No. 17-1150

# In the Supreme Court of the United States

CHUNG HOU HSIAO, PETITIONER

*v.*

KRISTINE R. CRANDALL, ET AL.

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

**BRIEF FOR THE RESPONDENTS IN OPPOSITION**


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## QUESTION PRESENTED

Under regulations administered by the U.S. Citizenship and Immigration Services (USCIS), an alien qualifies as "[g]randfathered"—and therefore potentially eligible for certain immigration benefits—if he was the beneficiary of a visa petition "which was properly filed * * * on or before April 30, 2001, and which was approvable when filed." 8 C.F.R. 245.10(a)(1)(i)(A). The question presented is:

Whether the court of appeals correctly upheld USCIS's conclusion that, in determining whether a previously denied visa petition was "approvable when filed," USCIS is not required to reevaluate the merits of the petition unless the previous denial was based on circumstances that arose after the petition was filed.

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**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1-15) is reported at 869 F.3d 1034. The order of the district court (Pet. App. 16-35) is reported at 98 F. Supp. 3d 1093.

**JURISDICTION**

The judgment of the court of appeals was entered on September 1, 2017. A petition for rehearing was denied on November 13, 2017 (Pet. App. 43-44). The petition for a writ of certiorari was filed on February 12, 2018 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] Kristine R. Crandall, Acting Director of the Nebraska Service Center of U.S. Citizenship and Immigration Services, is automatically substituted for her predecessor, Mark Hazuda. See Sup. Ct. R. 35.3.

## STATEMENT

1. The Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, provides that an alien who has been lawfully admitted to the United States and who satisfies other requirements may apply to adjust his status "to that of an alien lawfully admitted for permanent residence." 8 U.S.C. 1255(a). An alien is generally ineligible to apply for adjustment of status if he lacks lawful immigration status or has worked in the United States without legal authorization. 8 U.S.C. 1255(c)(2); see Pet. App. 4. But Congress established a grandfathering provision specifying that the Secretary of Homeland Security, acting through U.S. Citizenship and Immigration Services (USCIS), has discretion to adjust the status of an alien who would otherwise be disqualified by those prohibitions if, among other things, the alien was the beneficiary of a qualifying visa petition under 8 U.S.C. 1154 (2012 & Supp. IV 2016), that was filed "on or before April 30, 2001." 8 U.S.C. 1255(i)(1)(B)(i); see Pet. App. 4.[2]

The USCIS regulations implementing Section 1255(i) specify that an alien qualifies as a "[g]randfathered alien" potentially eligible for adjustment of status if, among other things, he was the beneficiary of "[a] petition for classification under Section [1154] which was properly filed * * * on or before April 30, 2001, and which was approvable when filed." 8 C.F.R. 245.10(a)(1)(i)(A).

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[2] Section 1255(i) refers to the Attorney General rather than the Secretary of Homeland Security, but the relevant authorities of the Department of Justice and the Immigration and Naturalization Service were transferred to the Department of Homeland Security (DHS) and USCIS in 2003. 6 U.S.C. 271(b). Relevant statutory references to the Attorney General are deemed to refer to the Secretary of Homeland Security or to the DHS official or component to which the statutory authority has been transferred. 6 U.S.C. 557.

A visa petition was "approvable when filed" if it was "properly filed, meritorious in fact, and non-frivolous." 8 C.F.R. 245.10(a)(3). A petition obviously qualifies as "approvable when filed" if it was actually approved, but the regulation also explains that a petition that was "was approvable when filed, but was later withdrawn, denied, or revoked due to circumstances that have arisen after the time of filing will preserve the alien beneficiary's grandfathered status if the alien is otherwise eligible." *Ibid.* The regulations define "[c]ircumstances that have arisen after the time of filing" to mean "circumstances similar to those outlined in [8 C.F.R] 205.1(a)(3)(i) or (a)(3)(ii)," provisions that refer to circumstances such as the death of the petitioner or beneficiary, the withdrawal of the petition, or the termination of a marriage. 8 C.F.R. 245.10(a)(4).

If an alien qualifies as grandfathered under Section 1255(i) and the implementing regulations (and satisfies other applicable requirements), the Secretary of Homeland Security "may" adjust the alien's status to that of an alien lawfully admitted for permanent residence. 8 U.S.C. 1255(i)(2). But as that permissive language makes clear, the decision to overlook the bar in Section 1255(c) is discretionary; Section 1255(i) "does *not* * * * create an automatic or a mandatory exception to [Section] 1255(c)." *Ahmed* v. *Gonzales*, 447 F.3d 433, 438 (5th Cir. 2006).

2. Petitioner is an alien who came to the United States in 1993 on a student visa. Pet. App. 20. In 1995, he earned a master's degree in electrical engineering. *Id.* at 5. In 2012, he filed an application to adjust his status to that of an alien lawfully admitted for permanent residence. *Id.* at 23. Petitioner was subject to Section 1255(c)'s general bar on adjustment of status because he had been present in the United States without

lawful status since 2001 and because he had worked in the United States without authorization. *Id.* at 7, 23. But he argued that he qualified as a grandfathered alien under Section 1255(i) and USCIS's implementing regulations based on two visa petitions he had filed in 1998 and 2000. *Id.* at 6-8, 20-23.

In 1998, petitioner filed a visa petition seeking to be classified as an alien of "exceptional ability" under 8 U.S.C. 1153(b)(2)(A) and 8 U.S.C. 1154(a)(1)(F) (1994). Pet. App. 5. An alien may qualify for that visa category if he demonstrates "exceptional ability in the sciences, arts, or business" that "will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States." 8 U.S.C. 1153(b)(2)(A); see 8 C.F.R. 204.5(k). Such a visa ordinarily requires the alien to have a job offer from a U.S. employer, but the Secretary of Homeland Security has discretion to waive that requirement in a particular case if she "deems it to be in the national interest." 8 U.S.C. 1153(b)(2)(B) (1994). The Immigration and Naturalization Service (INS), which at the time administered the relevant statutes, denied petitioner's 1998 visa petition. Pet. App. 6. It explained that, "although the record established that [petitioner] was a competent researcher, the record did not contain evidence to establish that the waiver of the requirement for a job offer by a specific employer would be in the national interest." *Ibid.* (brackets and internal quotation marks omitted).

In 2000, petitioner filed another visa petition, this time seeking to be classified as an alien of "extraordinary ability" under 8 U.S.C. 1153(b)(1)(A) and 8 U.S.C. 1154(a)(1)(E) (2000). Pet. App. 6. That visa category is reserved for aliens who are part "of that small percent-

age who have risen to the very top of [a] field of endeavor," who have "sustained national or international acclaim," and whose "achievements have been recognized in the field of expertise." 8 C.F.R. 204.5(h)(2) and (3); see 8 U.S.C. 1153(b)(1)(A). The INS again denied the petition. Pet. App. 7. It concluded that "the evidence submitted did not establish that [petitioner] was one of that small percentage who had risen to the very top of the field." *Id.* at 6-7 (brackets omitted).[3]

In his 2012 application claiming grandfathered status under Section 1255(i), petitioner asserted that even though his 1998 and 2000 visa petitions were denied, they were "approvable when filed" within the meaning of 8 C.F.R. 245.10(a)(1)(i)(A). Pet. App. 7-8. To support that assertion, petitioner "cited some evidence that was in the record at the time the petitions were originally adjudicated, and he also provided new evidence." *Id.* at 8.

USCIS denied petitioner's 2012 application for adjustment of status. Pet. App. 36-42. USCIS noted that his 1998 and 2000 visa petitions "were denied for cause and were not approved." *Id.* at 41-42. It added that USCIS "maintains that these petitions were not approvable when filed" and that petitioner therefore "d[id] not

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[3] In 2012, petitioner filed a third visa petition. Pet. App. 7. Like his 1998 petition, the 2012 petition sought classification as an alien of exceptional ability under 8 U.S.C. 1153(b)(2)(A), along with a waiver of the job-offer requirement in the national interest. Pet. App. 7. This time, however, petitioner claimed exceptional ability in solar technology, which was a different area of expertise than he claimed in his previous petitions. *Ibid.* USCIS approved the 2012 petition, which gave rise to petitioner's request to adjust his status under Section 1255. *Ibid.* But because it was not filed until long after April 30, 2001, the 2012 petition does not qualify petitioner for grandfathered status under Section 1255(i) and the implementing regulations.

satisfy the requirements" for grandfathered-alien status under 8 C.F.R. 245.10(a)(3). Pet. App. 42.

3. Petitioner sought review of USCIS's decision in federal district court. Pet. App. 8. On cross-motions for summary judgment, the court rejected his challenge and upheld USCIS's denial of relief. *Id.* at 16-35.

Petitioner argued that, to determine whether his 1998 and 2000 petitions were "approvable when filed" under Section 245.10(a), USCIS was required to reevaluate those applications and consider new evidence he offered for the first time in 2012. Pet. App. 27. USCIS, in contrast, interpreted Section 245.10(a) to make the denial of the 1998 and 2000 petitions sufficient to establish that those petitions were not approvable when filed because the denials were not based on circumstances that arose after filing. *Id.* at 27-28. The district court agreed with USCIS's interpretation, concluding that it is "more faithful to the text of the regulation." *Id.* at 33.

The district court explained that, by cross-referencing 8 C.F.R. 205.1(a)(3)(i) and (ii), the regulation "allows visa petitions to be considered 'approvable when filed' despite being denied if they were denied due to circumstances such as the petitioner's withdrawal of the petition, the death of the beneficiary or petitioner, failure to pay the filing fee, or changes in family relationships." Pet. App. 33. Here, however, the INS denied petitioner's 1998 and 2000 petitions not because of any such post-filing developments, but rather because the "information he provided * * * was insufficient to qualify him" for the visas he sought. *Ibid.*

The district court also noted that petitioner's interpretation "would require USCIS to re-adjudicate old petitions that were already adjudicated fifteen and seventeen years ago." Pet. App. 34. The court agreed with

the First Circuit that "there is no reason to think that the grandfathering provision was meant to give" that sort of "second bite at the apple to one who earlier had a full and fair opportunity to prove" that he was entitled to have a visa petition granted. *Ibid.* (quoting *Echevarría* v. *Keisler*, 505 F.3d 16, 19-20 (1st Cir. 2007)).

The district court emphasized that USCIS has discretion to "examin[e] additional evidence" or otherwise reevaluate the merits of a denied petition if USCIS "finds it prudent to do so." Pet. App. 34. The court held only that, "based on the specific facts of this case," "there was no legal error when USCIS chose to rely heavily on a previous disposition on the merits" in determining that petitioner's 1998 and 2000 visa petitions were not "approvable when filed" under 8 C.F.R. 245.10(a)(1)(i)(A). Pet. App. 34.

4. The court of appeals affirmed. Pet. App. 1-15. The court agreed with USCIS that, except where a visa petition was "denied based on circumstances that arose after filing," USCIS "is permitted to rely on the mere fact of the denial as conclusive proof that the petition was not meritorious in fact" and thus was not "approvable when filed" under Section 245.10(a)(1)(i)(A). *Id.* at 11. The court noted that, under *Auer* v. *Robbins*, 519 U.S. 452 (1997), "[a]n agency's interpretation of its own regulation is 'controlling unless plainly erroneous or inconsistent with the regulation.'" Pet. App. 11 (quoting *Auer*, 519 U.S. at 461). But the court explained that even if it "were not required to accord deference to the agency's interpretation here, [it] would conclude that USCIS's interpretation of the regulations in this case is more logical." *Ibid.*

The court of appeals first noted that "USCIS's position conforms more closely with the text of the regulation." Pet. App. 11. The regulation specifies that a visa petition will preserve an alien's grandfathered status if it was "approvable when filed, but was later withdrawn, denied, or revoked *due to circumstances that have arisen after the time of filing*." 8 C.F.R. 245.10(a)(3) (emphasis added). The court explained that "[t]his statement means that the term 'approvable when filed' is not an invitation to relitigate any petition that was denied on its merits," but instead describes petitions that were actually approved or that were withdrawn or denied based on post-filing developments. Pet. App. 11.

The court of appeals also noted that the First Circuit had adopted the same interpretation, and it agreed with the First Circuit that "a court should not require revisiting the original visa determination, if one was made 'on the merits,' did not depend on changed circumstances, and could have been effectively reviewed at the time." Pet. App. 13 (quoting *Echevarría*, 505 F.3d at 20). Here, the court noted that petitioner "does not contend that there was no opportunity for review when his visa petitions were originally denied." *Ibid.* And the court therefore concluded that "[r]equiring the agency to now readjudicate a question that was already resolved well over a decade ago would not be a sensible reading of the regulation." *Ibid.*

Finally, the court of appeals distinguished this case from *In re Riero*, 24 I. & N. Dec. 267 (B.I.A. 2007), and *Ogundipe* v. *Mukasey*, 541 F.3d 257 (4th Cir. 2008), cert. denied, 556 U.S. 1137 (2009). Pet. App. 13-14 & n.3. The court explained that, in those cases, the Board of Immigration Appeals (BIA) and the Fourth Circuit had upheld administrative decisionmakers' "exercise of

*discretion* to review new evidence" in determining whether previously denied visa applications had been approvable when filed under Section 245.10(a)(3). *Id.* at 13; see *id.* at 14 n.3. But the court explained that to approve such an exercise of discretion is not to "*obligate* a similar review for all future applicants." *Id.* at 13.; see *id.* at 14 n.3.[4]

**ARGUMENT**

Petitioner renews his contention (Pet. 9-16) that even if a visa petition was denied on the merits and not because of any post-filing change in circumstances, USCIS must reevaluate the petition—and consider any new evidence offered by the applicant—when determining whether the petition was "approvable when filed" under 8 C.F.R. 245.10(a). The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or another court of appeals. No further review is warranted.

1. The court of appeals' decision was correct. Petitioner does not contend that anything in 8 U.S.C. 1255(i) or any other statutory provision entitled him to relitigate the merits of his 1998 and 2000 petition denials in this proceeding. Instead, he argues only that USCIS's refusal to allow such relitigation is inconsistent with the USCIS regulation creating and defining the "approvable when filed" standard, 8 C.F.R. 245.10(a). The court of appeals correctly held that even without the deference due to an agency's interpretation of its own regulation under *Auer* v. *Robbins*, 519 U.S. 452 (1997),

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[4] The court of appeals stated that although the question was not presented in *Ogundipe*, the Fourth Circuit's opinion "suggest[ed] that consideration of [new] evidence might be *required*," not just permitted. Pet. App. 14 n.3. The court stated that it disagreed with the Fourth Circuit "[t]o the extent" it endorsed that view. *Ibid.*

USCIS would have the better reading of the Section 245.10(a)'s text.

a. Section 245.10(a) provides that "[a]pprovable when filed means that, as of the date of the filing of the qualifying immigrant visa petition," the petition "was properly filed, meritorious in fact, and non-frivolous." 8 C.F.R. 245.10(a)(3). The regulation specifies that "[t]his determination will be made based on the circumstances that existed at the time the qualifying petition * * * was filed." *Ibid.* The regulatory text then elaborates on the meaning of "[a]pprovable when filed" by explaining that a visa petition will qualify if the petition "was approvable when filed, but was later withdrawn, denied, or revoked *due to circumstances that have arisen after the time of filing*." *Ibid.* (emphasis added). And the regulation defines "[c]ircumstances that have arisen after the time of filing" to mean "circumstances similar to those outlined in [8 C.F.R.] 205.1(a)(3)(i) or (a)(3)(ii)." 8 C.F.R. 245.10(a)(4). Those provisions, in turn, describe post-filing events that could lead to the withdrawal or denial of a petition, including the death of the petitioner and various changes in family or employment relationships. 8 C.F.R. 205.1(a)(3)(i) and (ii).

As the court of appeals explained, the regulation's explicit textual focus on "circumstances that have arisen after the time of filing" makes clear that "the term 'approvable when filed' is not an invitation to relitigate any petition that was denied on the merits," but rather is "a safety valve for petitions that would have been approved on their merits if they had been adjudicated on the day they were filed but were not approved because of subsequent events." Pet. App. 11.

Petitioner's interpretation, in contrast, would mandate reconsideration of the merits of the underlying visa

petition in every case—not just those involving changed circumstances. But if that were correct, the regulation would have exactly the same meaning and effect if the sentence discussing "circumstances that have arisen after the time of filing" and the accompanying definition were deleted altogether. That by itself provides sufficient reason to reject petitioner's view: As in statutory interpretation, it is a "cardinal principle" that courts "must give effect, if possible, to every clause and word of a [regulation]." *Williams* v. *Taylor*, 529 U.S. 362, 404 (2000) (citations and internal quotation marks omitted); see, *e.g.*, *Jewett* v. *Commissioner*, 455 U.S. 305, 315-316 (1982).

In addition, as the court of appeals and the First Circuit have explained, petitioner's interpretation does not reflect "a sensible reading of the regulation" because it would require USCIS to redetermine matters that were already adjudicated in full and fair proceedings in connection with the underlying visa petitions. Pet. App. 13; see *Echevarría* v. *Keisler*, 505 F.3d 16, 19-20 (1st Cir. 2007). As this case illustrates, that relitigation could take place on a stale record decades after the original petition denial. USCIS had sound reasons to provide grandfathering relief to aliens whose petitions were approvable when filed and then withdrawn or denied based on subsequent developments. But "there is no reason to think that the grandfathering provision was meant to give a second bite at the apple to one who earlier had a full and fair opportunity" to pursue a visa petition and was simply denied on the merits. *Echevarría*, 505 F.3d at 19-20. To the contrary, as USCIS's predecessor agency explained in promulgating the regulation, "[w]hen [USCIS] has denied an immigrant visa petition

* * * based on ineligibility at the time of filing, the petition does not qualify to grandfather the alien." 66 Fed. Reg. 16,383, 16,385 (Mar. 26, 2001).

b. Petitioner briefly contends (Pet. 14-15) that the court of appeals misinterpreted Section 245.10. But he does not acknowledge or attempt to refute the court's textual analysis, including the court's emphasis on the regulation's explicit reference to "circumstances that have arisen after the time of filing." And although petitioner asserts that he is not seeking "a second bite at the apple" because he is not technically asking to overturn the denial of his 1998 and 2000 petitions, he does not explain why an alien in his position should be allowed to relitigate legal and factual issues that were resolved against him in full and fair proceedings nearly two decades ago. Petitioner thus provides no sound reason to question the court of appeals' conclusion.

2. The court of appeals' decision does not conflict with any decision by another court of appeals.

a. Petitioner errs in asserting (Pet. 13-14) that the decision below conflicts with the Fourth Circuit's decision in *Ogundipe* v. *Mukasey*, 541 F.3d 257 (2008), cert. denied, 556 U.S. 1137 (2009). In that case, the grandfathering issue arose in removal proceedings before an immigration judge (IJ) and the BIA. *Id.* at 258. The alien argued that he qualified as grandfathered based on a previously denied visa petition. *Id.* at 258-259. The IJ and the BIA rejected that argument, concluding that the petition was not approvable when filed. *Id.* at 259-260. In so doing, however, they considered new evidence related to the merits of the petition. *Id.* at 260-261. The Fourth Circuit held that this consideration of new evidence was permissible, explaining that it found "nothing in the applicable statutes or regulations that

prevents an IJ in removal proceedings from considering other evidence that a petition was approvable when filed." *Id.* at 260.

As the court of appeals acknowledged, the Fourth Circuit went on "to suggest that consideration of [new] evidence might be *required*," not merely permitted. Pet. App. 14 n.3; see *Ogundipe*, 541 F.3d at 260-261. But that suggestion was not necessary to the Fourth Circuit's decision: Because the IJ and the BIA actually had considered the alien's new evidence in *Ogundipe*, the Fourth Circuit's holding that such consideration was permissible was sufficient to resolve the case.[5] And petitioner has not cited any subsequent decision by the Fourth Circuit applying *Ogundipe* to *require*, rather than merely permit, the reconsideration of the merits of a visa petition that was previously denied.

In any event, *Ogundipe* would not reflect the existence of a circuit conflict warranting this Court's intervention even if the relevant portion of the Fourth Circuit's opinion had been a holding rather than merely dicta. Perhaps because the case arose in removal proceedings rather than on review of a decision by USCIS, the Fourth Circuit did not consider USCIS's interpretation of its own regulation. If the issue arose in the Fourth Circuit again, therefore, that court would be required to revisit its interpretation of Section 245.10(a) in light of the deference owed to USCIS's interpretation under this Court's precedents. See *Auer*, 519 U.S. at

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[5] The court of appeals did not disagree with that aspect of *Ogundipe*. To the contrary, it expressly reserved the question whether USCIS "had the option to reconsider the merits of [petitioner's] prior petitions in light of the new evidence he submitted" and concluding only that "it was not required to do so." Pet. App. 14; see *Echevarría*, 505 F.3d at 20 (likewise reserving the question).

461; cf. *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 982-986 (2005). That reconsideration might well lead the Fourth Circuit to reach a different result, in part because its decision in *Ogundipe* failed to address the strong textual basis for USCIS's interpretation.

b. Petitioner also asserts (Pet. 11-12) that the court of appeals' decision conflicts with *In re Riero*, 24 I. & N. Dec. 267 (B.I.A. 2007). Even if that were correct, a conflict between a court of appeals and the BIA would not warrant this Court's review. See Sup. Ct. R. 10. And in any event, the court of appeals specifically distinguished *Riero*, explaining that "[t]he BIA's approval of an IJ's exercise of *discretion* to review new evidence" in that case "does not *obligate* a similar review for all future applicants who seek to avail themselves of the grandfathering provision." Pet. App. 13-14.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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