No. 08-1484

In the Supreme Court of the United States

JOSE ANAYA-AGUILAR, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether the court of appeals erred in holding that it lacked jurisdiction to review the Board of Immigration Appeals' denial of petitioner's motion to reopen immigration proceedings under 8 U.S.C. 1252(a)(2)(B)(ii) and (D).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes and regulations—Continued: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-5a) is not published in the *Federal Reporter* but is reprinted in 302 Fed. Appx. 481. The decisions of the Board of Immigration Appeals denying petitioner's motion to reopen (Pet. App. 8a-9a) and motion for reconsideration (Pet. App. 6a-7a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 9, 2008. A petition for rehearing was denied on February 23, 2009 (Pet. App. 2a). The petition for a writ of certiorari was filed on May 18, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In 1996, Congress amended the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, to expedite the removal of criminal and other illegal aliens from the United States. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546. As relevant here, Congress amended the INA to limit judicial review of certain discretionary decisions of the Attorney General. As amended, the relevant section of the INA now provides that no court shall have jurisdiction to review any

> decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

8 U.S.C. 1252(a)(2)(B)(ii). The phrase "this subchapter" refers to Title 8 of the United States Code, Chapter 12, Subchapter II, which is codified at 8 U.S.C. 1151-1381 and pertains broadly to immigration matters. See *Van Dinh* v. *Reno*, 197 F.3d 427, 433 (10th Cir. 1999).

In 2005, Congress amended the INA to include the following provision:

> Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

8 U.S.C. 1252(a)(2)(D), as added by the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 106(a)(1)(A)(iii), 119 Stat. 310.

b. The Board of Immigration Appeals (Board) may reopen any proceedings in which it has previously entered a decision. 8 U.S.C. 1229a(c)(7). 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). 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). The Board shall not grant the motion to reopen "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). An alien may file only one such motion to reopen, and it 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).

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). That interest is especially strong in the immigration context, where "every delay works to the advantage of the deportable alien who wishes merely to remain in the United States." *INS* v. *Doherty*, 502 U.S. 314, 323 (1992). The Board has broad discretion in adjudicating a motion to reopen, and 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 *Doherty*, 502 U.S. at 323; *Abudu*, 485 U.S. at 110; *INS* v. *Phinpathya*, 464 U.S. 183, 188 n.6 (1984).

c. Cancellation of removal is a form of relief from removal that allows an alien who has been physically present in the United States for at least ten years, who has not committed certain crimes, and who has been a person of good moral character to remain in the country because of the extreme hardship that removal would cause to certain United States citizen or lawful permanent resident family members. To be eligible for cancellation of removal, the alien must demonstrate, *inter alia*, that "removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." 8 U.S.C. 1229b(b)(1). The alien bears the burden of proving eligibility for cancellation of removal. 8 C.F.R. 1240.8(d). Even if the alien demonstrates eligibility for cancellation of removal, the decision whether to grant cancellation of removal is entrusted to the Attorney General's broad discretion. 8 U.S.C. 1229b(b)(1).

2. Petitioner is a native and citizen of Mexico. Pet. App. 3a, 10a. He entered the United States without authorization on an unknown date. *Id.* at 3a. He was charged with being removable as an alien present in the United States without being admitted or paroled, see 8 U.S.C. 1182(a)(6)(A)(i), and as an alien not in possession of a valid entry document, see 8 U.S.C. 1182(a)(7)(A)(i)(I). Administrative Record (A.R.) 417. Petitioner appeared before an immigration judge (IJ) with counsel, conceded removability, and sought cancellation of removal and voluntary departure. A.R. 417-418; see Pet. App. 28a, 32a-33a. The IJ held a hearing on the merits of petitioner's claims. Pet. App. 31a-51a.

The IJ determined that petitioner is removable, denied his application for cancellation of removal, and granted his application for voluntary departure. A.R. 417-427. As relevant here, the IJ determined that petitioner failed to demonstrate eligibility for cancellation of removal because he did not establish that his removal would cause exceptional and extremely unusual hardship to his United States citizen children. A.R. 424-425.

The Board affirmed, without opinion, the immigration judge's decision. A.R. 393. The Board specifically noted that petitioner was required to depart the United States within 60 days, or he would become statutorily ineligible for a period of ten years for various forms of discretionary relief, including cancellation of removal. *Ibid.*; see 8 U.S.C. 1229c(d)(1)(B); 8 C.F.R. 1240.26(a). Petitioner has not voluntarily departed the United States.

3. Almost two years later, petitioner moved to reopen his case. Pet. App. 10a-18a. He alleged that his former attorney had provided ineffective assistance of counsel in preparing and presenting his application for cancellation of removal and in keeping him apprized of the status of his case. *Id.* at 10a.

The Board denied the motion to reopen. Pet. App. 8a-9a. The Board observed that "[t]he motion was not filed within the statutory and regulatory 90-day time limit for filing a motion to reopen." *Id.* at 8a (citing 8 U.S.C. 1229a(c)(7)(C)(i) and 8 C.F.R. 1003.2(c)(2)). The Board acknowledged that the 90-day deadline could be equitably tolled, but stated that petitioner "has not argued that his case warrants equitable tolling" and that he has failed to provide "sufficient facts for [the Board] to properly consider the issue." *Id.* at 9a. The Board reviewed petitioner's allegations regarding ineffective

assistance of counsel and determined that, "[b]ased on these sketchy factual allegations it is impossible to determine whether [petitioner] diligently followed his case with [his prior attorney] while his appeal was pending or his reasons for waiting until February 2007[] to investigate the status of his case." *Ibid.* The Board therefore denied the motion to reopen "as untimely filed" without "reach[ing] the substantive allegations raised therein." *Ibid.*

Petitioner then filed a motion for reconsideration of the Board's denial of his motion to reopen, which the Board denied. Pet. App. 6a-7a. The Board found no error in its prior decision. *Id.* at 6a. It also held that, because petitioner proffered new evidence in his motion to reconsider, that motion should be treated as a second motion to reopen, and such a motion is numerically barred by the INA and the relevant regulations. *Id.* at 7a.

4. The court of appeals dismissed petitioner's petition for review in an unpublished, per curiam opinion. Pet. App. 3a-5a. Citing its prior decision in *Kucana* v. *Mukasey*, 533 F.3d 534 (7th Cir. 2008), cert. granted, No. 08-911 (Apr. 27, 2009), the court of appeals held that 8 U.S.C. 1252(a)(2)(B)(ii) precluded judicial review of the Board's denial of petitioner's motions to reopen and reconsider. Pet. App. 4a. The court explained that, under Section 1252(a)(2)(B)(ii), "discretionary decisions by immigration authorities are immune from judicial review unless they raise 'constitutional claims or questions of law.'" *Ibid.* (quoting 8 U.S.C. 1252(a)(2)(D)). The court then determined that petitioner did not raise any constitutional claim or question of law that would be reviewable under 8 U.S.C. 1252(a)(2)(D). Pet. App. 4a-5a.

DISCUSSION

Petitioner seeks review (Pet. 18-20) of the court of appeals' determination that 8 U.S.C. 1252(a)(2)(B)(ii) precluded it from reviewing the Board's denial of his motion to reopen immigration proceedings. On April 27, 2009, this Court granted certiorari in *Kucana* v. *Holder*, No. 08-911, to decide whether Section 1252(a)(2)(B)(ii) precludes judicial review of the Board's denial of a motion to reopen immigration proceedings. Because this case presents the same question as *Kucana*, the Court should hold the petition pending the Court's decision in *Kucana*, and then dispose of it accordingly.[*]

[*] Petitioner also argues (Pet. 21) that the court of appeals erred in holding that his petition for review did not raise any constitutional claim or question of law that would be reviewable under 8 U.S.C. 1252(a)(2)(D). That issue does not warrant this Court's review. Because *Kucana* concerns the threshold question whether Section 1252(a)(2)(B)(ii) deprives the courts of jurisdiction to review denials of motions to reopen, the Court should hold this petition for *Kucana*, rather than assume that Section 1252(a)(2)(B)(ii) precludes judicial review and then reach out to decide whether Section 1252(a)(2)(D) restores jurisdiction over petitioner's claims. Moreover, petitioner has not identified any pressing need for this Court's review of the Section 1252(a)(2)(D) issue. He does not contend that there is any disagreement in the circuits regarding whether the types of claims he raised contain reviewable constitutional claims or questions of law. Indeed, he provides only a conclusory, three-sentence argument on this issue, which may not even be sufficient to preserve the issue in this Court.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Kucana* v. *Holder*, No. 08-911, and then disposed of in accordance with the Court's decision in that case.

Respectfully submitted.

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