are unreviewable for a different reason, which is that they are "committed to [the Board's] unfettered discretion" by law, and "the very nature of the claim renders it not subject to judicial review," Pet. App. 8-9 (quoting *Luis*, 196 F.3d at 40). The court also reaffirmed its earlier determination that petitioner did not

present any constitutional claims or questions of law. *Ibid.*

8. Petitioner filed a petition for rehearing en banc, which was denied. Pet. App. 25.

ARGUMENT

Petitioner contends (Pet. 9-25) that the court of appeals erred in holding that the Board's decision not to exercise its discretion to reopen his case *sua sponte* is unreviewable. The court of appeals' decision is correct, and it does not conflict with any decision of another court of appeals or of this Court. Moreover, this case would present a poor vehicle to review the question presented, because even if a Board decision not to reopen a case *sua sponte* were reviewable, the Board acted well within its broad discretion in denying petitioner's second request for reopening, which was filed nearly five years after his removal order became final. Further review is therefore unwarranted.[2]

1. At issue in this case is the Board's decision not to reopen petitioner's case *sua sponte* in response to petitioner's second request for reopening, which was made in 2006, nearly five years after his removal order became final. After an IJ found him removable and denied his requests for asylum, withholding of removal, and voluntary departure, A.R. 115-121, petitioner filed an appeal with the Board and then abandoned it, A.R. 85. After the Board dismissed his appeal, petitioner did not seek judicial review. See 8 U.S.C. 1252(a) and (b)(1) (authorizing judicial review of final removal orders). He

[2] The question presented in this case is also presented in the pending petitions in *Ochoa* v. *Holder*, petition for cert. pending, No. 10-920 (filed Jan. 18, 2011), and *Gor* v. *Holder*, petition for cert. pending, No. 10-940 (filed Jan. 18, 2011).

also did not file a motion to reopen immigration proceedings within the parameters Congress specified. See 8 U.S.C. 1229a(c)(7)(C) (motion to reopen generally must be filed within 90 days of final removal order). Instead, two years after his removal order became final, petitioner asked the Board to reopen his case and grant him voluntary departure. A.R. 57-65. Two and one-half years after that motion had been denied, petitioner again requested reopening from the Board, seeking an entirely different form of relief, adjustment of status. A.R. 7-17. In this second request for reopening, petitioner argued that his request should be treated as a motion to reopen that complies with the statutory prerequisites, see 8 U.S.C. 1229a(c)(7), because although it was untimely and number-barred, equitable tolling was warranted, A.R. 14-15; and that if his submission was not treated as a motion to reopen filed pursuant to 8 U.S.C. 1229a(c)(7), the Board should exercise its discretion to reopen his case *sua sponte*, A.R. 11.

At this point, only petitioner's request that the Board reopen his case *sua sponte* is at issue; petitioner no longer argues that his submission should be characterized as a motion to reopen that complies with 8 U.S.C. 1229a(c)(7). The Board had determined that petitioner's second request for reopening was untimely and number-barred; that petitioner had not made a sufficient showing to warrant equitable tolling of those statutory limitations (if equitable tolling even is available); and that this was not an extraordinary case warranting an exercise of its *sua sponte* reopening authority. Pet. App. 22-23. The court of appeals agreed that petitioner's request was untimely and number-barred, but initially thought that it lacked jurisdiction under 8 U.S.C. 1252(a)(2)(B) to review the Board's decision that petitioner had not

demonstrated the due diligence necessary for equitable tolling. Pet. App. 20-21. On remand from this Court, the court of appeals held that it did have jurisdiction to review the Board's due diligence determination, *id.* at 7-8, but that the Board had not abused its discretion in concluding that equitable tolling was unwarranted, *id.* at 10-13. In both of its decisions, the court of appeals held that the Board's decision not to reopen petitioner's case *sua sponte* was unreviewable, and that petitioner did not raise any question of law or constitutional claim. *Id.* at 8-9, 20-21. In his new certiorari petition, petitioner does not challenge the court's holding that he did not file a timely motion to reopen under 8 U.S.C. 1229a(c)(7) and that he had not made a showing to support equitable tolling; he seeks review only on the question whether the Board's decision not to reopen his case *sua sponte* is judicially reviewable. See Pet. 9-25.

a. The court of appeals correctly recognized that the Board's decision not to exercise its authority to reopen proceedings *sua sponte* is not judicially reviewable because it is committed to the Board's discretion by law. 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); see *Lincoln* v. *Vigil*, 508 U.S. 182, 191-192 (1993); *Heckler* v. *Chaney*, 470 U.S. 821, 829-831 (1985). 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. 9; see, *e.g.*, *Tamenut* v. *Mukasey*, 521 F.3d 1000, 1003 (8th Cir. 2008) (per curiam) (en banc). As the court of appeals previously has explained, "the decision of the [Board] whether to invoke its *sua sponte* authority is committed to its

unfettered discretion"; "the very nature of the claim renders it not subject to judicial review." *Luis* v. *INS*, 196 F.3d 36, 40 (1st Cir. 1999). The Board's regulation addressing *sua sponte* reopening provides "no guidelines or standards which dictate how and when the [Board] should invoke its *sua sponte* power," and when "'no judicially manageable standards are available for judging how and when an agency should exercise its discretion,'" courts cannot review the agency's actions for abuse of discretion. *Ibid.* (quoting *Heckler*, 470 U.S. at 830). The regulation does not require the Board to reopen a removal proceeding under any particular circumstances. Rather, it simply provides the Board the discretion to reopen proceedings if and when it elects to do so.

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 *sua sponte* establishes a procedural mechanism for the Board itself in aid of its own internal administration. Neither Congress nor the regulation allowing *sua sponte* reopening has conferred any privately enforceable rights on an alien in this setting. See *Gor* v. *Holder*, 607 F.3d 180, 195 (6th Cir. 2010) (Batchelder, C.J., concurring) ("[t]he power of the [Board] to reopen *sua sponte* arises only from its own regulations"; "Congress has taken no steps to establish an individual right applicable to [aliens]"), petition for cert. pending, No. 10-940 (filed Jan. 18, 2011); *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).

Moreover, the purposes of the INA, and of its judicial review provisions, would be undermined if decisions by the Board not to exercise its discretionary *sua sponte* reopening authority were subject to judicial review. Congress enacted statutory provisions governing motions to reopen and judicial review in 1990 and 1996 in order to prevent abuses of motions to reopen by imposing time and numerical limitations on such motions, shortening the time for judicial review, and requiring the consolidation of petitions for judicial review of the denials of motions to reopen with the petition for review of the final order of removal (see 8 U.S.C. 1252(b)(6)). Those changes were adopted for the purpose of expediting the process of administrative and judicial review, the final resolution of removal proceedings, and the actual removal of the alien. See *Dada* v. *Mukasey*, 554 U.S. 1, 12-15 (2008); *Stone* v. *INS*, 514 U.S. 386, 393-394 (1995). A determination by the Board not to exercise its discretion to reopen a case *sua sponte* may be made months or (as here) years after the order of removal became final, the time for filing a motion to reopen has expired (or such a motion has been denied), and the time for judicial review has expired. If such determinations were then judicially reviewable, the result would be to circumvent the limitations Congress imposed on judicial review. An alien, simply by requesting an IJ or the Board to reopen a case *sua sponte*, could thereby trigger one or more new rounds of judicial review, perhaps seeking stays of removal, and creating delays and congestion in the courts. The potential for those consequences weighs heavily against recognizing a right of judicial review.

This case proves the point: although the government began removal proceedings in 1999, Pet. App. 2, petitioner's case is still ongoing because, after abandoning

the appeal of his removal order, he filed two requests for reopening, both long after his removal order became final, and raising different arguments each time.[3]

The conclusion that the Board's decision not to reopen a case *sua sponte* is unreviewable is strongly supported by the history of the Board's *sua sponte* reopening authority. Congress enacted the INA in 1952, see Pub. L. No. 82-414, § 103(a), 66 Stat. 163, 173, charging the Attorney General "with the administration and en-

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[3] Indeed, there is substantial reason to question whether Congress contemplated that a Board decision not to reopen proceedings *sua sponte* is the sort of decision over which a court of appeals would even have *jurisdiction* when it authorized judicial review of final removal orders in 8 U.S.C. 1252. The INA provides an alien with the right to file one motion to reopen, subject to specified time and other limits; it makes sense that Congress would have expected that denials of such motions would be judicially reviewable in light of the fact that Congress authorized such motions by statute. See *Cheng Fan Kwok* v. *INS*, 392 U.S. 206, 216 (1968) (predecessor statute to Section 1252 contemplated judicial review of "only those determinations made during a [removal] proceeding," "including those determinations made incident to a *motion* to reopen such proceedings") (emphasis added); 8 U.S.C. 1252(b)(6) (judicial review of "*motion* to reopen or reconsider" shall be consolidated with petition for review of an underlying removal order) (emphasis added). But an alien has no personal right in connection with *sua sponte* reopening of final removal proceedings. It therefore is not obvious that Section 1252 contemplates jurisdiction over a petition seeking review of the Board's exercise of its own discretion on such matters, which occurs after a removal order has become final and the alien has no right to further agency review. That is especially so because to authorize judicial review of decisions not to reopen a case *sua sponte* would extend immigration proceedings substantially, contrary to the need for finality that Congress has recognized in several provisions in the INA. See *Stone*, 514 U.S. at 399-400 (noting Congress's concern that "every delay works to the advantage of the deportable alien who wishes merely to remain in the United States" (internal quotation marks omitted)).

forcement" of the Act, and authorized him to "establish such regulations * * * as he deems necessary for carrying out [that] authority." Pursuant to that authority, the Attorney General promulgated a series of regulations defining the"[p]owers of the Board," which included the power to "reopen * * * any case in which a decision has been made by the Board." 17 Fed. Reg. 11,475, §§ 6.1(b) and (d), 6.2 (1952). In 1958, the Attorney General clarified that the Board may reopen proceedings in response to a motion by the parties or on its own motion. See 23 Fed. Reg. 9118-9119, § 3.2; see also *Zhang* v. *Holder*, 617 F.3d 650, 656 (2d Cir. 2010).

Congress has addressed motions to reopen filed by aliens, but it has never addressed the Board's *sua sponte* reopening power. In 1990, Congress became concerned that aliens illegally present in the United States were filing motions to reopen to prolong their stay, and it directed the Attorney General to issue regulations to limit the number of motions to reopen an alien may file and the time period for filing such motions. See *Dada*, 554 U.S. at 13. After the Attorney General promulgated those regulations, see 61 Fed. Reg. 18,900, 18,905 (1996), Congress codified key portions of them, providing that each alien may file one motion to reopen, subject to specified time and other limits. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 304(a)(3), 110 Stat. 3009-593. Notably, Congress said nothing about the Board's *sua sponte* reopening authority. Thus, although Congress has provided aliens with a personal right under the INA to file one motion to reopen within the time limit specified, it has "taken no steps to establish an individual right" for aliens to seek or obtain *sua sponte* reopening, instead leaving that discretionary mechanism

entirely to the Board, see *Zhang*, 617 F.3d at 662 (noting that although Congress codified standards for timely motions to reopen based on new evidence, it "was silent as to * * * the [Board's] *sua sponte* authority"). 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.

b. Petitioner makes essentially two arguments about how in his view the court of appeals erred. First, he contends that after this Court's recent decision in *Kucana* v. *Holder*, 130 S. Ct. 827, 834 (2010), *all* Board decisions not to reopen a case *sua sponte* are judicially reviewable. Pet. 12-17. Second, he argues that even if such decisions generally are not judicially reviewable, the Board's decision not to exercise its *sua sponte* authority in *his* case is reviewable under 8 U.S.C. 1252(a)(2)(D) because it raises a constitutional claim or question of law. Pet. 18-25. Neither argument is correct.

i. Petitioner is mistaken in arguing that all decisions by the Board not to exercise its *sua sponte* authority are judicially reviewable after *Kucana*. As petitioner himself recognizes (Pet. 6), *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 under 8 U.S.C. 1229a(c)(7). 130 S. Ct. at 836-837.

In the decision below, the reviewability of the Board's decision not to reopen petitioner's case *sua sponte* 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. 9 (citing *Luis* v. *INS*, *supra*); see Pet. 12 (recognizing court's rationale). 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*," while noting that 11 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); see Pet. App. 14.[4]

Contrary to petitioner's contention (Pet. 12-14), *Kucana*'s logic does not lead to the conclusion that denials of *sua sponte* reopening are reviewable. The answer to that question turns on whether the regulation authorizing *sua sponte* reopening confers private rights and whether it imposes standards to guide agency decisionmaking. By contrast, the issue in *Kucana* was whether the exercise of jurisdiction to review the denial of a *motion* to reopen, which the alien had a personal statutory

[4] Petitioner is wrong to suggest (Pet. 14-15) that either the government or the court of appeals relied on the theory that Board decisions not to reopen a case *sua sponte* are unreviewable because of 8 U.S.C. 1252(a)(2)(B)(ii). Such decisions are unreviewable because they are committed to agency discretion by law.

right to file, was precluded by a certain statutory provision, 8 U.S.C. 1252(a)(2)(B)(ii). The Court's interpretation of the statute at issue in *Kucana* simply does not speak to the question whether the decision to reopen a case *sua sponte* is committed to agency discretion and is for that reason unreviewable. Therefore, nothing in the *Kucana* Court's holding or rationale supports judicial review of Board decisions not to exercise *sua sponte* reopening authority.

ii. Alternatively, petitioner contends (Pet. 18-25) that even if decisions not to reopen *sua sponte* generally are unreviewable because they are committed to agency discretion by law, courts may review the Board's decision not to reopen his case *sua sponte* because he raised a "constitutional question" or "issue of law." Petitioner's argument rests on 8 U.S.C. 1252(a)(2)(D), which provides:

> Nothing in subparagraph (B) or (C) [of 8 U.S.C. 1252(a)], 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 filed with an appropriate court of appeals in accordance with this section.

Ibid.

Section 1252(a)(2)(D) does not apply here. By its plain text, Section 1252(a)(2)(D) 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). Denials of *sua sponte* reopening are not made unreviewable due to a provision in Section 1252(a) or elsewhere in Chapter 12 of Subchapter II of Title 8. In-

stead, they are unreviewable as committed to agency discretion by law, 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 discretion. See pp. 13-18, *supra*. Because Section 1252(a)(2)(D) is inapplicable here by its terms, it lends no support to petitioner's argument that the Board's decision not to exercise its *sua sponte* reopening discretion is judicially reviewable.

Moreover, the very nature of *sua sponte* reopening makes it unreviewable, and that does not change based on the types of claims the alien presents. The Board may choose not to reopen a case for a variety of reasons, and the Board is not required to explain why it does not exercise its discretionary *sua sponte* reopening authority. Although the Board often does give reasons for such a decision for the benefit of the parties, the Board's decision to do so should not then make its decision subject to judicial review. If the courts were to hold that the reviewability of determinations not to reopen a case *sua sponte* turned on the reasons the Board gave for such decisions, it would create a substantial disincentive for the Board to explain those rulings for the benefit of the parties. For that reason as well, the court of appeals was correct to find petitioner's claim unreviewable.

2. Contrary to petitioner's contention (Pet. 9-12), the decision below does not conflict with any decisions from other circuits regarding whether decisions not to reopen a case *sua sponte* are judicially reviewable.

a. The courts of appeals have unanimously held that the Board's decision whether to reopen proceedings *sua sponte* is unreviewable because it is committed to agency discretion by law. See, *e.g.*, Pet. App. 9 (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); *Mosere* v. *Mukasey*, 552 F.3d 397, 401 (4th Cir.), cert. denied, 130 S. Ct. 137 (2009); *Enriquez-Alvarado* v. *Ashcroft*, 371 F.3d 246, 248-250 (5th Cir. 2004); *Barry* v. *Mukasey*, 524 F.3d 721, 724 (6th Cir. 2008); *Pilch* v. *Ashcroft*, 353 F.3d 585, 586 (7th Cir. 2003); *Tamenut*, 521 F.3d at 1004; *Ekimian* v. *INS*, 303 F.3d 1153, 1159 (9th Cir. 2002); *Belay-Gebru* v. *INS*, 327 F.3d 998, 1000-1001 (10th Cir. 2003); *Lenis*, 525 F.3d at 1294. This Court recognized this unanimity in *Kucana*. See 130 S. Ct. at 839 n.18 (noting that 11 courts of appeals had "held that such decisions are unreviewable because *sua sponte* reopening is committed to agency discretion by law, see 5 U.S.C. § 701(a)(2)").

b. There is no disagreement in the courts of appeals regarding petitioner's first argument, which is that *all* decisions not to reopen a case *sua sponte* are judicially reviewable after *Kucana*. All of the courts of appeals that have addressed the issue post-*Kucana*—like all of the courts of appeals that had addressed the issue prior to *Kucana*—have adhered to the view that denials of *sua sponte* reopening are unreviewable. See Pet. App. 9; *Pllumi* v. *Attorney Gen.*, No. 09-4454, 2011 WL 1278741, at *2 n.6 (3d Cir. Apr. 6, 2011); *Sharma* v. *Holder*, 633 F.3d 865, 874 (9th Cir. 2011); *Mejia-Hernandez* v. *Holder*, 633 F.3d 818, 823-824 (9th Cir. 2011); *Gor*, 607 F.3d at 187-188; *Ochoa* v. *Holder*, 604 F.3d 546, 549 n.3 (8th Cir. 2010), petition for cert. pending, No. 10-920 (filed Jan. 18, 2011); *Ozeiry* v. *Attorney Gen.*, 400 Fed. Appx. 647, 649-650 (3d Cir. 2010) (per curiam) (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) (per curiam) (unpublished); see also Pet. App. 14. That is not surprising, because the *Kucana* Court "express[ed] no opinion on whether federal courts may review the Board's decision not to reopen removal proceedings *sua sponte*," 130 S. Ct. at 839 n.18, and because *Kucana* concerned a matter of statutory interpretation, not the question whether an agency action was committed to agency discretion by law. There is, accordingly, no court that agrees with petitioner's primary argument about the effect of *Kucana* on the courts' unanimous view that Board decisions not to reopen a case *sua sponte* are committed to agency discretion by law.

c. Petitioner likewise has not established any disagreement in the circuits on his second argument, which is that the decision not to reopen a case *sua sponte* becomes reviewable under 8 U.S.C. 1252(a)(2)(D) when an alien raises a "constitutional claim[]" or "question[] of law."

i. As an initial matter, this case does not present the question whether Board decisions not to reopen a case *sua sponte* are judicially reviewable when the alien raises a "constitutional claim[]" or "question[] of law," because the court of appeals did not opine on that question. The court of appeals expressly held that petitioner's petition for review did not present any constitutional claim or question of law. Pet. App. 8-9, 20. Indeed, the court determined that petitioner had "waived" his claim of ineffective assistance of counsel by failing to present sufficient argument in support of the claim. *Id.* at 20 n.1.[5] As a result, the court did not address whether

[5] Although petitioner now contends (Pet. 24) that his petition for review raised a question of law regarding whether "the Board's decision

there would be any exception to the general rule that a decision not to reopen a case *sua sponte* is unreviewable when the alien raises a constitutional claim or question of law. Indeed, the court did not mention Section 1252(a)(2)(D) at all. Accordingly, this case does not raise the question whether a Board decision not to reopen a case *sua sponte* is reviewable when the alien raises a constitutional claim or question of law.[6]

ii. In any event, petitioner has not established that there is any disagreement in the courts of appeals regarding whether denials of *sua sponte* reopening are reviewable when the alien raises a constitutional claim or question of law. Several of the cases petitioner cites do not address *sua sponte* reopening at all; they address other contexts. See *Rosario* v. *Holder*, 627 F.3d 58, 61-62 (2d Cir. 2010) (although court lacks jurisdiction to review denial of alien's application for cancellation of

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was arbitrary and capricious in its finding that this case does not warrant exceptional circumstances," petitioner did not argue that jurisdiction was warranted under 8 U.S.C. 1252(a)(2)(D) on that basis below. Instead, he argued that judicial review was permitted under Section 1252(a)(2)(D) because he raised a constitutional claim, namely, that his attorneys' alleged ineffectiveness denied him due process. Pet. Supp. C.A. Br. 13-15. In any event, petitioner's new claim does not raise a "question[] of law" within the meaning of 8 U.S.C. 1252(a)(2)(D): it involves the application of settled legal principles to the particular facts of his case, not a question of the meaning of a law or regulation.

[6] Petitioner contends (Pet. 18-20) that the court of appeals erred in twice holding he did not raise a colorable constitutional claim or question of law in his petition for review. That fact-specific disagreement with the court of appeals' decision does not independently warrant this Court's review. In any event, even if the court of appeals erred in that regard, this case still would not warrant this Court's review, because the fact that the court believe that petitioner had waived any constitutional claim or question of law meant that it did not consider whether such claims are judicially reviewable.

removal under 8 U.S.C. 1252(a)(2)(B), review of constitutional claims and questions of law is permitted by 8 U.S.C. 1252(a)(2)(D)); *Argueta* v. *Holder*, 617 F.3d 109, 111-112 (2d Cir. 2010) (same); *Cardoso-Tlaseca* v. *Gonzales*, 460 F.3d 1102, 1106-1107 (9th Cir. 2006) (addressing whether the Board has the authority to grant a motion to reopen filed by an alien who has departed the United States in light of the departure bar in 8 C.F.R. 1003.2(d)); *Mendiola* v. *Holder*, 585 F.3d 1303, 1309-1310 (10th Cir. 2009) (same); *Bernal-Vallejo* v. *INS*, 195 F.3d 56, 63-64 (1st Cir. 1999) (in the context of a denial of a request for suspension of deportation, court stated that despite a statutory jurisdictional bar, the alien could obtain review of a constitutional claim, but that the alien did not raise a colorable constitutional claim). That courts may consider constitutional or legal questions raised in other contexts does not bear on whether courts may consider such claims in the unique context of a Board decision not to exercise its *sua sponte* reopening authority.[7]

Of the remaining decisions petitioner cites (Pet. 12-17), none of them directly addressed whether Section 1252(a)(2)(D) permits judicial review of legal or constitutional challenges to the Board's decision not to reopen a case *sua sponte*. For example, in *Mosere* v. *Mukasey*, *supra*, the court of appeals stated that decisions not to reopen *sua sponte* are unreviewable, but like the decision below, the court said nothing about whether there should be an exception for challenges that raise "questions of law," and it did not address 8 U.S.C.

[7] Petitioner also relies on one decision that is unpublished and nonprecedential; this decision cannot create the type of disagreement in published decisions that would warrant this Court's review. See *Nawaz* v. *Holder*, 314 Fed. Appx. 736, 737 (5th Cir. 2009) (unpublished).

1252(a)(2)(D), the provision upon which petitioner relies. See 552 F.3d at 400-401. The same is true of *Belay-Gebru* v. *INS*, *supra*, where the Tenth Circuit held that it could not "consider [the alien's] claim that the [Board] should have exercised its *sua sponte* power to reopen his case." 327 F.3d at 1000. The court did not state any exception to that rule or discuss Section 1252(a)(2)(D).

Cruz v. *Attorney General of U.S.*, 452 F.3d 240 (3d Cir. 2006), considered unique circumstances in which the court could not determine whether it had jurisdiction to review the Board's decision in light of 8 U.S.C. 1252(a)(2)(C), which precludes review of certain decisions concerning criminal aliens; the court "remand[ed] th[e] case to the [Board] to give it the opportunity to" address a preliminary question about the alien's prior conviction and "to decide, based on the outcome of this analysis, whether it should exercise its *sua sponte* authority to reopen [the alien's] case." 452 F.3d at 242-243, 248-249. Although the court recognized that it generally "lack[s] jurisdiction to review [Board] decisions not to reopen proceedings *sua sponte*" because "there is no standard governing the agency's exercise of discretion," it did not rule on whether the particular claim at issue was reviewable because it remanded the case to the Board for clarification. *Id.* at 249-250.[8] In *Cevilla* v.

[8] A case petitioner does not cite, *Pllumi* v. *Attorney General of United States*, *supra*, is similar: the Third Circuit remanded to the Board because it could not tell whether the Board had denied *sua sponte* reopening based on an "incorrect legal premise." 2011 WL 1278741, at *3. The court stated that although decisions whether to reopen a case *sua sponte* are "are committed to the unfettered discretion of the [Board]," the court may "recogniz[e] when the [Board] has relied on an incorrect legal premise" and "remand to the [Board] so it may exercise its authority against the correct legal background." *Id.* at *2-*3

Gonzales, 446 F.3d 658, 662-663 (2006), the Seventh Circuit held that the Board's determination that an alien was ineligible for cancellation of removal did not violate due process. The court's discussion of jurisdiction in that case was premised upon a reading of 8 U.S.C. 1252(a)(2)(B) that this Court rejected in *Kucana*, and the court did not decide the question presented here. 446 F.3d at 660-661.

In *Tamenut* v. *Mukasey*, *supra*, the court held that "the [Board's] decision whether to reopen proceedings on its own motion is committed to agency discretion by law." 521 F.3d at 1004. The court suggested in passing that it "generally do[es] have jurisdiction over any colorable constitutional claim," but the court did not explain the legal basis for that suggestion or discuss Section 1252(a)(2)(D), and the suggestion was *dicta* because the court concluded that the alien did not raise any colorable constitutional claim. *Id.* at 1004-1005. *Lenis* v. *United States Attorney General*, *supra*, is similar: after the court of appeals held that the Board's decision not to reopen a case *sua sponte* is unreviewable, 525 F.3d at 1292-1294, it noted that "an appellate court may have jurisdiction over constitutional claims related to the [Board's] decision not to exercise its *sua sponte* power," but then decided that it had "no occasion to examine that question" because "no constitutional claim [wa]s raised," *id.* at 1294 n.7.

Finally, in *Luis* v. *INS*, *supra*, the court of appeals held (in the context of a motion to reconsider) that "the decision of the [Board] whether to invoke its *sua sponte* authority is committed to its unfettered discretion"; "the

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(internal quotation marks omitted). The court did not discuss Section 1252(a)(2)(D).

very nature of the claim renders it not subject to judicial review" and it "is not subject to review by this court." 196 F.3d at 40-41. The court then addressed the alien's contention that the Board's refusal to grant her motion to reconsider her case violated her due process rights and found it "frivolous." *Id.* at 41. Although the court stated that it "ha[d] jurisdiction" to consider that claim, *ibid.*, it did not qualify its holding that denials of *sua sponte* reopening are unreviewable, and (as particularly relevant here) it did not rely upon, or even mention, 8 U.S.C. 1252(a)(2)(D).[9] In this case, the court of appeals relied the rule in *Luis* to hold that a Board decision not to reopen a case *sua sponte* is unreviewable. Pet. App. 8-9.

Because none of the decisions petitioner cites either expressly adopted or expressly rejected his argument that Section 1252(a)(2)(D) allows judicial review of legal or constitutional challenges to a decision not to reopen a case *sua sponte*, there is no disagreement in the circuits warranting this Court's review.

3. This case would present a particularly poor vehicle to consider the reviewability of Board decisions not to reopen a case *sua sponte*, because even if such decisions were reviewable, the Board acted well within its broad discretion here. The Board reserves its *sua sponte* reopening authority for "exceptional situations," explaining that the "power to reopen on [the Board's] own motion is not meant to be used as a general cure for filing defects or to otherwise circumvent the regulations,

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[9] The only authority the court cited for the proposition that the alien's due process claim was reviewable was *Bernal-Vallejo* v. *INS*, *supra*, a case addressing denial of a request for suspension of deportation, not a decision of the Board not to reopen a case *sua sponte*. See p. 25, *supra*.

where enforcing them might result in hardship." *In re J-J-*, 21 I. & N. Dec. 976, 984 (B.I.A. 1997); see Pet. 6 (accepting this standard). The request at issue is petitioner's second attempt to reopen his case, made five years after his removal order became final. In the request, petitioner sought a new form of discretionary relief—adjustment of status—but he did not demonstrate that he satisfies the prerequisities for that relief.[10]

To qualify for adjustment of status, an applicant is required to show that he "is eligible to receive an immigrant visa and is admissible to the United States for permanent residence * * * and * * * an immigrant visa is immediately available to the alien at the time the application is filed." 8 U.S.C. 1255(i)(2). Generally, two governmental approvals are required to make such a showing for an employment-based immigration preference: (1) approval by the Department of Labor of an application for alien labor certification, and (2) approval by the Department of Homeland Security of a visa petition for the benefit of the adjustment applicant who is to fill the position. The issuance of the labor certification establishes that the alien is not inadmissible under 8 U.S.C. 1182(a)(5)(A)(i), which requires an employer of an alien seeking admission to the United States to perform skilled labor to first obtain certification from the Secretary of Labor that there are not sufficient workers to perform the particular labor in the relevant area. The approval of the visa petition with a current priority date,

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[10] Petitioner's ineffective assistance of counsel claim is ancillary to his claim for adjustment of status: petitioner contended that his prior attorneys' ineffectiveness meant that the Board should either treat his request as a timely motion to reopen under 8 U.S.C. 1229a(c)(7), or should reopen his case *sua sponte* so he could pursue adjustment of status. A.R. 14-17.

on the other hand, establishes that an immigrant visa is immediately available to the alien. See *United States* v. *Ryan-Webster*, 353 F.3d 353, 355-356 (4th Cir. 2003) (describing process and the significance of each step). Petitioner argued in his second request for reopening that he was the beneficiary of a labor certification, but he did not argue or include evidence showing that he had ever received an approved visa petition. Petitioner's failure to demonstrate eligibility for the relief he requested thus also would have warranted the denial of his request for reopening. Further review is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General
TONY WEST
Assistant Attorney General
STACEY I. YOUNG
Attorney

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