No. 06-610

In the Supreme Court of the United States

JAMAL MOORANI, PETITIONER

v.

ALBERTO R. GONZALES, 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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QUESTIONS PRESENTED

1. Whether the grant of a motion to reopen removal proceedings necessarily vacated the requirement in an underlying order granting voluntary departure that the alien depart the United States by a specified date.

2. Whether the filing of a motion to reopen removal proceedings automatically tolls the period within which an alien must depart the United States under an order granting voluntary departure.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-5) is not published in the *Federal Reporter* but is available at 182 Fed. Appx. 352. The order of the Board of Immigration Appeals (Pet. App. 6) and the decision of the immigration judge (Pet. App. 7-8) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 26, 2006. A petition for rehearing was denied on August 2, 2006 (Pet. App. 25-26). The petition for a writ of certiorari was filed on October 31, 2006. 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, as an alternative to

formal removal proceedings and entry of a formal removal order, "[t]he Attorney General may permit an alien 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 ordering that the alien be removed, 8 U.S.C. 1229c(b)(1). Aliens who receive voluntary departure avoid the five to ten-year period of inadmissibility that would result from an order of removal. See 8 U.S.C. 1182(a)(9)(A). 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." *Thapa* v. *Gonzales*, 460 F.3d 323, 328 (2d Cir. 2006) (quoting *Lopez-Chavez* v. *Ashcroft*, 383 F.3d 650, 651 (7th Cir. 2004)). To qualify for a grant of voluntary departure at the close of removal proceedings, an alien must satisfy certain statutory conditions, including establishing that he "has the means to depart the United States and intends to do so." 8 U.S.C. 1229c(b)(1)(D); see 8 U.S.C. 1229c(b)(1)(A)-(C).

Because the Act provides that the Attorney General "may" permit an alien to depart voluntarily, the determination whether to allow an alien to do so is discretionary with the Attorney General, and with the immigration judge (IJ) and Board of Immigration Appeals (BIA) who act on his behalf. And the Act further provides that "[t]he Attorney General may by regulation limit eligibility for voluntary departure * * * for any class or classes of aliens." 8 U.S.C. 1229c(e).

The Act prescribes that, when an alien is granted voluntary departure at the close of removal proceedings, "[p]ermission to depart voluntarily * * * shall not be valid for a period exceeding 60 days." 8 U.S.C. 1229c(b)(2).[1] An IJ who grants voluntary departure must "also enter an alternate order [of] removal," which takes effect if the alien fails to depart within the period specified in the voluntary departure order. 8 C.F.R. 1240.26(d); see 8 C.F.R. 1241.1(f). After entry of a final order, authority to extend a 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, see 8 C.F.R. 1240.26(f), subject to the statutory maximum of 60 days in the case of voluntary departure granted at the conclusion of proceedings. Failure "to depart the United States within the time period specified" results, *inter alia*, in the alien's becoming "ineligible for a period of 10 years," to receive certain forms of discretionary relief, including cancellation of removal, adjustment of status, and a subsequent grant of voluntary departure. 8 U.S.C. 1229c(d)(1)(B) (as amended by Pub. L. No. 109-162, Tit. VIII, § 812, 119 Stat. 3057); see 8 C.F.R. 1240.26(a).

b. The INA provides that an alien who has been found removable from the United States "may file one motion to reopen [the removal] proceedings" to present "new facts." 8 U.S.C. 1229a(c)(6)(A)-(B). The statute prescribes that "the motion to reopen shall be filed within 90 days of the date of entry of a final administra-

[1] When voluntary departure is granted before the initiation or in the course of removal proceedings, rather than at the close of such proceedings, the alien may be allowed a maximum of 120 days to depart voluntarily. 8 U.S.C. 1229c(a)(2)(A).

tive order of removal." 8 U.S.C. 1229a(c)(6)(C)(i). An alien who is the subject of removal proceedings and who departs the United States may not file a motion to reopen "subsequent to his or her departure." 8 C.F.R. 1003.2(d). In addition, if an alien who is the subject of removal proceedings departs the United States "after the filing of a motion to reopen," the alien's departure "constitute[s] a withdrawal of such motion." *Ibid.*

The regulations provide that, if removal proceedings are reopened, the IJ or the BIA may reinstate 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(f) and (h). Moreover, the "decision to grant or deny a motion to reopen * * * is within the discretion of the Board," and "[t]he Board has discretion to 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). Finally, the filing of a motion to reopen "shall not stay the execution of any decision made in the case," and "[e]xecution of such decision shall proceed unless a stay of execution is specifically granted by" the BIA or the IJ. 8 C.F.R. 1003.2(f).

2. Petitioner is a native and citizen of Pakistan who illegally entered the United States without inspection in 1990. On October 31, 1997, the government initiated removal proceedings against petitioner, charging him 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). Petitioner conceded that he was removable, but requested asylum and withholding of removal, or, in the alternative, voluntary departure. Pet. App. 2.

On August 8, 2000, the immigration judge (IJ) denied petitioner's request for asylum and withholding of removal, but granted his request for voluntary departure.

Pet. App. 13-24. The IJ's order gave petitioner a period of 60 days within which to effect his voluntary departure; included an alternate order of removal; and specified that, if petitioner failed "to depart voluntarily when and as required," the allowance of voluntary departure would "be withdrawn automatically and" the alternate removal order "would take immediate effect." *Id.* at 23-24.

Petitioner filed an administrative appeal to the BIA, which had the effect of rendering the IJ's order non-final and thus of tolling the voluntary departure period 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) (allowing Attorney General to permit voluntary departure at the conclusion of a removal proceeding under 8 U.S.C. 1229a); 8 C.F.R. 1003.6(a), 1003.39; *In re Chouliaris*, 16 I. & N. Dec. 168, 169-170 (BIA 1997). On April 8, 2002, the BIA summarily dismissed petitioner's appeal. Pet. App. 11-12. The BIA's order specified that petitioner would be permitted to depart voluntarily within a period of 30 days from the date of the BIA's order "or any extension beyond that time as may be granted by the district director." *Id.* at 12; see 8 C.F.R. 1240.26(f). The BIA's order also gave notice that, if petitioner failed to depart "within the time period specified," petitioner would "be ineligible for a period of 10 years for any further relief under," *inter alia*, the statutory provisions governing adjustment of status. Pet. App. 12.

3. On February 4, 2002, while petitioner's administrative appeal was still pending before the BIA, an employment-based visa petition was approved on petitioner's behalf. Pet. App. 2. Petitioner, however, did not file a motion with the BIA to remand the proceedings to

the IJ to enable him to seek adjustment of status based on the approved visa petition, as the regulations allow. See 8 C.F.R. 1003.2(c)(4). And after the BIA issued its order dismissing petitioner's appeal, petitioner did not depart the United States within the 30-day voluntary departure period specified in the BIA's order. Instead, on May 8, 2002, the final day of the voluntary departure period, petitioner filed a motion with the BIA to reopen its decision in his removal proceedings and to remand the proceedings to the IJ to permit him to seek adjustment of status based on the approved visa petition. *Id.* at 3. Petitioner did not at the same time move for a stay of execution of the BIA's decision under 8 C.F.R. 1003.2(f) pending consideration of his motion to reopen. The government opposed the motion to reopen, arguing that petitioner was ineligible to receive adjustment of status because, by the time of the government's response, petitioner had overstayed the voluntary departure period. *Ibid.*

On October 8, 2002, the BIA granted the motion to reopen and remanded the case to the IJ for further proceedings. Pet. App. 9-10. The BIA specifically noted the government's argument that petitioner was ineligible for adjustment of status "due to his failure to voluntarily depart within the scheduled period as reinstated in our earlier order." *Id.* at 10 n.2. The BIA observed, however, that the "district director, under some circumstances, may grant a *nunc pro tunc* extension of voluntary departure, which has the effect of not only extending an alien's voluntary departure time but also restoring voluntary departure to the date on which it expired." *Ibid.*; see 8 C.F.R. 1240.26(f).

On remand, the IJ permitted petitioner to request an extension of the voluntary departure period from the

ICE district director, but on August 19, 2002, the district director denied the request. Pet. App. 3. The IJ then issued a decision denying petitioner's application for adjustment of status, holding that there was no jurisdiction to proceed on the application because petitioner's failure to depart within the voluntary departure period had rendered him ineligible to seek adjustment for a period of ten years. *Id.* at 7-8. On October 5, 2004, the BIA affirmed the IJ's decision without opinion. *Id.* at 6.

4. The court of appeals affirmed in an unpublished, per curiam opinion. Pet. App. 1-5. Petitioner argued that his filing of a motion to reopen had automatically stayed the voluntary departure period. In rejecting that argument, *id.* at 4-5, the court of appeals relied on its previous decision in *Banda-Ortiz* v. *Gonzales*, 445 F.3d 387 (5th Cir. 2006), petition for cert. pending, No. 06-477 (filed Sept. 28, 2006), which held that the filing of a motion to reopen does not automatically toll the voluntary departure period. The court thus held in this case that petitioner "became ineligible for any further relief from removal after his voluntary departure period expired." Pet. App. 5.

Petitioner argued, in the alternative, that the BIA's grant of his motion to reopen necessarily had the effect of vacating the BIA's previous voluntary departure order, including the requirement that petitioner depart within 30 days of that order. Pet. App. 4. The court concluded that it "need not consider whether the BIA's decision to grant his motion vacated the underlying departure order and allowed [petitioner] to pursue his motion on the merits before the IJ." *Id.* at 5. The court explained that, under its previous decision in *Banda-Ortiz*, the BIA's "grant of the motion itself was untimely" because the voluntary departure period had expired, and

"the agency [thus] lacked any further jurisdiction over [petitioner's] case." *Ibid.*

ARGUMENT

1. Petitioner argues (Pet. 16-19) that the BIA's grant of his motion to reopen necessarily had the effect of vacating the voluntary departure period prescribed in the BIA's underlying order, and necessarily excused petitioner from the consequences of his failure to depart during that period. That contention lacks merit and does not warrant review.

When the BIA granted petitioner's motion to reopen his removal proceedings to permit him to apply for adjustment of status, the BIA specifically noted the government's argument that petitioner was ineligible for adjustment of status because he had overstayed the voluntary departure period set forth in the BIA's previous order. Pet. App. 10 n.2. The BIA did not reject the government's argument or suggest that it was lacking in merit.

To the contrary, the BIA assumed that petitioner would be ineligible for adjustment of status unless he received a *nunc pro tunc* extension of his voluntary departure period: the BIA's order, after noting the government's argument that petitioner was ineligible for adjustment of status, stated that the "district director, under some circumstances, may grant a *nunc pro tunc* extension of voluntary departure, which has the effect of not only extending an alien's voluntary departure time but also restoring voluntary departure to the date on which it expired." Pet. App. 10 n.2. Indeed, the BIA's previous order prescribed that petitioner would be subject to the ten-year ineligibility period if he "fail[ed] to depart the United States within the time period speci-

fied." *Id.* at 12. Especially in these circumstances, the BIA's grant of reopening did not have the effect of vacating the requirement in the BIA's previous order that petitioner depart within the voluntary departure period, as the BIA itself assumed that the voluntary departure period would control unless petitioner qualified for and received an extension from the district director.[2]

Contrary to petitioner's argument (Pet. 16-17), the decision below does not give rise to a conflict in the courts of appeals on whether, in the circumstances presented by this case, the BIA's grant of a motion to reopen necessarily vacates the voluntary departure period set forth in a prior order. First, the court of appeals' decision is unpublished and does not establish circuit precedent in the Fifth Circuit on any of the issues it addressed, including the consequences of the BIA's reopening. See Pet. App. 1 n.*.

Second, the court of appeals held that it need not address the issue of whether reopening necessarily vacated the voluntary departure period. The court reasoned that the BIA's grant of the motion to reopen to

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[2] By the time the BIA granted reopening, the 30-day voluntary departure period prescribed by the BIA's previous order had expired, and a period of more than the 60-day maximum authorized by the voluntary departure statute, see 8 U.S.C. 1229c(b)(2); 8 C.F.R. 1240.26(e)-(f), had elapsed. Although the district director has authority under the regulations to extend the voluntary departure period up to the statutory maximum, 8 C.F.R. 1240.26(e), the regulations make clear that, "[i]n no event can the total period of time, including any extension, exceed * * * 60 days as set forth in * * * the Act," 8 C.F.R. 1240.26(f). The court of appeals noted that there was a question whether the district director "in fact [had] the authority to issue the extension contemplated by the BIA," but declined to address the question because the district director had denied the extension in any event. Pet. App. 3 n.6.

allow petitioner to pursue his application for adjustment of status was itself untimely because, under *Banda-Ortiz*, petitioner's voluntary departure period had already elapsed, thus rendering him ineligible for adjustment of status, "and the agency lacked any further jurisdiction over [petitioner's] case." Pet. App. 5; see note 2, *supra*.[3]

Third, even if the court of appeals had reached the issue and had concluded that the BIA's grant of petitioner's motion to reopen failed to vacate petitioner's voluntary departure period, that conclusion would not conflict with the Seventh Circuit's decision in *Orichitch* v. *Gonzales*, 421 F.3d 595 (2005). See Pet. 17. *Orichitch* held that the BIA's grant of a motion to reopen in the circumstances of that case had the effect of vacating the BIA's prior voluntary departure order, such that the alien was no longer subject to the 10-year ineligibility period concerning his application for adjustment of status. 421 F.3d at 598. But in that case, unlike this one, the BIA's order did not specifically note that the alien may be ineligible for discretionary relief because he had overstayed the voluntary departure period, nor did the

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[3] Petitioner argues (Pet. 24-25) that, under *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943), the court of appeals was barred from concluding that expiration of the voluntary departure period, which rendered petitioner ineligible for adjustment of status, divested the Board of authority to grant petitioner's motion to reopen. The court, however, understood that to have been the basis for the IJ's decision on remand, which was affirmed by the BIA. See Pet. App. 4 n.7. If the court correctly understood the administrative decisions, then there is no *Chenery* issue, for the court's decision reached essentially the same result. See *id.* at 4-5. Petitioner may well be correct that the court misunderstood the IJ's decision on this point, and that the BIA did not lack jurisdiction to grant reopening. But that subsidiary issue in the court's unpublished decision presents no issue warranting review by this Court.

BIA expressly observe that the alien could seek an extension of the voluntary departure period. Indeed, the BIA in this case specifically preserved the ability of the government to make arguments on remand concerning petitioner's "statutory * * * eligibility for adjustment of status." Pet. App. 10 n.2. Even assuming that the Seventh Circuit was correct in holding that the grant of the motion to reopen had the effect of vacating the voluntary departure period in the circumstances of *Orichhitch*, the grant of the motion to reopen in this case—in light of the BIA's specific recognition that petitioner may be ineligible for relief based on his overstay of the voluntary departure period set forth in the BIA's prior order—cannot be considered to have had the necessary effect of vacating that voluntary departure period and relieving petitioner from the consequences of not having departed.[4]

2. Petitioner challenges (Pet. 19-24) the court of appeals' holding that his filing of a motion to reopen did not automatically toll the running of his voluntary departure period. The court of appeals correctly rejected

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[4] Contrary to petitioner's suggestion (Pet. 16-17), the court of appeals' decision does not conflict with the Ninth Circuit's decision in *Lopez-Ruiz* v. *Ashcroft*, 298 F.3d 886 (2002). That decision raised no questions concerning voluntary departure or the effect of a grant of reopening on a voluntary departure period, but instead held that the grant of a motion to reopen renders a removal order non-final so as to divest the court of appeals of jurisdiction over a petition for judicial review.

Two courts of appeals have held that, where an alien files a motion to reopen after the expiration of the voluntary departure period, the BIA's grant of reopening does not have the effect of relieving the alien from the consequences of having failed to depart before the voluntary departure period expired. See *Singh* v. *Gonzales*, 468 F.3d 135, 139-140 (2d Cir. 2006); *Dacosta* v. *Gonzales*, 449 F.3d 45, 50-51 (1st Cir. 2006).

petitioner's tolling argument. Although that question has divided the courts of appeals, it does not warrant review in this case or at this time.

a. The court of appeals correctly concluded that petitioner's filing of a motion to reopen did not automatically toll the running of the voluntary departure period. "Voluntary departure is a discretionary form of relief. If an alien chooses to seek it—and that choice is entirely up to the alien—it can produce a win-win situation." *Naeem* v. *Gonzales*, 469 F.3d 33, 36 (1st Cir. 2006). As the court of appeals explained in its previous decision in *Banda-Ortiz*, voluntary departure is "an agreed-upon exchange of benefits between an alien and the Government," 445 F.3d at 389, in that it "offer[s] an alien a specific benefit—exemption from the ordinary bars on subsequent relief—in return for a quick departure at no cost to the government," *id.* at 390 (quoting *Ngarurih* v. *Ashcroft*, 371 F.3d 182, 194 (4th Cir. 2004)). The grant of voluntary departure enables an alien to avoid the five to ten-year period of inadmissibility that would result from an order of removal, see 8 U.S.C. 1182(a)(9)(A); to select the destination point; to make arrangements for departure without the threat of custody; and to avoid any stigma associated with forced removal. See, *e.g.*, *Thapa* v. *Gonzales*, 460 F.3d 323, 328 (2d Cir. 2006).

"The benefits normally associated with voluntary departure," however, "come with corollary responsibilities." *Naeem*, 469 F.3d at 37. Because a principal purpose of voluntary departure is to provide an incentive for aliens to effect a prompt departure, see *Banda-Ortiz*, 445 F.3d at 390, an alien who seeks voluntary departure at the close of removal proceedings must demonstrate the means and intent to depart the country within a brief time, see 8 U.S.C. 1229c(b)(1)(D); 8 C.F.R.

1240.26(c)(1)(iv) and (3). The Act accordingly prescribes that the voluntary departure period cannot exceed 60 days when voluntary departure is granted at the close of removal proceedings (or 120 days when voluntary departure is granted before or during removal proceedings). 8 U.S.C. 1229c(a)(2)(A) and (b)(2). The statute further directs that, "[i]f an alien is permitted to depart voluntarily * * * and fails voluntarily to depart * * * within the time period specified, the alien," *inter alia*, "shall be ineligible for a period of 10 years," to receive certain forms of discretionary relief including adjustment of status. 8 U.S.C. 1229c(d)(1)(B); see 8 C.F.R. 1240.26(a).

Contrary to petitioner's argument, the INA's provision that an alien may file one motion to reopen, see 8 U.S.C. 1229a(c)(6)(A), does not establish that the filing of such a motion automatically tolls the voluntary departure period. Petitioner contends (Pet. 22-23) that the BIA ordinarily will not have resolved a motion to reopen before the voluntary departure period expires, and that tolling is necessary to ensure that an alien has a meaningful opportunity to seek reopening. Petitioner thus appears to contend that tolling is necessary in order to give effect to both the Act's provision for an alien to file a motion to reopen and its provision authorizing the Attorney General to permit voluntary departure. That contention is mistaken.

As the Fourth Circuit has explained, the "voluntary departure provision" establishing the maximum departure period of 60 or 120 days "applies to *certain* removable aliens" who qualify for that relief, "while the motion to reopen provision applies to *all* aliens subject to removal." *Dekoladenu* v. *Gonzales*, 459 F.3d 500, 505-506 (2006). Indeed, only 11% of removable aliens were

granted voluntary departure in 2005. See *id.* at 506 n.5. Accordingly, "[f]ollowing the normal rule of statutory construction, the more specific voluntary departure provision governs in those limited situations in which it applies." *Id.* at 506. Motions to reopen are unaffected in other cases.

Moreover, while the INA provides that an alien may file one motion to reopen, it confers no right to substantive relief. To the contrary, the granting of reopening is discretionary. See p. 4, *supra*. Similarly, the granting of voluntary departure is discretionary with the Attorney General, and the Attorney General is expressly authorized to limit eligibility for additional classes of aliens. See p. 2, *supra*. There accordingly is no inconsistency with the Act if, under applicable procedures, an alien who files a motion to reopen and chooses to remain in the country until the BIA acts upon it thereby gives up the benefits of voluntary departure. See 8 U.S.C. 1229c(e).

The conclusion that the filing of a motion to reopen does not automatically toll the running of the voluntary departure period, or permit an alien to disregard his undertaking to depart within the time allowed, is strongly supported by this Court's decision in *Stone* v. *INS*, 514 U.S. 386 (1995). There, the Court held that a final order of deportation remains final notwithstanding the filing of a motion to reopen, and that the time for filing a petition for judicial review of that order therefore is not tolled by the filing of a motion for reconsideration. See *id.* at 392-395. In reaching that conclusion, the Court pointed out that it was the longstanding position of the Attorney General, "a view we presume Congress understood when it amended the Act in 1990," that the filing of a motion for reconsideration (or reopening) does

not serve to stay the deportation order. See *id.* at 398 (citing 8 C.F.R. 3.8 (1977)). Similarly, here, we must presume that Congress understood that rule when it enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, and the current regulations embody the same rule. See 8 C.F.R. 1003.2(f). Because a provision in a BIA decision allowing voluntary departure is simply an alternative to a formal removal order in the same BIA decision—allowing the alien to depart on his own within a specified period of time rather than being removed by the government—it follows from that regulation that the voluntary departure requirement of the decision is likewise not stayed or tolled by the filing of a motion to reopen.[5]

By contrast, "mandat[ing] tolling of the voluntary departure period when an alien files a motion to reopen would have the effect of rendering the time limits for voluntary departure meaningless." *Dekoladenu*, 459 F.3d at 506; see *Banda-Ortiz*, 445 F.3d at 390 ("Automatic tolling would effectively extend the validity of [an alien's] voluntary departure period well beyond the sixty days that Congress has authorized."). Accepting petitioner's tolling argument also would substantially deny the government the benefits of voluntary departure —*i.e.*, securing a prompt departure without the need to devote the resources that attend the process of issuing

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[5] Indeed, the BIA held, prior to IIRIRA, that the filing of a motion to reopen did *not* toll the voluntary departure period. See *In re Shaar*, 21 I. & N. Dec. 541 (1996). Contrary to the Ninth Circuit's view in *Azarte* v. *Ashcroft*, 394 F.3d 1278, 1286-1287 (9th Cir. 2005), there is no indication that Congress intended to overturn that rule when it enacted IIRIRA, which, after all, imposed additional statutory restrictions on both voluntary departure and motions to reopen.

and executing an order of removal—without requiring petitioner to bear the associated costs. *Banda-Ortiz*, 445 F.3d at 390. "If filing a motion to reopen automatically tolled the voluntary departure period, aliens who have been granted voluntary departure would have a strong incentive to file a motion to reopen in order to delay their departure." *Dekoladenu*, 459 F.3d at 506; compare *Stone*, 514 U.S. at 400-401 (explaining that because a removal order remains final and subject to execution notwithstanding the filing of a motion for reconsideration, Congress has removed the incentive for aliens to file meritless motions). And "[b]ecause voluntary departure is a privilege that is only available to a subset of aliens, it is neither 'absurd' nor 'nonsensical' to require aliens who wish to reap the benefits of voluntary departure to give up their right to a resolution of a motion to reopen." *Ibid.*[6]

The Fourth Circuit concluded in *Dekoladenu* that "both the plain language of the statute and clear congressional intent explicitly limit the time allowed for voluntary departure and do not allow for judicial tolling of these limits" based on the filing of a motion to reopen. 459 F.3d at 504. But even if the relevant statutory provisions are regarded as ambiguous on the matter, the

[6] If petitioner had sought a remand to the IJ upon learning during the pendency of his BIA appeal that the employment-based visa petition had been approved, see pp. 5-6, *supra*; 8 C.F.R. 1003.2(c)(4), the BIA presumably would have remanded to the proceedings to the IJ to permit petitioner to seek adjustment of status. Petitioner then could have had his adjustment application resolved without being subject to any pending voluntary departure period. Petitioner, however, did not file a motion to remand, and the BIA accordingly proceeded to issue its decision dismissing petitioner's appeal and granting him voluntary departure, subject to the requirement that he effect departure within 30 days.

agency's conclusion that the filing of a motion to reopen does not automatically toll the voluntary departure period under the existing statutory and regulatory scheme would be entitled to deference. See *id.* at 507-508; *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 425 (1999).

The BIA's voluntary departure order in this case specifically informed petitioner that failure to depart within 30 days of the order would trigger the ten-year period of ineligibility for adjustment of status. See Pet. App. 12; see also 8 U.S.C. 1229c(d) ("The order permitting the alien to depart voluntarily shall inform the alien of the penalties under this subsection."). Moreover, the governing regulations provide that an IJ or the BIA "may reinstate voluntary departure in a removal proceeding that has been reopened * * * *if reopening was granted prior to the expiration of the original period of voluntary departure*," and further provide that "[i]n no event can the total period of time, including any extension, exceed 120 days or 60 days as set forth in" the Act. 8 C.F.R. 1240.26(h) (emphasis added). The evident corollary is that, if reopening is *not* granted "prior to the expiration of the original period of voluntary departure," no reinstatement of voluntary departure or extension of the voluntary period is permissible.

b. As petitioner correctly explains, the courts of appeals are divided on whether the filing of a motion to reopen automatically tolls the voluntary departure period. Four courts of appeals have held that the filing of a motion to reopen automatically triggers such tolling. See *Kanivets* v. *Gonzales*, 424 F.3d 330 (3d Cir. 2005); *Sidikhouya* v. *Gonzales*, 407 F.3d 950 (8th Cir. 2005); *Azarte* v. *Ashcroft*, 394 F.3d 1278 (9th Cir. 2005); *Ugokwe* v. *United States Att'y Gen.*, 453 F.3d 1325 (11th Cir. 2006). Two courts of appeals (including the court

below) have reached the contrary conclusion. See *Dekoladenu* v. *Gonzales*, 459 F.3d 500 (4th Cir. 2006); *Banda-Ortiz* v. *Gonzales*, 445 F.3d 387 (5th Cir. 2006), No. 06-477, petition for cert. pending (filed Sept. 28, 2006).

Although the courts of appeals are divided on the question, review is not warranted in this case or at this time. In the first place, the court of appeals' decision is unpublished and does not establish circuit precedent. See Pet. App. 1 n.*. The court of appeals simply followed its prior published decision in *Banda-Ortiz*. See Pet. 4-5. The government has filed a response to the petition for a writ of certiorari in *Banda-Ortiz* noting that the case has become moot and therefore recommending that the petition be granted, the court of appeals' decision be vacated, and the case be remanded with instructions to dismiss the petition for judicial review. See Resp. Br., *Banda-Ortiz* (No. 06-477), *supra*. If the Court accepts the government's recommendation and vacates the court of appeals' decision in *Banda-Ortiz*, there would then be no binding Fifth Circuit precedent on whether the filing of a motion to reopen automatically tolls the voluntary departure period.

The potential absence of any circuit precedent, and the resulting possibility that the Fifth Circuit ultimately could adopt a view different from the one it initially espoused in *Banda-Ortiz*, counsels against granting certiorari to review that court's unpublished opinion in this case. Even if the issue otherwise warranted review, the Court should await a final resolution of the issue by the Fifth Circuit before granting review to address the issue

in a case from that court, or await a suitable vehicle from another court of appeals.[7]

There are, moreover, broader considerations that render review of the tolling issue by this Court unwarranted at this time. First, in light of the judicial decisions and issues that have been raised, the Department of Justice has determined that it will promulgate regulations specifically regarding the tolling question presented by this case. That rulemaking process will afford the Department an opportunity to address the various statutory provisions bearing on reopening and voluntary departure, consider the various policy issues that have been raised, and further exercise the authority and discretion vested in the Attorney General under the relevant statutory provisions. Review of the tolling issue by this Court should await the issuance of such regulations.[8]

Second, as the certiorari petition in *Banda-Ortiz* points out (at 16-17), the Senate and the House of Representatives passed bills in the last Congress that contained provisions that would definitively resolve the toll-

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[7] The Fourth Circuit in *Dekoladenu* recently issued a decision holding that the filing of a motion to reopen does not automatically toll the voluntary departure period. The alien in that case has obtained an extension of the time in which to file a petition for a writ of certiorari to March 8, 2007 (Application No. 06A755).

[8] In 1997, when the Department, after notice and comment, promulgated interim regulations implementing the 1996 amendments to the INA, it discussed the tolling issue in the preamble (see *Banda-Ortiz* Pet. 27) and stated that the issue would be addressed when final regulations were issued on a variety of subjects. See 62 Fed. Reg. 10,312, 10,316 (1997). No such comprehensive regulations have been issued. However, as stated in the text, the Department has now determined that further regulations will be issued on the specific question of tolling presented in this case.

ing issue on a prospective basis in a manner consistent with the Fifth Circuit's decision in this case. Although comprehensive immigration reform bills have not yet been introduced in either the House or the Senate in this Congress, it is anticipated that such bills will be taken up by Congress during the current Session.[9]

Thus, not only does the Department of Justice plan to address the issue by regulation, but there also is a prospect that Congress will do so. For the foregoing reasons, the petition for a writ of certiorari should be denied. In the alternative, if the Court grants the petition in *Banda-Ortiz* and vacates the judgment of the court of appeals, as the government has recommended, the Court could grant the petition in this case, vacate the judgment below, and remand the case to permit the court of appeals to address the issue in light of the vacatur of the Fifth Circuit's *Banda-Ortiz* precedent on the issue.

CONCLUSION

The petition for a writ of certiorari should be denied. In the alternative, if the Court grants the petition for a writ of certiorari in *Banda-Ortiz* v. *Gonzales*, No. 06-477, and vacates the judgment of the court of appeals in that case, the Court may wish to consider granting the petition in this case, vacating the judgment below, and

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[9] In addition, we have been informed that the tolling issue has been raised in a number of cases pending before the BIA.

remanding the case to permit the court of appeals to address the claims raised by petitioner in light of this Court's disposition in *Banda-Ortiz*.

Respectfully submitted.

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