No. 09-913

In the Supreme Court of the United States

ELVIS DAVID LEWIS, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
DONALD E. KEENER
CAROL FEDERIGHI
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly determined that it lacked jurisdiction to review the decision of the Board of Immigration Appeals not to reconsider petitioner's case *sua sponte*.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and regulations:

Statutes and regulations—Continued: Page

In the Supreme Court of the United States

No. 09-913

ELVIS DAVID LEWIS, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-4a) is not published in the *Federal Reporter* but is reprinted in 325 Fed. Appx. 178. The decision of the Board of Immigration Appeals (Pet. App. 5a-6a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 6, 2009. A petition for rehearing was denied on August 18, 2009 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on November 16, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, an alien present in the

United States may seek adjustment of status to that of a lawful permanent resident. See 8 U.S.C. 1255. The alien must meet several prerequisites to qualify for adjustment, including that the alien be "admissible to the United States for permanent residence." 8 U.S.C. 1255(a)(2). As relevant here, aliens convicted of certain criminal offenses and aliens who have falsely represented themselves as United States citizens are not admissible for permanent residence. See 8 U.S.C. 1182(a)(2) and (6)(C)(ii). The Attorney General has discretion, under certain conditions, to waive the applicability of some of these grounds of inadmissibility, including those based on criminal convictions. 8 U.S.C. 1182(h). However, the Attorney General may not waive inadmissibility based on a false representation of United States citizenship. *Ibid.*

An alien is eligible to seek a waiver of inadmissibility only if he demonstrates that he meets certain statutory requirements. One of those requirements for an alien "who is the spouse [or] parent * * * of a citizen of the United States" is to show that "denial of admission would result in extreme hardship to * * * [his] spouse, * * * son, or daughter." 8 U.S.C. 1182(h)(1)(B). In addition to satisfying the statutory eligibility requirements, an alien seeking a waiver of inadmissibility must show that he warrants such relief as a matter of discretion. See, *e.g.*, *In re Mendez-Moralez*, 21 I. & N. Dec. 296, 299 (B.I.A. 1996) (en banc).

b. An alien may file one motion to reconsider any order of the Board of Immigration Appeals (Board) or the immigration judge (IJ). 8 U.S.C. 1229a(c)(6); 8 C.F.R. 1003.2(b), 1003.23(b). The alien may file only one such motion for any given decision, and it must be filed within 30 days of the date of entry of the deci-

sion of which reconsideration is sought. 8 U.S.C. 1229a(c)(6)(A) and (B); see 8 C.F.R. 1003.2(b)(2). The motion must "specify the errors of law or fact in the previous order" and "be supported by pertinent authority." 8 U.S.C. 1229a(c)(6)(C); see 8 C.F.R. 1003.2(b)(1). An alien "may not seek reconsideration of a decision denying a previous motion to reconsider." 8 C.F.R. 1003.2(b)(2).

If the alien does not file his motion to reconsider within the 30-day time period, the Board or the IJ still may reconsider his case *sua sponte*. 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). Whether to reconsider a decision *sua sponte* is entrusted to the discretion of the Board. 8 C.F.R. 1003.2(a). The Board "invoke[s] [its] sua sponte authority sparingly, treating it not as a general remedy for any hardships created by enforcement of the time and number limits in the motions regulations, but as an extraordinary remedy reserved for truly exceptional situations." *In re G-D-*, 22 I. & N. Dec. 1132, 1133-1134 (B.I.A. 1999).

2. Petitioner is a native and citizen of Grenada who entered the United States in February 1981 as a nonimmigrant visitor with authorization to stay for one month. Pet. App. 13a. Petitioner remained in the United States beyond the time permitted. *Ibid.* During his time in the United States, petitioner has been convicted of several crimes, including conspiracy to possess marijuana with the intent to distribute it, domestic assault, and embezzlement. *Id.* at 14a.

The former Immigration and Naturalization Service (INS) charged petitioner with being removable from the United States. Pet. App. 11a-12a; see Administrative

Record (A.R.) 772-773. The INS alleged that petitioner was removable for five different reasons: he overstayed his authorized period of stay, see 8 U.S.C. 1227(a)(1)(B); he had been convicted of a controlled substance violation, see 8 U.S.C. 1227(a)(2)(B)(i); he had been convicted of a crime of domestic violence, see 8 U.S.C. 1227(a)(2)(E)(i); he had been convicted of an aggravated felony, see 8 U.S.C. 1227(a)(2)(A)(iii); and he had been convicted of two or more crimes involving moral turpitude, see 8 U.S.C. 1227(a)(2)(A)(ii). Pet. App. 11a-12a; A.R. 562-563, 772-773.[1] The INS then lodged a sixth basis for removability: that petitioner had falsely represented himself to be a United States citizen in seeking employment, see 8 U.S.C. 1227(a)(3)(D). Pet. App. 12a; A.R. 562-563.

Petitioner appeared before an IJ and conceded the charges of removability against him, except that he neither admitted nor denied the charge that he had falsely claimed to be a United States citizen. A.R. 491, 496.

---

[1] The INS previously had ordered petitioner removed pursuant to the INA's expedited removal procedures, see 8 U.S.C. 1228(b), on the ground that petitioner's controlled substance offense qualified as an aggravated felony. Petitioner filed a petition for review of that decision. He "concede[d] that he is an alien and that his [drug] conviction * * * qualifies as an 'aggravated felony' within the meaning of the INA." *Lewis* v. *United States INS*, 194 F.3d 539, 541 (4th Cir. 1999). The court of appeals dismissed the petition for review, holding that it lacked jurisdiction under 8 U.S.C. 1252(a)(2)(C), which provides that "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 [8 U.S.C.] 1182(a)(2) or 1227(a)(2)(A)(iii)." *Lewis*, 194 F.3d at 541-542. But shortly before the court of appeals issued its decision, the INS commenced the formal removal proceedings that are the subject of this petition, pursuant to 8 U.S.C. 1229a, and subsequently sought petitioner's removal only through those proceedings.

Petitioner sought discretionary relief from removal. In particular, he sought adjustment of status under 8 U.S.C. 1255, based on an approved visa petition filed on his behalf by his United States citizen daughter, along with a waiver of inadmissibility under 8 U.S.C. 1182(h) for his convictions. A.R. 496.

The IJ determined that petitioner was removable on all six grounds alleged. A.R. 490-500. With regard to the charge that petitioner had falsely represented himself as a United States citizen, the IJ found that petitioner "attested under penalty of perjury to being a citizen of the United States" on the Form I-9 he submitted to obtain employment and "submitted to his employer a 'U.S. passport,' expired in 1993, indicating 'U.S.A.' as his place of birth." A.R. 496. The IJ further noted that petitioner "neither addressed this charge in his testimony nor in his applications for relief" from removal. *Ibid.* Based on the cited evidence, the IJ concluded that the INS had established by clear and convincing evidence that petitioner was removable for falsely representing himself to be a United States citizen. *Ibid.*

The IJ observed that a waiver of inadmissibility under 8 U.S.C. 1282(h) "does not waive [petitioner's] inadmissibility for falsely claiming citizenship." A.R. 496 n.2. Nevertheless, the IJ proceeded to consider petitioner's eligibility for a waiver of inadmissibility. A.R. 496-499. The IJ determined that petitioner did not meet the "extreme hardship" requirement for such a waiver and further held that he would deny the waiver in the exercise of his discretion in light of petitioner's numerous criminal convictions and his false claim of United States citizenship. *Ibid.* The IJ therefore concluded that petitioner was ineligible to adjust his status and ordered him removed to Grenada. A.R. 499.

Petitioner appealed this decision to the Board, but then withdrew his appeal. A.R. 471-473, 483-486. The Board issued an order noting that fact and returning the record to the IJ. A.R. 400-401.

3. Petitioner filed a motion to reconsider with the IJ. A.R. 480-481. Petitioner again sought adjustment of status and a waiver of inadmissibility, this time based on his marriage to a United States citizen and his claim of hardship to that spouse. Pet. App. 15a.

The IJ reopened petitioner's case but again found him removable and denied the requested relief from removal. Pet. App. 11a-18a. In response to petitioner's argument that he did not falsely claim United States citizenship, the IJ specifically examined the evidence in the record and concluded that the second piece of evidence—an altered passport—was a Grenadian passport that had been modified "to show [petitioner's] place of birth being the United States of America." A.R. 151. The IJ determined that petitioner had "taken [this] and modified it accordingly so as to masquerade as a United States citizen." A.R. 152. As a result of this finding, the IJ again held that petitioner was statutorily ineligible for a waiver of inadmissibility, and therefore statutorily ineligible for adjustment of status. Pet. App. 15a.

The IJ also rejected the new forms of relief petitioner requested—cancellation of removal under 8 U.S.C. 1229b and voluntary departure under 8 U.S.C. 1229c—explaining that petitioner was ineligible for those forms of relief because of his conviction of an aggravated felony and his false claim of United States citizenship (which precluded a finding of good moral char-

acter). Pet. App. 16a-17a.[2] The IJ therefore again ordered petitioner removed from the United States. *Id.* at 17a.

4. The Board dismissed petitioner's appeal. Pet. App. 7a-10a. The Board observed that, although petitioner argued that he was eligible for a waiver of inadmissibility, he "fail[ed] to address" on appeal the IJ's finding that he was ineligible for a waiver of inadmissibility because of his false claim of United States citizenship. *Id.* at 9a; see A.R. 59-69. The Board further emphasized that petitioner "has never contested on appeal the Immigration Judge's finding that he is removable as charged under * * * 8 U.S.C. 1227(a)(3)(D)," the false-claim-of-citizenship provision. Pet. App. 9a. Accordingly, the Board concluded that petitioner was ineligible for a waiver of inadmissibility and therefore ineligible to adjust his status to that of a lawful permanent resident. *Ibid.* For the same reason, the Board rejected petitioner's second argument, which was that the Board erred in precluding him from presenting evidence of rehabilitation in support of his request for adjustment of status. *Id.* at 10a.

Petitioner filed a petition for review, and the court of appeals dismissed it in part and denied it in part in an unpublished, per curiam decision. *Lewis* v. *Mukasey*, 262 Fed. Appx. 544 (4th Cir.), cert. denied, 129 S. Ct. 310 (2008). As relevant here, the court held that it lacked jurisdiction to review petitioner's claim that he was not removable for falsely claiming United States citizenship. The court explained that petitioner had not exhausted his available administrative remedies because he failed

[2] Petitioner did not appeal the denial of cancellation of removal. See A.R. 59-69. The Board upheld the IJ's denial of voluntary departure, Pet. App. 10a, and petitioner did not pursue it further.

to contest that issue before the Board. *Id.* at 545. The court also rejected petitioner's second argument, which was that the IJ erred in precluding him from presenting evidence of rehabilitation after finding him ineligible for adjustment of status. *Ibid.* The court explained that petitioner "cannot succeed with this due process claim because he fail[ed] to show the requisite prejudice resulting from the alleged error." *Ibid.*

Petitioner filed a petition for rehearing, which was denied. Petitioner then filed a petition for a writ of certiorari, which also was denied. See *Lewis* v. *Mukasey*, 129 S. Ct. 310 (2008) (No. 08-203).

5. Petitioner successively filed three motions to reconsider with the Board.

a. In his first motion, petitioner argued that the Board erred in finding that he waived any challenge to removability based on his false claim of citizenship and that the Board and IJ had incorrectly sustained that charge of removability. A.R. 50-54.

The Board denied the motion to reconsider, explaining that petitioner failed to articulate any legal or factual error in the Board's or IJ's previous determinations that he is removable and ineligible for a waiver of inadmissibility based on his false claim of United States citizenship. A.R. 38. Petitioner did not seek judicial review of that determination.

b. Petitioner's second motion sought reconsideration of the Board's denial of his first motion for reconsideration. A.R. 31-36. Petitioner again contended that he had not waived any challenge to the finding that he was removable for having made a false claim of United States citizenship. A.R. 34.

The Board denied this motion as well, explaining that the motion was numerically barred under 8 C.F.R.

1003.2(b)(2), which allows only one motion to reconsider. A.R. 26. Petitioner did not seek judicial review of that determination either.

c. Petitioner then filed a third motion to reconsider, which is the motion at issue here. Petitioner conceded that he had exceeded the numerical limitations for motions to reconsider, but asked the Board to exercise its *sua sponte* authority to reconsider its denial of his second motion to reconsider. A.R. 7-9. Petitioner again argued that the IJ erred in concluding that he had made a false claim of United States citizenship. A.R. 8-9.

The Board denied petitioner's third reconsideration motion. Pet. App. 5a-6a. The Board noted that, under 8 C.F.R. 1003.2(b)(2), an alien may not seek reconsideration of a previous denial of reconsideration. Pet. App. 5a. The Board also declined to reconsider its previous decision *sua sponte*, "find[ing] no basis upon which to exercise [its] *sua sponte* authority." *Ibid.* The Board explained that petitioner had "failed to contest on appeal the finding that he is removable" on the basis of a false claim of citizenship, observing that petitioner "did not raise his challenge to removability in either his Notice of Appeal or his appellate brief." *Id.* at 5a-6a. In any event, the Board explained, "the finding of removability * * * is supported by *two* pieces of evidence, namely the Form I-9 [petitioner's employment eligibility form] and the copy of [petitioner's] passport falsely listing the United States as his place of birth." *Id.* at 6a. The Board therefore found "no error in [its] dismissal of [petitioner's] appeal and no basis to *sua sponte* reconsider [its] decision." *Ibid.*

6. The court of appeals dismissed petitioner's petition for review in an unpublished, per curiam order. Pet. App. 3a-4a. The court explained that it was being

asked to review "an order of the Board * * * declining to exercise its sua sponte authority to grant [petitioner's] third motion to reconsider" and held that it did "not have jurisdiction to review the Board's decision not to invoke its sua sponte authority to grant relief." *Id.* at 4a. The court cited (*ibid.*) *Mosere* v. *Mukasey*, 552 F.3d 397 (4th Cir.), cert. denied, 130 S. Ct. 137 (2009), where it had previously explained that the Board's denial of a motion to reopen based on its *sua sponte* authority is not subject to judicial review because that authority is entrusted to the Board and "there are no meaningful standards by which to judge the [Board's] exercise of its discretion." *Id.* at 400-401.

ARGUMENT

Petitioner contends (Pet. 12-21) that the court of appeals erred in dismissing his claim for lack of jurisdiction and that the agency erred in denying his application for adjustment of status. The court of appeals' decision is correct and does not conflict with a decision of any other court of appeals. Petitioner's other arguments, which relate generally to the merits of his case, are not properly before this Court, because the court of appeals did not rule on them. Further review is therefore unwarranted.

1. At issue in this case is the Board's denial of petitioner's third motion to reopen. Under the governing regulations, an alien is limited to one motion to reconsider any given decision. 8 C.F.R. 1003.2(b)(2). The motion at issue is petitioner's third motion to reconsider. Accordingly, the motion is numerically barred. *Ibid.* Petitioner conceded that point below, but argued that the Board should exercise its *sua sponte* authority to reopen proceedings. A.R. 7-9.

The Board declined to exercise its discretion to reconsider petitioner's case *sua sponte*, Pet. App. 5a-6a, and the court of appeals held that it lacked jurisdiction to review that determination, *id.* at 4a. In support of its conclusion that a denial of *sua sponte* reconsideration opening is unreviewable, the court of appeals cited *Mosere* v. *Mukasey*, 552 F.3d 397, 400-401 (4th Cir.), cert. denied, 130 S. Ct. 137 (2009), which held that the decision whether to reopen removal proceedings *sua sponte* is unreviewable because it is committed to the Board's discretion by law. Pet. App. 4a. 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). As the *Mosere* court explained, that is true with respect to *sua sponte* reopening because "there are no meaningful standards by which to judge the [Board's] exercise of its discretion." 552 F.3d at 401. The *Mosere* court noted that "Section 1003.2(a) * * * 'provides no guidance as to the [Board's] appropriate course of action, sets forth no factors . . . , places no constraints on the [Board's] discretion, and specifies no standards for a court to use to cabin the [Board's] discretion.'" *Ibid.* (quoting *Tamenut* v. *Mukasey*, 521 F.3d 1000, 1004 (8th Cir. 2008) (en banc)). Furthermore, 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. It does not confer any privately enforceable rights on an alien. Accordingly, the Board's decision whether to reconsider a decision *sua sponte* is committed to agency discretion by law and is not reviewable by a court.

The decision below is consistent with the unanimous view of the courts of appeals that the Board's decision

not to reopen or reconsider a case *sua sponte* is unreviewable. See *Mosere*, 552 F.3d at 400 (collecting cases).[3] Although most cases concerning the Board's *sua sponte* authority have addressed motions to reopen, rather than motions to reconsider, the two are the same for purposes of judicial review, because the relevant regulation commits both decisions to the Board's broad discretion, provides a procedural mechanism for the Board rather than conferring an individually-enforceable right, and provides no judicially manageable standards for reviewing these decisions. See, *e.g.*, *Calle-Vujiles* v. *Ashcroft*, 320 F.3d 472, 475 (3d Cir. 2003).

Petitioner contends (Pet. 13) that the court of appeals' ruling conflicts with *Tamenut* v. *Gonzales*, 477 F.3d 580 (8th Cir. 2007), but the Eighth Circuit vacated that decision *en banc* and joined the unanimous view of the other courts of appeals. See 521 F.3d at 1004. Petitioner also cites (Pet. 14) decisions of the First and Third Circuits, but those decisions are inapposite. *Prado* v. *Reno*, 198 F.3d 286 (1st Cir. 1999), is directly contrary to petitioner's position. There, the court of appeals held that the alien's claim was "simply not justiciable" because "the decision of the [Board] whether to invoke its sua sponte authority is committed to its unfettered discretion." *Id.* at 292 (citation omitted).

Cruz v. *Attorney General of the United States*, 452 F.3d 240 (3d Cir. 2006), is likewise inapt. In that case, the court of appeals remanded to the Board to answer

---

[3] In *Kucana* v. *Holder*, 130 S. Ct. 827 (2010), which held that 8 U.S.C. 1252(a)(2)(B)(ii) generally does not preclude judicial review of the denial of a motion to reopen, the Court recognized that ten courts of appeals had agreed that denials of *sua sponte* reopening are unreviewable because *sua sponte* reopening is committed to agency discretion by law. *Id.* at 839 n.18.

predicate factual and legal questions that would have an impact on whether judicial review was barred by a particular provision of the INA, 8 U.S.C. 1252(a)(2)(C), or (alternatively) was barred because the decision was committed to agency discretion by law. See 452 F.3d at 249-250. The court of appeals recognized that it generally "lack[s] jurisdiction to review [Board] decisions not to reopen proceedings sua sponte," but determined that a remand was appropriate in that particular case because unresolved factual and legal issues meant that the court was "presented with a jurisdictional conundrum in that we have no way of knowing whether the [Board] declined to exercise its sua sponte authority on a reviewable or non-reviewable basis." *Ibid.* *Cruz* did not create disagreement in the circuits, for the court of appeals accepted the general principle that the Board's decision not to exercise its *sua sponte* authority is unreviewable. Moreover, this is not the exceptional case where the court of appeals is unable to discern the basis for the Board's decision: the Board has repeatedly explained that petitioner waived any challenge to the IJ's finding that he made a false claim of citizenship and that the IJ's factual findings were well-supported in the record. Pet. App. 5a-6a, 9a. The court of appeals has already held that petitioner failed to exhaust his challenge to the false-claim-of-citizenship finding, *Lewis* v. *Mukasey*, 262 Fed. Appx. 544, 545 (4th Cir. 2008), and this Court denied certiorari, see 129 S. Ct. 310 (2008).

2. Petitioner also contends that the court of appeals erred because he raises a question of law or constitutional claim, which would be reviewable under 8 U.S.C. 1252(a)(2)(D). See Pet. 13 (citing *Midi* v. *Holder*, 566 F.3d 132 (4th Cir. 2009)). He is mistaken. Section 1252(a)(2)(D) 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.

8 U.S.C. 1252(a)(2)(D).

As an initial matter, petitioner did not raise any argument regarding Section 1252(a)(2)(D) in the court of appeals, and the court of appeals did not pass on it. This Court therefore should decline to address that issue in the first instance. *E.g.*, *United States* v. *Williams*, 504 U.S. 36, 41 (1992). Moreover, petitioner does not allege that there is any disagreement in the circuits regarding the applicability of Section 1252(a)(2)(D) to denials of *sua sponte* reconsideration.

In any event, 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. Instead, they are unreviewable as committed to agency discretion by law, both because the regulations allowing the Board to reopen or reconsider a case on its *own* motion create no privately enforceable right, and because there are no judicially manageable standards to evaluate the agency's exercise of its discretion. See pp. 11-12, *supra*. Even assuming that Section 1252(a)(2)(D) applies to matters that are committed to agency discretion

by law, petitioner does not raise any colorable legal issue. The Board determined that petitioner was removable because he made a false claim of citizenship and that petitioner waived any challenge to that determination. Pet. App. 5a-6a, 9a. Those fact-based determinations do not raise questions of law. Moreover, although petitioner alleges (Pet. 20-21) a due process violation, his complaint is about the IJ's conduct of his hearing, not of the Board's decision not to reconsider his case *sua sponte*, and, in any event, that claim was already rejected by the court of appeals and certiorari was denied by this Court. See pp. 16-17, *infra*. Accordingly, the court of appeals did not err in finding petitioner's claim unreviewable.

3. Even if the court of appeals did have jurisdiction here, petitioner could not prevail. *Sua sponte* reconsideration is entrusted to the Board's broad discretion. See 8 C.F.R. 1003.2(a). The Board has explained that it only reopens or reconsiders proceedings *sua sponte* in "exceptional situations" and not "as a general cure for filing defects or to otherwise circumvent the regulations, where enforcing them might result in hardship." *In re J-J-*, 21 I. & N. Dec. 976, 984 (B.I.A. 1997). Here, the IJ reviewed the evidence and testimony and made specific findings that petitioner made a false claim of citizenship based on two independent pieces of evidence—an I-9 employment authorization form and a falsified passport. Pet. App. 6a; A.R. 496. On appeal, petitioner entirely "fail[ed] to address" the IJ's finding that he was ineligible for a waiver of inadmissibility because of his false claim of United States citizenship and "never contested" the IJ's finding "that he is removable as charged under * * * 8 U.S.C. § 1227(a)(3)(D)." Pet. App. 9a. The Board reasonably decided to deny petitioner's third suc-

cessive motion to reconsider where the IJ had made specific findings on the issue and petitioner had failed to contest the IJ's determination despite numerous filings and years of proceedings before the agency.

4. Petitioner contends (Pet. 15-21) that the IJ erred in finding that he made a false claim of citizenship. That claim is not properly presented here because it was not addressed by the court of appeals. The court of appeals ruled only that petitioner's claim was unreviewable; it did not consider any of the underlying substantive issues petitioner sought to raise. Pet. App. 4a. Review should be denied on that basis alone. See, *e.g.*, *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 109 (2001).

In any event, both the Board and the court of appeals determined that petitioner waived that claim several years ago by failing to challenge the IJ's findings in his initial appeal. See Pet. App. 9a; *Lewis*, 262 Fed. Appx. at 545. Petitioner sought certiorari, and it was denied. See *Lewis*, 129 S. Ct. at 310. Petitioner cannot attempt to revive a challenge to the IJ's factual findings at this late date. And even if petitioner could raise and prevail on his argument that he did not falsely claim citizenship, the IJ already has determined that he would not warrant a favorable exercise of discretion, as would be required for the relief petitioner seeks. A.R. 496-499.

Finally, petitioner contends (Pet. 20-21) that the IJ violated his due process rights by not allowing him to put on certain evidence in support of a request for relief for which he was ineligible. That claim also was not addressed by the court in the decision below. It also was raised and rejected by the Board (Pet. App. 10a) and the court of appeals (*Lewis*, 262 Fed. Appx. at 545) at an earlier stage of this litigation, and certiorari was denied. The claim would fail on its merits in any event. As the

court of appeals explained, petitioner "cannot succeed with this due process claim because he fails to show the requisite prejudice resulting from the alleged error." *Ibid.* 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
DONALD E. KEENER
CAROL FEDERIGHI
Attorneys

JUNE 2010