No. 98-577

In the Supreme Court of the United States

OCTOBER TERM, 1998

OSCAR DAVID GOMEZ-OCHOA, PETITIONER

v.

JANET RENO, ATTORNEY GENERAL, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Section 242(a)(2)(C) of the Immigration and Nationality Act (INA), 8 U.S.C. 1252(a)(2)(C) (Supp. III 1997), which precludes judicial review of final administrative removal orders entered in expedited removal proceedings against aliens who have been convicted of aggravated felonies, divested the court of appeals of jurisdiction to review the final administrative removal order entered against petitioner.

2. Whether the District Director of the Immigration and Naturalization Service who entered the final administrative removal order against petitioner correctly concluded that petitioner was ineligible for discretionary relief from removal.

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OPINION BELOW

The order of the court of appeals (Pet. App. 1) is unreported.

JURISDICTION

The order of the court of appeals was entered on March 11, 1998. A motion for reconsideration was denied on April 24, 1998 (Pet. App. 9). The petition for a writ of certiorari was filed on July 22, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, a native and citizen of Mexico, entered the United States without inspection in 1994. On March 26, 1996, petitioner was convicted in Oklahoma state court of obtaining merchandise by false pretenses. He was sentenced to a suspended sentence of one year's imprisonment and was fined $250. Pet. 2-3.

On September 30, 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546. Section 321(a)(3) of IIRIRA classified petitioner's criminal offense as an "aggravated felony" within the meaning of the Immigration and Nationality Act (INA). See 110 Stat. 3009-627 (amending 8 U.S.C. 1101(a)(43)(G) (1994)). Petitioner thereby became deportable based on his offense. See 8 U.S.C. 1227(a)(2)(A)(iii) (Supp. III 1997).[1]

On January 6, 1998, the Immigration and Naturalization Service (INS) instituted removal proceedings against petitioner with the issuance of a Notice of Intent to Issue A Final Administrative Removal Order, on the ground that his criminal conviction made him removable. Pet. 3. As petitioner's removal proceedings were commenced after April 1, 1997, the general effective date of IIRIRA (see IIRIRA § 309(a), 110 Stat. 3009-625), those proceedings were governed by the provisions of IIRIRA.

IIRIRA amended the INA's provisions for expedited removal of aliens who have been convicted of committing aggravated felonies. The new expedited procedure

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[1] The amendments were expressly made applicable to convictions entered before the enactment of IIRIRA. See IIRIRA § 321(b), 110 Stat. 3009-628.

is now codified at Section 238 of the INA, 8 U.S.C. 1228 (Supp. III 1997). That Section states, in pertinent part:

> **(b) Removal of aliens who are not permanent residents**
>
> (1) The Attorney General may, in the case of an alien described in paragraph (2), determine the deportability of such alien under [8 U.S.C. 1227(a)(2)(A)(iii)] (relating to conviction of an aggravated felony) and issue an order of removal pursuant to the procedures set forth in this subsection or [8 U.S.C. 1229(a)].
>
> (2) An alien is described in this paragraph if the alien–
>
> (A) was not lawfully admitted for permanent residence at the time at which proceedings under this section commenced * * * .
>
> * * * * *
>
> (3) The Attorney General may not execute any order described in paragraph (1) until 14 calendar days have passed from the date that such order was issued, unless waived by the alien, in order that the alien has an opportunity to apply for judicial review under section 1252.

8 U.S.C. 1228(b) (Supp. III 1997).

Petitioner did not contest that he was properly placed in expedited removal proceedings under Section 1228. He also did not contest the INS's allegations that he was not a citizen of the United States, that he had not been lawfully admitted for permanent residence, and that he had been convicted of the offense of

obtaining merchandise by false pretenses. See INS Mot. to Dism. Pet. for Review, Attach. 1.

On February 4, 1998, pursuant to Section 1228(b), the INS served petitioner with a Final Administrative Removal Order signed by the District Director. Pet. 3. In that Order, the District Director found petitioner to be removable as charged. Pet. App. 6-7. He further found that, because petitioner was convicted of an aggravated felony, petitioner was ineligible for any form of discretionary relief from removal. The District Director ordered petitioner removed from the United States to Mexico. *Ibid.*

2. Petitioner filed a petition for review of the Final Administrative Removal Order in the United States Court of Appeals for the Fifth Circuit.[2] Pet. 4. The INS moved to dismiss the petition for review for lack of subject-matter jurisdiction. The INS relied on 8 U.S.C. 1252(a)(2)(C) (Supp. III 1997), which provides:

> Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

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[2] Section 1228(b) provides that judicial review of Final Administrative Removal Orders is to be conducted pursuant to Section 242 of the INA, 8 U.S.C. 1252 (Supp. III 1997), which requires all petitions for review of orders of removal to be filed in the courts of appeals.

The INS argued that the court lacked jurisdiction over the petition because petitioner is removable under Section 1227(a)(2)(A)(iii), by reason of his criminal conviction. On March 11, 1998, the court of appeals granted the INS's motion to dismiss the petition for review for lack of jurisdiction. Pet. App. 1.

ARGUMENT

The court of appeals properly dismissed petitioner's petition for review of his Final Administrative Removal Order for lack of jurisdiction. Section 1252(a)(2)(C) expressly divested the court of jurisdiction over that petition for review. Further, petitioner's underlying challenge to his removal order is without merit, for he is plainly ineligible for discretionary relief from removal. Further review is therefore not warranted.

1. Petitioner was placed in removal proceedings under 8 U.S.C. 1228(b) (Supp. III 1997), which directs the Attorney General to expedite the removal of aliens who are not permanent residents and who have been convicted of an aggravated felony. There is no dispute that petitioner was convicted of an aggravated felony, or that he was therefore properly placed in expedited removal proceedings under Section 1228. Further, Section 1252(a)(2)(C) divests the courts of appeals of jurisdiction over orders entered against several categories of criminal aliens, including those convicted of aggravated felonies. That Section precludes a court from exercising "jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section * * * 1227(a)(2)(A)(iii)," *i.e.*, an aggravated felony. Accordingly, the court of appeals correctly concluded that it lacked jurisdiction over the petition for review of petitioner's removal order.

Petitioner contends (Pet. 7) that Congress could not have intended to preclude judicial review of cases like his because, in 8 U.S.C. 1228(b)(3) (Supp. III 1997), Congress has provided that the Attorney General may not execute a final order of removal entered in an expedited removal case until 14 days after the order issues, so that the alien has an opportunity to apply for judicial review. Congress's inclusion of the 14-day period in which to seek judicial review does not suggest that the court of appeals had jurisdiction in this case, however, for Congress may have recognized that *some* judicial review might remain available under the INA to aggravated felons, even if such persons were not able to file petitions for review routinely or even frequently. Thus, for example, the courts of appeals retain jurisdiction to review whether an alien subject to a final order of removal entered in an expedited removal proceeding based on an aggravated felony is in fact an alien, and whether the alien was in fact convicted of the offense. See *Yang* v. *INS*, 109 F.3d 1185, 1992 (7th Cir.), cert. denied, 118 S. Ct. 624 (1997). Also, Congress has not provided the "clear and convincing" evidence necessary to conclude that it has withdrawn the courts of appeals' authority to hear constitutional challenges to provisions of the INA itself brought by aggravated felons. Cf. *Johnson* v. *Robison*, 415 U.S. 361, 373-374 (1974). The 14-day waiting period found in Section 1228(b) allows an alien to obtain judicial review under Section 1252 in such circumstances.

The uncontested facts of this case, however, show that petitioner does not fall within any of the classes of cases for which judicial review might be available under Section 1252. Petitioner did not contest the INS's allegations that he was not a citizen of the United States, that he was not a lawful permanent resident of

the United States, and that he was convicted of the offense of obtaining merchandise by false pretenses. The court of appeals was not presented with any issue such as whether petitioner's crime did in fact constitute an aggravated felony. Thus, the court properly concluded that it lacked jurisdiction to review petitioner's final administrative removal order.[3]

2. Petitioner also contends (Pet. 10-11) that the INS District Director's refusal to allow him to apply for discretionary relief from removal violated due process, and was contrary to the INA. Petitioner did not raise that claim in the court of appeals, and the court did not independently pass on the matter. It would therefore be inappropriate for this Court to address that claim in the first instance. See, *e.g.*, *Heller* v. *Doe*, 509 U.S. 312, 319 (1993); *Demarest* v. *Manspeaker*, 498 U.S. 184, 188-189 (1991).

In any event, petitioner's claim has no merit. He contends that he was statutorily eligible to apply for discretionary relief in the form of a waiver of inadmissability under 8 U.S.C. 1182(h) (Supp. III 1997). That contention is incorrect, for 8 U.S.C. 1228(b)(5) (Supp. III 1997) clearly precludes him from obtaining such discretionary relief. Section 1228(b)(5) provides: "No alien described in this [expedited removal] section shall be eligible for any relief from removal that the Attorney General may grant in the Attorney General's discretion." Petitioner was properly placed in removal proceedings under Section 1228, and he is "described" in Section 1228(b)(1), which refers to aliens convicted of

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[3] Petitioner contends (Pet. 5) that the court of appeals dismissed his petition for review without the benefit of his response. Petitioner was served with the government's motion to dismiss and had the opportunity to respond; he chose not to do so.

an aggravated felony. Further, the waiver of inadmissibility that is available under Section 1182(h) requires the exercise of discretion by the Attorney General. Petitioner is therefore ineligible for such relief.

Petitioner erroneously relies (Pet. 11) on the Board of Immigration Appeals' decision in *In re Michel*, Int. Dec. No. 3335 (Jan. 30, 1998). In that case, the Board found that, because the alien had not been "admitted" to the United States, he was technically eligible for relief under Section 1182(h), since that provision only prohibits the grant of discretionary relief to criminal aliens who have been admitted into the country. Petitioner, however, is not similarly situated to the alien in *Michel*. The alien in *Michel* was not in expedited removal proceedings and, thus, was not subject to Section 1228(b)(5)'s bar to discretionary relief. Petitioner, on the other hand, is barred from applying for a waiver of inadmissibility under Section 1182(c) because the granting of the waiver is discretionary.

As petitioner was barred from any form of discretionary relief in his removal proceedings under Section 1228(b)(5), his claim (Pet. 11) that his due process rights were violated because he was deprived of the opportunity to apply for discretionary relief is necessarily without merit. There was no relief for which petitioner was eligible, and so the District Director was not required to consider any application for relief.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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