No. 07-593

In the Supreme Court of the United States

JIAHUA HUANG AND HUAN HUANG, PETITIONERS

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether an order of the Board of Immigration Appeals (BIA) granting a motion to reopen that was filed after the expiration of a period during which the BIA had granted petitioners permission to depart voluntarily from the United States had the effect of retroactively relieving petitioners from the consequences that Congress has prescribed for aliens who fail to depart within the time specified in an order granting voluntary departure.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-2) is unreported. The decisions of the Board of Immigration Appeals (Pet. App. 3-6, 12-13, 14-16) and the immigration judge (Pet. App. 7-11, 17-25) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 2007. The petition for a writ of certiorari was filed on October 30, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Immigration and Nationality Act (INA or the Act), 8 U.S.C. 1101 *et seq.*, as amended, provides that "[t]he Attorney General may permit" certain removable aliens "voluntarily to depart the United States at the

alien's own expense." 8 U.S.C. 1229c(a)(1) and (b)(1). Voluntary departure may be granted before the initiation of removal proceedings or during the course of such proceedings, 8 U.S.C. 1229c(a)(1), and also may be granted at the close of removal proceedings in lieu of an order that the alien be removed from the United States, 8 U.S.C. 1229c(b)(1). Aliens who are granted voluntary departure and comply with its terms avoid the period of inadmissibility that would otherwise result from departure following entry of an order of removal under 8 U.S.C. 1182(a)(9)(A). See 8 C.F.R. 1241.7 ("an alien who departed before the expiration of [a] voluntary departure period * * * shall not be considered to [have been] deported or removed"). Voluntary departure also permits aliens "to choose their own destination points, to put their affairs in order without fear of being taken into custody at any time, [and] to avoid the stigma * * * associated with forced removals." *Lopez-Chavez* v. *Ashcroft*, 383 F.3d 650, 651 (7th Cir. 2004).

To qualify for a grant of permission to depart voluntarily at the close of removal proceedings, an alien must satisfy certain statutory conditions, including "establish[ing] by clear and convincing evidence that [he] has the means to depart the United States and intends to do so." 8 U.S.C. 1229c(b)(1). Even if those conditions are satisfied, the decision whether to permit an alien to depart voluntarily is discretionary with the Attorney General and with the immigration judges (IJs) and the Board of Immigration Appeals (BIA or Board) who act on the Attorney General's behalf. See 8 U.S.C. 1229c(b)(1) (stating that the Attorney General "*may* permit" otherwise-removable aliens who satisfy the specified conditions to depart voluntarily) (emphasis added); 8 U.S.C. 1229c(e) (providing that the Attorney General

"may by regulation limit eligibility for voluntary departure * * * for any class or classes of aliens").

The INA strictly limits the period for which a grant of voluntary departure may last. For aliens who are granted that privilege at the conclusion of removal proceedings, Congress has provided that "[p]ermission to depart voluntarily * * * shall not be valid for a period exceeding 60 days." 8 U.S.C. 1229c(b)(2). Under the Attorney General's regulations, an IJ who grants voluntary departure must "also enter an alternate order [of] removal," 8 C.F.R. 1240.26(d), which automatically converts into a final order of removal if the alien remains in the United States beyond the period permitted for voluntary departure, 8 C.F.R. 1241.1(f). Once voluntary departure has been granted, authority to extend the period of voluntary departure specified initially by an IJ or the BIA is vested in the district director or other officers of Immigration and Customs Enforcement (ICE) in the Department of Homeland Security (DHS), subject to the statutory maximum of 60 days in the case of voluntary departure granted at the conclusion of removal proceedings. See 8 C.F.R. 1240.26(f).

Congress has also provided two specific consequences "if an alien [who] is permitted to depart voluntarily" at the conclusion of removal proceedings "fails voluntarily to depart the United States within the time period specified." 8 U.S.C. 1229c(d)(1) (Supp. V 2005). First, the alien "shall be subject to a civil penalty of not less than $1,000 and not more than $5,000." 8 U.S.C. 1229c(d)(1)(A) (Supp. V 2005). Second, the alien "shall be ineligible, for a period of 10 years," for several specified forms of *discretionary* relief, including cancellation of removal, adjustment of status, and a future grant of

voluntary departure. 8 U.S.C. 1229c(d)(1)(B) (Supp. V 2005). An alien who has overstayed a voluntary departure period remains eligible, however, for *other* forms of protection from removal—including asylum,[1] withholding of removal,[2] and protection under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong, 2d Sess. (1988), 1465 U.N.T.S. 85.

b. The INA and the Attorney General's regulations permit an alien to file a motion to reopen proceedings after a final decision has been rendered by an IJ or the BIA. 8 U.S.C. 1229a(c)(7)(B) (Supp. V 2005); 8 C.F.R. 1003.23(b)(3) (IJ); 8 C.F.R. 1003.2(c) (BIA). The purpose of a motion to reopen is to present "new facts" that may bear on an alien's eligibility for relief. 8 U.S.C. 1229a(c)(7)(B) (Supp. V 2005); see also 8 C.F.R. 1003.2(c)(1) (stating that motions to reopen filed with the BIA must identify evidence that "could not have been discovered or presented at the former hearing" or seek discretionary relief "on the basis of circumstances that have arisen subsequent to the hearing"). An alien "may file one motion to reopen." 8 U.S.C. 1229a(c)(7)(A) (Supp. V 2005). And, subject to three specifically enumerated exceptions that are inapplicable here, 8 U.S.C. 1229a(c)(7)(C)(ii)-(iv) (Supp. V 2005), any such motion "shall be filed within 90 days of the date of entry of a final administrative order of removal." 8 U.S.C. 1229a(c)(7)(C)(i) (Supp. V 2005).

The INA establishes no standards for granting a motion to reopen. The regulations state that "[t]he decision

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[1] 8 U.S.C. 1158 (2000 & Supp. V 2005).

[2] 8 U.S.C. 1231(b)(3) (2000 & Supp. V 2005).

to grant or deny a motion to reopen * * * is within the discretion of the Board" and that it 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); see *INS* v. *Phinpathya*, 464 U.S. 183, 188 n.6 (1984) (whether to grant a motion to reopen "is entirely within the BIA's discretion"). Among other restrictions, an alien who departs the United States may not file a motion to reopen "subsequent to his or her departure," and an alien's departure "after the filing of a motion to reopen * * * shall constitute a withdrawal of such motion." 8 C.F.R. 1003.2(d). With particular respect to voluntary departure, the regulations state that if either the IJ or the BIA grants reopening, either may then "reinstate" a prior grant of voluntary departure, but only "if reopening was granted prior to the expiration of the original period of voluntary departure." 8 C.F.R. 1240.26(h).

2. Petitioners, a father and son, are citizens of the People's Republic of China. Pet. App. 18. The son, petitioner Huan Huang (Huan), last entered the United States in September 1994 on a visa that permitted him to remain until March 25, 2001. *Id.* at 8. The father, petitioner Jiahua Huang (Jiahua), last entered the United States on September 15, 1995, on a visa that authorized him to remain in the United States until April 1, 1996. *Ibid.* Petitioners both overstayed their visas. *Id.* at 18.

3. a. On December 4, 2001, the former Immigration and Naturalization Service (INS) charged petitioners with being removable. A.R. 170-171, 1029-1030. At a master calendar hearing before an IJ, petitioners conceded removability, but sought to apply for asylum, withholding of removal, and, in the alternative, volun-

tary departure. A.R. 69-70. A hearing was held before an IJ, at which petitioners testified. A.R. 72-132.

On April 18, 2002, the IJ issued an oral decision. Pet. App. 17-25. The IJ concluded that petitioners were not eligible for asylum because they had not filed their applications within one year of their arrival in the United States, as required by 8 U.S.C. 1158(a)(2)(B), and had not demonstrated their eligibility to invoke the "[c]hanged circumstances" exception to that one-year limitation contained in 8 U.S.C. 1158(a)(2)(D). Pet. App. 19-20. With respect to withholding of removal, the IJ concluded that the application by Huan (the son) was "contingent upon the application of the father," *id.* at 19, and that Jiahua was not eligible for withholding of removal because "the facts in this case did not establish that it is more likely than not that [he] would be persecuted if [he] were to return to his home country for religious or political reasons." *Id.* at 24.

The IJ did determine, however, that petitioners were eligible for, and "merit[ed] the discretionary grant of[,] voluntary departure." Pet. App. 24. As required by 8 C.F.R. 1240.26(f), the IJ's order further provided that if petitioners did not depart within the time allowed, "the voluntary departure order will become an order of removal" and petitioners would be removed to China. Pet. App. 25. After petitioners' attorney stated their intent to "reserve appeal" to the BIA, the IJ informed petitioners that, if those appeals were "not successful" and petitioners were then to "remain in the United States beyond the authorized date," petitioners would "be found ineligible for certain forms of relief," including "cancellation of removal, adjustment of status and voluntary departure." A.R. 131-132.

b. Petitioners filed an administrative appeal to the BIA, which had the effect of rendering the IJ's order non-final and thus suspending both the voluntary departure period and the alternate order of removal pending appeal. See 8 U.S.C. 1101(a)(47)(B) (order becomes "final" upon affirmance by BIA); 8 U.S.C. 1229c(b)(1) (authorizing the Attorney General to permit voluntary departure "at the conclusion of a [removal] proceeding under section 1229a"). While the appeal was pending, Jiahua (the father) married a United States citizen, who, on April 17, 2003, filed immediate-relative (I-130) visa petitions on behalf of each petitioner. A.R. 157, 975.[3]

On November 25, 2003, the BIA affirmed the IJ's decision. Pet. App. 14-16. The Board agreed that petitioners' "asylum applications [were] untimely," and that, with respect to withholding of removal, petitioners had "failed to establish past persecution, or a clear probability of future persecution." *Id.* at 15. "Pursuant to the Immigration Judge's order," the Board stated that petitioners would be "permitted to voluntarily depart from the United States * * * within 30 days from the date of this order or any extension beyond that time as may be granted by [DHS]." *Ibid.* The BIA's order further provided that if petitioners "fail[ed] to so depart," they would "be removed as provided in the Immigration Judge's order," be subject to a civil penalty, and "be ineligible for a period of 10 years for any further relief" under various provisions of the Act, specifically identifying those authorizing adjustment of status. *Id.* at 15-

[3] The visa petitions were approved on July 1, 2004. A.R. 157, 975. The approval notices designated Jiahua as a "husband or wife of a U.S. citizen" (A.R. 157) and Huan as an "unmarried child (under age 21) of a U.S. citizen" (A.R. 975).

16 (citing, *inter alia*, Sections 240A and 245 of the INA, 8 U.S.C. 1229b and 1255).

4. a. The 30-day voluntary departure period specified in the BIA's order was scheduled to expire on December 25, 2003. Petitioners did not seek an extension of that period from DHS.[4] Nor did they depart. Instead, on December 22, 2003—three days before the expiration of their voluntary departure period—petitioners filed a motion with the IJ, asking the IJ to reopen their removal proceedings to permit them to apply for adjustment of status based on the then-pending I-130 visa petitions that had been filed by Jiahua's wife. A.R. 213-215. See p. 7 & note 3, *supra*.

The IJ refused to consider petitioners' motion, concluding that any filing was required to be made with the BIA. Pet. App. 9; A.R. 367, 369; see 8 C.F.R. 1003.2 ("A request to reopen or reconsider any case in which a decision has been made by the Board * * * must be in the form of a written motion to the Board.").

b. On January 15, 2004—21 days after the expiration of their voluntary departure period—petitioners filed a motion to reopen with the BIA. Pet. App. 12. DHS did not file a response to this motion, and the BIA "deemed [the motion] unopposed." *Ibid.* On March 1, 2004, the BIA granted petitioners' motion to reopen and remanded the matter to the IJ "so that [petitioners] may present their adjustment applications to the Immigration Judge." *Ibid.* In that order, the Board stated that Jiahua "has met the requirements of *Matter of Velarde*, 23 I&N Dec. 253 (BIA 2002), in that he has presented

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[4] Given the 60-day cap on a period of voluntary departure allowed at the conclusion of removal proceedings, see 8 U.S.C. 1229c(b)(2), any such extension would have been limited to an additional 30 days.

clear and convincing evidence indicating a strong likelihood that his marriage is bona fide." Pet. App. 12 n.1. The BIA's order granting reopening further stated that, on remand, "[t]he DHS and [petitioners] will be afforded the opportunity to present any and all available evidence relevant to [petitioners'] statutory and discretionary eligibility for adjustment of status." *Id.* at 13 n.1.

c. DHS filed a motion asking the BIA to reconsider its order granting reopening. A.R. 196-199. In that motion, DHS argued that petitioners' overstay of their voluntary departure period had rendered them "not statutorily eligible for" adjustment of status, A.R. 197, and that the Board had thus erred in granting a motion to reopen to permit petitioners to apply for that form of relief, A.R. 198.[5] On November 15, 2004, the BIA entered an order denying DHS's motion, stating that "DHS failed to raise" that argument "in opposition to [petitioners'] motion to reopen, and offers no explanation for having failed to do so." A.R. 173. The Board stated: "The DHS can present its argument to the Immigration Judge." *Ibid.*

d. On December 3, 2004, DHS filed with the IJ a motion to pretermit petitioners' adjustment-of-status applications, asserting that petitioners were statutorily ineligible for that form of discretionary relief because they had failed to depart the United States within the time specified in the BIA's November 25, 2003, order granting voluntary departure. Pet. App. 7; A.R. 149-154.

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[5] While DHS's motion to reconsider was pending with the BIA, the I-130 visa petitions filed by Jiahua's wife were granted. See note 3, *supra*.

On December 27, 2004, the IJ granted DHS's motion. Pet. App. 7-11. The IJ stated that 8 U.S.C. 1229c(d) "provides in unequivocal terms that any alien who fails to depart the United States within the time period specified in a voluntary departure order is, by virtue of that failure, rendered ineligible for adjustment of status for a period of ten years." Pet. App. 9. The IJ further noted that any extensions of a voluntary departure period granted by the BIA "are within the sole discretion of [DHS]," and it stated that "there [was] no evidence in the record that [petitioners'] voluntary departure period was extended." *Id.* at 10 (citing 8 C.F.R. 1240.26(f)).

e. Petitioners filed an administrative appeal to the BIA of the IJ's decision pretermitting their applications for adjustment of status. On March 14, 2006, the BIA affirmed the IJ's decision. Pet. App. 3-6. Petitioners had argued "that the [IJ] erred in not considering their application for relief after the Board had remanded the record for this purpose and that the DHS should have appealed our grant of the motion to reopen rather than argue that [petitioners] were ineligible for the requested relief before the [IJ]." *Id.* at 4. But "[t]hese arguments," the Board explained, "miss[ed] the central point of the Immigration Judge's conclusion," which was that petitioners "are statutorily ineligible for the requested relief." *Ibid.* The BIA noted that its March 1, 2004, decision had "invited the parties to make their arguments before the Immigration Judge regarding eligibility for the requested relief," and it stated that it "agree[d] with" the IJ's conclusion. *Id.* at 4-5. The Board noted that petitioners had affirmatively sought voluntary departure and been "provided the appropriate warnings of the consequences for any failure to depart." *Id.* at 5.

The Board also concluded that the governing regulations "do not grant us jurisdiction to extend the period of voluntary departure in the case before us," and it noted that the Ninth Circuit's decision in *Azarte* v. *Ashcroft*, 394 F.3d 1278 (2005), was "specifically limited to cases where the motion to reopen proceedings was filed within the time allotted for voluntary departure, which was not the case here." Pet. App. 6.

f. A unanimous panel of the court of appeals denied a petition for review in an unpublished opinion. Pet. App. 1-2. Citing its previous decision in *Banda-Ortiz* v. *Gonzales*, 445 F.3d 387 (5th Cir. 2006), cert. denied, 127 S. Ct. 1874 (2007), the court rejected petitioners' argument "that their motion to reopen proceedings vacated the prior order that they voluntarily depart by a certain date." Pet. App. 2. The court of appeals also rejected petitioners' argument that the BIA's order granting the motion to reopen was an "implicit holding that they were statutorily eligible for adjustment of status and that this comprises the 'law of the case.'" *Ibid.* Because "[t]he referenced order expressly afforded both parties the opportunity to present evidence regarding [petitioners'] eligibility for adjustment of status," the court concluded that "[t]here was no finding, implicit or otherwise, that [petitioners] were statutorily eligible for adjustment of status." *Ibid.*

ARGUMENT

Petitioners contend (see Pet. 21-24) that the BIA erred in concluding that they are statutorily ineligible for adjustment of status, on the theory that "the voluntary departure order with which they allegedly failed to comply no longer existed after the Board granted the motion to reopen proceedings." Pet. 21. Petitioners also

suggest (Pet. 25-29) that this case implicates the division in lower court authority that this Court is currently considering in *Dada* v. *Mukasey*, No. 06-1181 (argued Jan. 8, 2008). Petitioners' contentions lack merit, and further review is not warranted.

1. The issues before the Court in *Dada* are not present here. The conflict described (at 25-28) in the petition for a writ of certiorari—the one at issue in *Dada*—involves whether a motion to reopen that is filed *before* the expiration of a voluntary departure period tolls or otherwise suspends an alien's obligation to depart from the United States while that motion is pending.[6] In this case, however, petitioners acknowledge that their voluntary departure period "*had already expired*" at the time they filed their motion to reopen with the BIA, Pet. 24 (emphasis added), so there was nothing left to "toll." Accord Pet. App. 6 (BIA noting that the motion to reopen at issue was "filed approximately 1 month after [petitioners] were required to have left the United States"). Petitioners cite *no* decision in which a court of appeals has held that an alien's mere filing of a motion to reopen *after* the expiration of a voluntary departure period but within the 90-day period Congress has allowed for motions to reopen retroactively extends

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[6] Compare *Ugokwe* v. *United States Att'y Gen.*, 453 F.3d 1325 (11th Cir. 2006) (holding that the filing of a motion to reopen automatically tolls the voluntary departure period); *Kanivets* v. *Gonzales*, 424 F.3d 330 (3d Cir. 2005) (same); *Sidikhouya* v. *Gonzales*, 407 F.3d 950 (8th Cir. 2005) (same); and *Azarte* v. *Ashcroft*, 394 F.3d 1278 (9th Cir. 2005) (same), with *Dekoladenu* v. *Gonzales*, 459 F.3d 500 (4th Cir. 2006) (filing of a motion to reopen does not toll the voluntary departure period); *Banda-Ortiz* v. *Gonzales*, 445 F.3d 387 (5th Cir. 2006) (same), cert. denied, 127 S. Ct. 1874 (2007); and *Chedad* v. *Gonzales*, 497 F.3d 57 (1st Cir. 2007) (same).

the voluntary departure period or exempts the alien from the statutory consequences contained in 8 U.S.C. 1229c(d)(1) (Supp. V 2005). In fact, every court of appeals that has addressed that question has held to the contrary. See *Naeem* v. *Gonzales*, 469 F.3d 33, 37 (1st Cir. 2006); *Singh* v. *Gonzales*, 468 F.3d 135, 139 & n. 3 (2d Cir. 2006); *de Martinez* v. *Ashcroft*, 374 F.3d 759, 763-764 (9th Cir. 2004). Accordingly, there no warrant to hold this petition for a writ of certiorari pending the Court's decision in *Dada*.[7]

2. Petitioners renew their contention (at 21-24) that the BIA's March 1, 2004, order that granted their motion to reopen retroactively "eliminated the existence and the effect of the previous voluntary departure order" that petitioners had already overstayed at the time they filed their motion to reopen. Pet. 24-25. That claim lacks merit, and the court of appeals' rejection of it in the circumstances of this case does not conflict with the decisions of any other court of appeals.

a. The INA provides for two specific consequences "if an alien [who is granted] permi[ssion] to depart voluntarily [at the conclusion of removal proceedings] voluntarily fails to depart the United States within the time period specified." 8 U.S.C. 1229c(d)(1) (Supp. V 2005). As pertinent here, the Act states that such an alien "shall be ineligible, for a period of 10 years, to re-

[7] Following oral argument in *Dada*, the Court directed the parties to file supplemental briefs addressing the following question: "Whether an alien who has been granted voluntary departure and has filed a timely motion to reopen should be permitted to withdraw the request for voluntary departure prior to the expiration of the departure period." 06-1181 Docket entry (Jan. 14, 2008). That issue is likewise not present here because petitioners did not seek to withdraw their request for voluntary departure within the voluntary departure period.

ceive any further relief under" the sections of the Act governing, *inter alia*, adjustment of status. 8 U.S.C. 1229c(d)(1)(B) (Supp. V 2005) (cross-referencing, *inter alia*, 8 U.S.C. 1229b, 1255, 1258, 1259). Because petitioners neither sought nor obtained an extension of their voluntary departure period from DHS under 8 C.F.R. 1240.26(f), the time period specified for them to depart voluntarily expired on December 25, 2003—30 days after entry of the BIA's November 25, 2003, order. Accordingly, because petitioners voluntarily remained in the United States beyond December 25, 2003, the court of appeals correctly held that they are now statutorily ineligible for adjustment of status.

The BIA's March 1, 2004, order granting petitioners' unopposed motion to reopen their removal proceedings does not alter the analysis. As the court of appeals explained, that order made "no finding, implicit or otherwise, that [petitioners] were statutorily eligible for adjustment of status." Pet. App. 2. To the contrary, both the Board's March 1, 2004, order (*id.* at 12-13 n.1) and the Board's subsequent order denying DHS's motion to reconsider (A.R. 173), "invited the parties to make their arguments before the Immigration Judge regarding eligibility for the requested relief." Pet. App. 4.

Nor are petitioners correct in asserting (Pet. 21-24) that the BIA is *required* to conclude that the subsequent grant of a motion to reopen inherently represents a determination that an alien is eligible for a particular form of discretionary relief, or automatically excuses the alien from the statutory penalties that Congress has provided for aliens who overstay a voluntary departure period. See *Singh*, 468 F.3d at 139 ("We hold that, for purposes of 1229c(d), the granting of a motion to reopen does not

undo the effect of a prior violation of a voluntary departure order."); *Dacosta* v. *Gonzales*, 449 F.3d 45 (1st Cir. 2006); see also *Odogwu* v. *Gonzales*, 217 Fed. Appx. 194 (4th Cir.) (per curiam), cert. denied, 128 S. Ct. 359 (2007). First, "[t]he granting of a motion to reopen does not *necessarily* imply that the underlying application for relief will also be granted, only that it will be considered in light of whatever previously unavailable evidence is presented." *Singh*, 468 F.3d at 139-140 (emphasis added); accord *Dacosta*, 449 F.3d at 50 ("The filing of a motion to reopen with the BIA is not a vehicle for trying an issue, but is merely a request for the opportunity to try it."). Second, in situations (like this one) where an alien has *already* overstayed a voluntary departure period at the time he files a motion to reopen, nothing in either the INA or the Attorney General's regulations provides that a subsequent grant of reopening by the Board will "'retroactively nullify' [the alien's] previous violation of the terms of th[e] order" granting voluntary departure. *Dacosta*, 449 F.3d at 50-51; accord *Singh*, 468 F.3d at 139 ("the granting of a motion to reopen does not undo the effect of a prior violation of a voluntary departure order"); *Odogwu*, 217 Fed. Appx. at 198 ("even though granting a motion to reopen has the legal effect of vacating a prior voluntary departure order, it does not 'retroactively nullify' the *consequences* of a prior violation of a then valid voluntary departure order") (emphasis added). To the contrary, the Attorney General's regulations strongly suggest otherwise by providing that the BIA may "reinstate" a prior grant of voluntary departure following the grant of a motion to reopen, but only in situations where "reopening was granted *prior to* the expiration of the original period of

voluntary departure." 8 C.F.R. 1240.26(h) (emphasis added).

Finally, petitioners' proposed approach "would create perverse, but significant, incentives, not to comply with voluntary departure orders." *Singh*, 468 F.3d at 140. Under longstanding regulations of the Attorney General—regulations that petitioners do not challenge in this case—an alien who departs the United States may not file a motion to reopen "subsequent to his or her departure," and an alien's departure "after the filing of a motion to reopen * * * shall constitute a withdrawal of such motion." 8 C.F.R. 1003.2(d). As a result, an alien who is granted voluntary departure and *complies* with its terms by departing from the United States within the specified time will not be able to pursue a further grant of relief by way of a motion to reopen. In contrast, under petitioners' approach, an alien who *violates* the terms of his agreement to depart voluntarily but then obtains reopening *on any basis*—including situations (as in this case) in which the BIA grants reopening without the benefit of a response from DHS, or where the Board grants reopening to enable the alien to pursue a form of relief, such as asylum or withholding of removal, for which an overstay of a voluntary departure period does not render an alien ineligible, see p. 4, *supra*—would *automatically* regain his eligibility for the very forms of discretionary relief for which Congress has specifically provided that he would become substantively ineligible upon overstay of a voluntary departure period. As a result, petitioners' proposed approach "would put persons who violated their departure orders at a procedural advantage over those who complied with the terms of their orders," which "would be contrary to the statutory

purpose of voluntary departure—to allow a quick departure at no cost to the government." *Odogwu*, 217 Fed. Appx. at 198.

b. Petitioners contend (Pet. 21-22) that the court of appeals' decision in this case conflicts with the Seventh Circuit's decision in *Orichitch* v. *Gonzales*, 421 F.3d 595 (2005). Although *Orichitch* contains language that could be read to suggest that any grant of a motion to reopen by the BIA would "automatically" excuse an alien from the statutorily prescribed consequences for failing to depart the United States within the time specified in an order granting voluntary departure, see *id.* at 598, that decision "involved an unusual set of facts that are easily distinguishable from this case," *Singh*, 468 F.3d at 139.

First, the motion at issue in *Orichitch* was a "joint motion to reopen" by the alien and DHS. 421 F.3d at 598; see 8 C.F.R. 1003.2(c)(3)(iii) (providing that such motions are not subject to the time and numerical limitations applicable to motions to reopen filed by the alien alone). Second, whereas here *petitioners* are responsible for the fact that their motion to reopen was filed with the BIA after their voluntary departure periods had already expired, the alien in *Orichitch* had become the beneficiary of an approved I-130 visa petition "almost a full month before her extended voluntary departure date" was scheduled to expire, and the only reason why the joint motion was not filed within the voluntary departure period was because the responsible government official had, "[f]or some unknown reason," neglected to sign the motion until three days after the alien's voluntary departure period had already expired. 421 F.3d at 596.

Third, in *Orichitch*, the Seventh Circuit interpreted the particular BIA order granting the joint motion to

reopen as constituting an implicit conclusion that the alien in that case was statutorily eligible for adjustment of status. *Id.* at 598 (concluding that, by granting reopening, the BIA had "dispos[ed] of the Section 240B(d) [*i.e.*, 8 U.S.C. 1229c(d) (Supp. V 2005)] issue in the [alien's] favor"). In contrast, the BIA's March 1, 2004, and November 14, 2004, orders in this case make clear that the Board granted reopening because DHS had failed to oppose petitioners' motion (A.R. 173) and because petitioners had presented evidence "indicating a strong likelihood that [Jiahua's] marriage is bona fide" (Pet. App. 12 n.1). Those same orders, however, make clear that the BIA had not determined, either explicitly or implicitly, that petitioners were statutorily eligible for adjustment of status. *Id.* at 13 n.1 (stating that, "[o]n remand," "[t]he DHS * * * will be afforded the opportunity to present any and all available evidence relevant to both [petitioners'] statutory and discretionary eligibility for adjustment of status"); A.R. 173 ("The DHS can present its arguments [regarding petitioners' substantive eligibility for adjustment of status] to the Immigration Judge.").

Given these significant differences, there is no clear conflict between *Orichitch* and the court of appeals' decision in this case. In addition, because the *Orichitch* decision was rendered before the First Circuit's decision in *Dacosta*, the Second Circuit's decision in *Singh*, and the Fourth Circuit's unpublished decision in *Odugwu*—and because the Seventh Circuit has not applied *Orichitch*'s holding in any subsequent decision—this Court's review would be premature at this time even if there were such a conflict.

3. There is an additional reason why review in not warranted in this case. On November 30, 2007, the Attorney General issued a proposed rule addressing a number of issues related to voluntary departure. 72 Fed. Reg. 67,674 (2007). The proposed rule would directly address the issue presented in this case, and resolve it in a manner inconsistent with petitioners' position in this Court:

> The granting of a motion to reopen or reconsider that was filed after the penalties under section 240B(d) of the Act [8 U.S.C. 1229c(d) (Supp. V 2005)] had already taken effect, as a consequence of the alien's prior failure voluntarily to depart within the time allowed, does not have the effect of vitiating or vacating those penalties, except as provided in section 240B(d)(2) of the Act [8 U.S.C 1229c(d)(2) (Supp. V 2005)].

72 Fed. Reg. at 67,686 (proposed 8 C.F.R. 1240.26(e)(2)).[8]

The comment period for the proposed rule closed on January 29, 2008, and the Department of Justice is currently considering the comments. The proposed rule would "app[ly] prospectively only, that is, only with respect to immigration judge orders issued on or after the effective date of the final rule that grant a period of voluntary departure." 72 Fed. Reg. at 67,682. But the rule, if it becomes final, would constitute an authoritative interpretation and implementation of the provisions of the Act and the Attorney General's regulations governing voluntary departure and reopening. It therefore would

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[8] Section 1229c(d)(2) provides an exemption from the statutory penalties for certain battered spouses and children. 8 U.S.C. 1229c(d)(2) (Supp. V 2005).

provide an additional basis for the Seventh Circuit to reconsider its decision in *Orichitch* and thus eliminate any need for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2008