No. 04-1300

In the Supreme Court of the United States

JOSE ANTONIO MACIAS-PLACENCIA, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, for purposes of determining eligibility for cancellation of removal under 8 U.S.C. 1229b(b), a voluntary departure from the United States under threat of removal ends a period of continuous physical presence.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-2a) is unreported. The order of the Board of Immigration Appeals (Pet. App. 3a) and the decision of the immigration judge (Pet. App. 4a-12a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 26, 2004. The petition for a writ of certiorari was filed on January 18, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Before the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub.L. No. 104-208, Div. C, 110 Stat. 3009-546 (8 U.S.C.

1101 *et seq.*), one of the forms of discretionary relief available in immigration proceedings was suspension of deportation. To qualify for suspension of deportation, an alien was required to have maintained continuous physical presence in the United States for the seven-year period immediately preceding the date of the application. 8 U.S.C. 1254(a)(1) (1994). An alien who temporarily left the United States was not "considered to have failed to maintain continuous physical presence in the United States * * * if the absence from the United States was brief, casual, and innocent and did not meaningfully interrupt the continuous physical presence." 8 U.S.C. 1254(b)(2) (1994).

IIRIRA repealed the suspension-of-deportation provision and enacted a new form of discretionary relief entitled cancellation of removal. 8 U.S.C. 1229b. For an alien who is not a lawful permanent resident, eligibility for cancellation of removal requires continuous physical presence in the United States for the ten-year period immediately preceding the date of the application. The cancellation provision contains a section entitled "Termination of continuous period," which specifies, *inter alia*, that the issuance of a Notice to Appear generally ends a period of continuous physical presence. 8 U.S.C. 1229b(d)(1). The provision also establishes that a single departure from the United States that lasts for more than 90 days, or multiple departures that last for more than 180 days in the aggregate, interrupt continuous physical presence. 8 U.S.C. 1229b(d)(2).

2. Petitioner is a native and citizen of Mexico. He entered the United States without inspection on or about September 9, 1989. In August 2002, the Immigration and Naturalization Service (INS) commenced removal proceedings against petitioner under 8 U.S.C. 1182(a)(6)(A)(i) as an

alien present in the United States without being admitted or paroled. Pet. App. 5a-6a.[1]

a. At his removal hearing, petitioner conceded that he was removable from the United States, but he applied for cancellation of removal under 8 U.S.C. 1229b(b). Pet. App. 6a. Petitioner admitted in his application that, in 1994, he had been apprehended by immigration officials and was granted an administrative voluntary departure in lieu of being placed in deportation proceedings. See *id.* at 7a; 8 U.S.C. 1252(b) (1994) (allowing INS to grant administrative voluntary departure, without commencing deportation proceedings, to an alien who "admits to belonging to a class of aliens who are deportable").[2] Petitioner also admitted that, approximately four hours after he voluntarily departed for Mexico, he returned to the United States without inspection. Pet. App. 7a.

The immigration judge (IJ) denied petitioner's application for cancellation of removal on the ground that peti-

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[1] On March 1, 2003, the INS ceased to exist as an agency within the Department of Justice, and its enforcement functions were transferred to the Department of Homeland Security (DHS). Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135. This brief continues to refer to the INS with respect to the events that predated the reorganization.

[2] Before the enactment of IIRIRA, one statutory provision governed the grant of voluntary departure before the initiation of deportation proceedings (*i.e.*, "administrative" voluntary departure), 8 U.S.C. 1252(b) (1994), and a separate provision governed the grant of voluntary departure during deportation proceedings, 8 U.S.C. 1254(e)(1) (1994). After IIRIRA, a single provision confers authority to grant voluntary departure both before and after the commencement of removal proceedings. See 8 U.S.C. 1229c(a)(1) (stating that the "Attorney General may permit an alien voluntarily to depart the United States * * * in lieu of being subject to [removal] proceedings * * * or prior to the completion of such proceedings").

tioner was "precluded from establishing the requisite ten years continuous physical presence by virtue of his voluntary return [to Mexico] in 1994." Pet. App. 9a-10a. The IJ relied in part on *Vasquez-Lopez* v. *Ashcroft*, 343 F.3d 961 (9th Cir. 2003), which held that administrative voluntary departure terminates a period of continuous physical presence for purposes of determining eligibility for cancellation of removal. See Pet. App. 8a-9a. The IJ granted petitioner voluntary departure and ordered that he be removed if he did not timely depart. *Id.* at 11a-12a.

b. On June 24, 2004, the Board of Immigration Appeals (BIA) summarily affirmed the decision of the immigration judge. Pet. App. 3a.

3. Petitioner filed a petition for review in the court of appeals. On July 28, 2004, the court issued an order requesting petitioner to show cause why the petition for review should not be summarily denied. Pet. App. 2a. On October 14, 2004, the court summarily denied the petition, ruling that the questions raised were "so insubstantial as not to require further argument." *Ibid.* (citing, *inter alia*, *Vasquez-Lopez*, *supra*).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. Further review is unwarranted.

1. Petitioner argues (Pet. 4-19) that the court of appeals erred in relying on *Vasquez-Lopez* v. *Ashcroft*, 343 F.3d 961 (9th Cir. 2003), as a basis for denying his petition for review. In petitioner's view, *Vasquez-Lopez* erred in holding that an administrative voluntary departure in lieu of deportation terminates continuous physical presence for purposes of determining eligibility for cancellation of removal. Petitioner's argument is grounded in his contention (Pet. 6)

that IIRIRA effected a "significant change in the continuous physical presence" requirement.

Petitioner observes (Pet. 7) that, prior to IIRIRA, a "brief, casual, and innocent" departure from the United States did not interrupt a period of continuous physical presence under the pre-existing suspension-of-deportation provision. 8 U.S.C. 1254(b)(2) (1994). An administrative voluntary departure did not qualify as a "brief, casual, and innocent" departure, and therefore was deemed to end a period of continuous physical presence. See *Hernandez-Luiz* v. *INS*, 869 F.2d 496 (9th Cir. 1989). Petitioner observes that IIRIRA's cancellation-of-removal provision does not retain an explicit exception for "brief, casual, and innocent" departures, but specifies two relevant situations that terminate a period of continuous physical presence: (i) if the alien departs on any single occasion for a period exceeding 90 days or on multiple occasions for a cumulative period exceeding 180 days, 8 U.S.C. 1229b(d)(2); or (ii) if the alien is served with a Notice to Appear for removal proceedings, 8 U.S.C. 1229b(d)(1). Petitioner concludes (Pet. 7-9) that, after IIRIRA, *no* departure of less than 90 days can be considered to interrupt a period of continuous physical presence, at least as long as no Notice to Appear has been served by the time of the departure.

Petitioner's argument lacks merit and was correctly rejected by the court of appeals in *Vasquez-Lopez*. The fact that, under IIRIRA, *any* departure of more than 90 days terminates a period of continuous physical presence in no way establishes that *no* departure of less than 90 days terminates a period of continuous physical presence. IIRIRA established an automatic rule for a departure that exceeds 90 days, but did not purport to establish the opposite automatic rule for a departure of less than 90 days. Indeed, the provision establishing the automatic 90-day (and 180-day)

ceiling is entitled "Treatment of *certain* breaks in presence," 8 U.S.C. 1229b(d)(2) (emphasis added), confirming that the provision does not establish an exclusive rule for determining whether a departure terminates a period of continuous physical presence. See *Vasquez-Lopez*, 343 F.3d at 972.

The "stop time" rule in 8 U.S.C. 1229b(d)(1)(A), which establishes that the issuance of a Notice to Appear generally is deemed to end a period of continuous physical presence, supports the conclusion that an administrative voluntary departure terminates a period of continuous physical presence. Petitioner does not dispute that a period of continuous physical presence is terminated by a voluntary departure granted after the commencement of removal proceedings (*i.e.*, after issuance of a Notice to Appear). An administrative voluntary departure in lieu of formal deportation, granted before the commencement of removal proceedings, should be treated no differently.

Indeed, the statutory provision governing voluntary departures specifies that the grant of an administrative voluntary departure is "in lieu of" subjecting the alien to removal proceedings. 8 U.S.C. 1229c(a)(1). An alien who is granted administrative voluntary departure "in lieu of" being subject to removal proceedings—no less than an alien who is served with a Notice to Appear for removal proceedings—ceases to accrue "continue physical presence" in the United States for purposes of maintaining eligibility for cancellation of removal. See *Vasquez-Lopez*, 343 F.3d at 973-974. The very premise of voluntary departure is that the alien agrees to *leave* the country (and not to return except as a lawful entrant). That premise is squarely inconsistent with maintaining *continued* physical presence within the country. See *id.* at 974. A contrary conclusion would give an alien who agrees to voluntarily depart an

incentive to return unlawfully within 90 days so that he can maintain eligibility for cancellation of removal. Congress could not have intended that result.

2. The decisions below and in *Vasquez-Lopez* are consistent with the BIA's decision in *In re Romalez-Alcaide*, 23 I. & N. Dec. 423 (2002) (en banc). The BIA concluded in *Romalez-Alcaide* that an administrative voluntary departure terminates a period of continuous physical presence for purposes of establishing eligibility for cancellation of removal.

The factual circumstances at issue in *Romalez-Alcaide* precisely parallel those in this case. There, as here, the alien was granted administrative voluntary departure in 1994, but he unlawfully returned within one or two days. 23 I. & N. Dec. at 423. In concluding that his voluntary departure terminated the alien's continuous physical presence, the BIA relied on: (i) the language and purpose of the relevant statutory provisions, including the "stop time" provision, the provision establishing a 90-day and 180-day ceiling for departures, and the provisions governing voluntary departure; (ii) the pre-IIRIRA decisions holding that voluntary departure under threat of deportation breaks a period of continuous physical presence; and (iii) regulations promulgated by the Attorney General under the Nicaraguan Adjustment and Central American Relief Act (NACARA), Pub. L. No. 105-100, Tit. II, § 203(b), 111 Stat. 2198, which provide that the voluntary departure of aliens subject to NACARA terminates their continuous physical presence in the United States, see 8 C.F.R. 240.64(b)(3). As the court in *Vasquez-Lopez* correctly concluded, the BIA's decision in *Romalez-Alcaide* is entitled to deference. See, *e.g.*, *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (observing that the "BIA should be accorded *Chevron* deference as it gives ambiguous statutory terms concrete meaning through a

process of case-by-case adjudication") (internal quotation marks omitted).

3. Contrary to petitioner's argument (Pet. 14-15), the court of appeals' decisions below and in *Vasquez-Lopez* do not conflict with *Rivera-Jimenez* v. *INS*, 214 F.3d 1213 (10th Cir. 2000). In *Rivera-Jimenez*, the BIA had denied suspension of deportation on the ground that the alien's voluntary departure was not "brief, casual, and innocent" under pre-IIRIRA law, 8 U.S.C. 1254(b)(2) (1994). The court of appeals held that the case was governed by the post-IIRIRA rules for determining continuous physical presence rather than by pre-IIRIRA law. *Rivera-Jimenez*, 214 F.3d at 1216-1218. The court did not apply the post-IIRIRA rules, however, and made no suggestion that voluntary departure would fail to terminate continuous physical presence after IIRIRA. Instead, the court remanded to the BIA for the BIA's application in the first instance of the rules established by IIRIRA. *Id.* at 1218. In doing so, the court emphasized that there was, at that time, "no administrative interpretation" of the provisions enacted by IIRIRA, and that such an interpretation would be accorded considerable weight. *Ibid.* Accordingly, far from conflicting with the court of appeals' decisions below and in *Vasquez-Lopez*, the decision in *Rivera-Jimenez* indicates that the Tenth Circuit would now agree with the holding of *Vasquez-Lopez* that the BIA's subsequent interpretation in *Romalez-Alcaide* is entitled to deference.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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