No. 09-106

# In the Supreme Court of the United States

ISAAC PEDERNERA, PETITIONER

*v.*

ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

**BRIEF FOR THE RESPONDENT IN OPPOSITION**

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## QUESTION PRESENTED

Whether the court of appeals correctly dismissed the petition for review filed by petitioner, a Visa Waiver Program alien, more than 30 days after the agency's removal order, where 8 U.S.C. 1252(b)(1) provides that such petitions "must be filed not later than 30 days after the date of the final order of removal."

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**BRIEF FOR THE RESPONDENT IN OPPOSITION**

## OPINION BELOW

The order of the court of appeals (Pet. App. 1a-2a) is unreported.

## JURISDICTION

The judgment of the court of appeals was entered on April 22, 2009. An Emergency Motion for Rehearing and Rehearing En Banc and to Stay Deportation, construed by the court of appeals as a motion for reconsideration, was denied on April 24, 2009 (Pet. App. 8a). The petition for a writ of certiorari was filed on July 23, 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), a petition for review of an order of removal "must

be filed not later than 30 days after the date of the final order of removal." 8 U.S.C. 1252(b)(1). The time limit for filing a petition for review in an immigration case is "mandatory and jurisdictional." *Stone* v. *INS*, 514 U.S. 386, 405 (1995) (citations omitted).

b. An alien who wishes to visit the United States temporarily for business or pleasure generally must obtain a non-immigrant visitor's visa (B-visa). See 8 U.S.C. 1101(a)(15)(B), 1201(a)(1)(B); 22 C.F.R. 41.12, 41.31. A non-immigrant alien is inadmissible if he does not possess "a valid nonimmigrant visa * * * at the time of application for admission." 8 U.S.C. 1182(a)(7)(B)(i)(II).

Aliens from designated countries, however, may seek admission to the United States for up to 90 days as visitors for business or pleasure through the Visa Waiver Program (VWP) without having to obtain a non-immigrant visitor's visa. See 8 U.S.C. 1187(a). To obtain admission under the VWP, the alien must waive certain rights, including any right (1) to administrative or judicial review of an immigration officer's determination as to admissibility, and (2) to contest removal after admission, except on the basis of an application for asylum. 8 U.S.C. 1187(b); see 8 C.F.R. 217.4; see also, *e.g.*, *Itaeva* v. *INS*, 314 F.3d 1238, 1239 (10th Cir. 2003). Applicants who do not execute a waiver of such rights "may not" be granted a visa waiver. 8 U.S.C. 1187(b); see 8 C.F.R. 217.2(b)(1) (requiring completion of Form I-94W).[1]

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[1] Form I-94W, the Arrival-Departure Record, must be completed by all non-immigrant visitors seeking entry to the United States under the VWP. That form contains a section indicating agreement to waive rights to a hearing to contest removability. After admitting an alien through the VWP, the immigration officer retains the arrival portion

In effect, the waiver of rights takes VWP aliens out of the normal procedures that ordinarily govern the admission and removal of aliens under 8 U.S.C. 1229a. See, *e.g.*, *Ferry* v. *Gonzales,* 457 F.3d 1117, 1126 (10th Cir. 2006) (The waiver "assure[s] that . . . [a VWP alien] will leave on time and will not raise a host of legal and factual claims to impede his removal if he overstays.") (quoting *Handa* v. *Clark*, 401 F.3d 1129, 1135 (9th Cir. 2005)). Except for asylum applicants (not relevant here), aliens admitted through the VWP who fail to comply with the terms of admission or fail to depart the United States are generally not entitled to proceedings before immigration judges. See 8 C.F.R. 217.4(b)(1) (Removal of an alien admitted under the VWP "shall be effected without referral of the alien to an immigration judge for a determination of deportability, except * * * [for] an alien * * * who applies for asylum in the United States."); 8 C.F.R. 1208.2(c)(1)(iv) (VWP alien who overstays his visa "*not entitled to [removal] proceedings under section 240 of the Act* [8 U.S.C. 1229a]").

c. The Attorney General is generally authorized to adjust the status of an alien who has been admitted to the United States and is present in the United States to that of an alien admitted for lawful permanent residence. See 8 U.S.C. 1255(a). Through the exercise of that authority, the Attorney General may relieve an alien already present in this country of the burdens of consular processing. A favorable exercise of discretion

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and returns the departure portion of the Form I-94W and passport to the alien. See U.S. Dep't of Homeland Security, *Arrival-Departure Record, CBP Form I-94W, for Visa Waiver Program (VWP) Applicants* (Dec. 30, 2008) <http://www.cbp.gov/xp/cgov/travel/id_visa/i-94_instructions/cbp_i94w_form.xml>.

to adjust an alien's status is "a matter of grace, not right." *Elkins* v. *Moreno*, 435 U.S. 647, 667 (1978).

One of the requirements for adjustment of status is that "an immigrant visa [be] immediately available to [the alien] at the time his application [for adjustment] is filed." 8 U.S.C. 1255(a)(3). An alien can satisfy that requirement by showing that a spouse who is a United States citizen has filed a visa petition for the alien's benefit and that the petition has been approved. See *INS* v. *Miranda*, 459 U.S. 14, 15 (1982) (per curiam).

2. Petitioner is a native and citizen of Argentina.[2] Pet. App. 19a; Certified Admin. R. 3-4, 6 (A.R.). On September 24, 2000, at age 19, petitioner was granted admission into the United States under the VWP for a period not to exceed 90 days. Pet. App. 3a; A.R. 6 (petitioner's Form I-94W). Petitioner claims that he met Vera Paez, a United States citizen, in 2001. Pet. App. 11a. The couple married seven years later, in 2008. *Id.* at 12a.

On January 3, 2009, petitioner was arrested and charged with two counts of simple battery stemming

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[2] Although Argentina was a designated VWP participant at the time that petitioner sought admission to the United States, its participation was terminated in February 2002 after the Department of Justice determined, in consultation with the Department of State, that Argentina's participation in the VWP was no longer compatible with the enforcement of United States immigration laws. See U.S. Dep't of Justice, *Department of Justice Terminates Argentina's Participation in Visa Waiver Program* (Feb. 20, 2002) <http://www.usdoj.gov/opa/pr/2002/February/02_ins_090.htm>. That decision stemmed from an increase, seen after the collapse of Argentina's economy and subsequent deterioration of its employment market, in the number of Argentine nationals attempting to use the VWP to enter the United States and remain illegally in the country after their 90-day period of admission had expired. *Ibid.*

from an argument with his sister and her husband. Pet. App. 12a. He was taken to the county jail, where he claims he was interviewed by an immigration official on January 7, 2009. *Ibid.*[3]

On January 8, 2009, Immigration and Customs Enforcement (ICE) issued an order of removal against petitioner for having remained in the United States longer than authorized, in violation of 8 U.S.C. 1227(a)(1)(B). Pet. App. 3a-4a. At that time, ICE also issued a Notice of Intent to Remove, informing petitioner that he had violated the terms of his admission under the VWP and that, as a result, he would be removed from the United States pursuant to 8 U.S.C. 1187 and 1227(a)(1)(B). Pet. App. 20a; A.R. 2.

On January 13, 2009, petitioner pleaded nolo contendere to one charge of simple battery (the second charge was dropped). Pet. App. 19a. The court sentenced petitioner to ten days in county jail, credited him with time served, and ordered twelve months of probation. *Ibid.* On January 17, 2009, petitioner was transported from county jail to an immigration detention center in Miami, Florida. *Ibid.*

3. a. On March 20, 2009, petitioner filed a petition for review of his removal order in the Eleventh Circuit. Pet. App. 20a. On March 26, 2009, petitioner also filed an emergency motion for stay of removal pending review, *ibid.*, accompanied by his unsworn declaration (dated March 24, 2009). That declaration stated, *inter alia,* that "to the best of [his] knowledge," on January 17, 2009, ICE agents asked petitioner if he wanted to

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[3] Petitioner's Form I-213 (Record of Deportable/Inadmissible Alien) indicates that Immigration and Customs Enforcement agents encountered petitioner at the jail pursuant to a routine sweep on January 8, 2009. A.R. 3-4.

sign a "deportation order," which he refused to do; on January 22, agents told petitioner he needed to sign "the deportation paper and leave"; and on February 5, petitioner was directed to tell his wife to provide his passport "so they can deport [him] quickly," and was advised not to fight it because he "was already going to be deported." Emergency Mot. for Stay of Removal Pending Review, Exh. 1, at 3 (¶ 12), 4 (¶¶ 13, 16), 7 (Decl.). The declaration nevertheless asserted that petitioner "never received notice of the immigration charges against [him]" and "never received a copy of any removal order against [him]." Decl. 5 (¶ 18).

According to petitioner, on February 20, 2009, ICE agents asked him to sign some papers, including a document (Form I-299(a), Warning for Failure To Depart) stating that a final order of removal had been issued against him on January 8, 2009. Decl. 5 (¶ 17); Pet. App. 5a-7a. Petitioner refused to sign the papers and asked that the papers be sent to his attorney. Decl. 5 (¶ 17); see Pet. App. 7a.

b. On April 22, 2009, in an unpublished per curiam order, the court of appeals dismissed the petition for review as untimely under 8 U.S.C. 1252(b)(1) and denied petitioner's motion to stay his removal as moot. Pet. App. 1a-2a. On April 24, 2009, the court of appeals construed petitioner's Emergency Motion for Rehearing and Rehearing En Banc and to Stay Deportation as a motion for reconsideration of its April 22, 2009 order dismissing the petition for review and denied the motion. *Id.* at 8a. Petitioner was removed from the country that same day. Pet. 10.

c. This Office has been informed that, according to United States Citizenship and Immigration Services (USCIS), petitioner's wife filed an immigrant relative

visa petition on petitioner's behalf in February 2009, and that petition was approved on July 21, 2009.

**ARGUMENT**

Petitioner asserts that he did not receive timely notice of the order of removal and contends that the court of appeals consequently erred in dismissing his petition for review. Petitioner's assertion is factbound, and the court of appeals' unpublished order dismissing his petition for review does not conflict with any decision of this Court or any other court of appeals. Moreover, petitioner fails to show that this Court's review would make any material difference in his case. Further review is therefore unwarranted.

1. The INA states that a petition for review of a final order of removal "must be filed not later than 30 days after the date of the final order of removal." 8 U.S.C. 1252(b)(1). A court of appeals is thus statutorily precluded from considering a petition for review if the petitioner fails to seek judicial review within that time limit. See Fed. R. App. P. 26(b) (forbidding any extension of the time to seek review of an administrative order unless a statute expressly authorizes the court to do so). As this Court held in *Stone* v. *INS*, 514 U.S. 386 (1995), the time limit for filing a petition for review is a "jurisdictional" rule that "must be construed with strict fidelity" to its terms. *Id.* at 405.

Even assuming that the date of service or other form of notice of a removal order could affect the jurisdictional 30-day filing period that commences from the date the order was issued, petitioner's argument is premised on his assertion (Pet. 21) that "there is no dispute" as to whether he received timely notice that he had been ordered removed. Petitioner relies on the self-serving

statement in the declaration he filed in the court of appeals that, "to the best of [his] knowledge" (Decl. 7), he did not receive timely notice. But the government cast considerable doubt on that assertion before the court of appeals, based on contradictory assertions in petitioner's declaration. See Pet. App. 22a n.3. For example, petitioner indicated awareness of a removal order as early as January 17, 2009, when ICE agents asked him if he would sign a "deportation order," or at least by February 5, 2009, when he was directed to tell his wife to provide his passport "so they can deport me quickly." Decl. 3 (¶ 12), 4 (¶ 16). That factbound issue counsels against this Court's review.

2. Petitioner contends (Pet. 13-20) that the courts of appeals disagree on whether the time for filing a petition for review of a final removal order runs from the date of the order or from the date of service. Petitioner asserts that his petition for review would have been timely in the First, Second, Third, Fifth, Sixth, and Ninth Circuits, which he says recognize that the 30-day period for filing a petition for review "does not start to run until the Government complies with its obligation to notify the [alien] ordered removed about the order of removal." Pet. 11. But all the cases on which petitioner relies involved a final removal order issued by the Board of Immigration Appeals (BIA) following removal proceedings before an immigration judge. When the BIA issues a final removal order, 8 C.F.R. 1003.1(f) requires it to serve that order on the alien. By petitioner's own description, it was the BIA's failure to comply with that regulation that provided the rationale for those decisions. See Pet. 13-16 (citing cases).

This case, however, involves a removal order issued directly by ICE against a VWP alien, who had waived

any right to contest removal by virtue of the VWP. Because petitioner's removal order was not issued by the BIA, it was not subject to 8 C.F.R. 1003.1(f). Although petitioner argues (in a footnote, Pet. 13-14 n.1) that a separate regulation (8 C.F.R. 103.5a(c)) imposes a similar service obligation and should have a similar effect on the 30-day period for filing here, petitioner fails to cite any authority—let alone a conflicting circuit court decision—for that proposition. Accordingly, even assuming that an unpublished and non-precedential order such as the one entered by the court below could give rise to the sort of circuit conflict warranting review by this Court, that order does not conflict with the decision of any other court of appeals.[4]

3. Petitioner also contends (Pet. 23-25) that the Due Process Clause entitled him to a removal hearing before he could be deported from the United States. Petitioner, who waived the right to contest removal when he entered the country under the VWP, has no right to an evidentiary hearing concerning his removal. See 8 U.S.C. 1187(b). That is an integral part of the statutory bargain struck between the government and aliens seeking to take advantage of the privilege of entry under the VWP. See pp. 2-3, *supra*.

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[4] To support his claim of conflict, petitioner cites another unpublished decision from the Eleventh Circuit as well as decisions from the Seventh and Tenth Circuits that purportedly conclude that the 30-day period for seeking appellate review runs from the date of the order, irrespective of when service occurred. See Pet. 16-20. But those cases involved orders of removal issued by the BIA, and thus at best would conflict with the line of circuit cases discussed above also involving BIA orders subject to 8 C.F.R. 1003.1(f). For the reasons just discussed, this VWP case is not a proper vehicle to resolve any such separate conflict.

To the extent petitioner claims that he did not knowingly and voluntarily waive the right to contest removal (see Pet. 20 n.5), that claim presupposes a legal right to challenge the waiver on such grounds. Although the Fifth Circuit's decision in *Nose* v. *Attorney General of the United States*, 993 F.2d 75, 78-79 (1993), appears to permit such a challenge, the government is currently contesting that proposition in *Bayo* v. *Chertoff*, 535 F.3d 749 (7th Cir. 2008), vacated, No. 07-1069 (7th Cir. Jan. 30, 2009) (argued on reh'g en banc May 13, 2009). In any event, petitioner's contention is dubious as a factual matter given that, before gaining admission into the United States, he executed a Form I-94W (which includes the waiver of rights) in Spanish. A.R. 6; see note 1, *supra*.

Moreover, petitioner has no constitutionally protected liberty interest in his underlying claim for adjustment of status (see Pet. 20 n.5)—a discretionary form of relief. See, *e.g.*, *Jupiter* v. *Ashcroft*, 396 F.3d 487, 492 (1st Cir.), cert. denied, 546 U.S. 938 (2005); *Tovar-Landin* v. *Ashcroft*, 361 F.3d 1164, 1166-1167 (9th Cir. 2004); *Mireles-Valdez* v. *Ashcroft*, 349 F.3d 213, 219 (5th Cir. 2003); *Nativi-Gomez* v. *Ashcroft*, 344 F.3d 805, 809 (8th Cir. 2003); *Achacoso-Sanchez* v. *INS*, 779 F.2d 1260, 1264 (7th Cir. 1985). And in any event, an alien admitted under the VWP who stays beyond the authorized period and then applies for adjustment of status is not entitled to an adjustment. See, *e.g.*, *Momeni* v. *Chertoff*, 521 F.3d 1094, 1097 (9th Cir. 2008); *Lacey* v. *Gonzales*, 499 F.3d 514, 519 (6th Cir. 2007); *Schmitt* v. *Maurer*, 451 F.3d 1092, 1096 (10th Cir. 2006). Although the Ninth Circuit has permitted a VWP alien to apply to adjust status based on a preexisting marriage *before* the 90-day period expired, see *Freeman* v. *Gonzales*, 444 F.3d 1031

(2006), petitioner here did not marry a United States citizen until seven years *after* his authorized period of entry had expired and did not apply for adjustment based on that marriage at any point before his removal. Accordingly, petitioner has failed to establish any reasonable likelihood that he would prevail on his claim for relief from removal.[5]

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[5] Petitioner nevertheless may still pursue an application for lawful permanent resident status through a United States consulate. As noted above (pp. 6-7, *supra*), petitioner is now the beneficiary of an approved I-130 immediate relative visa. Accordingly, petitioner is eligible to seek an immigrant visa from an overseas consular officer. See 8 U.S.C. 1151(b)(2)(A)(i), 1154(a)(1)(A)(i), 1201(g), 1202(a); 8 C.F.R. 204.1(e)(2) and (3). A consular officer who is presented with an approved petition for an immediate relative visa has no discretion to deny an immigrant visa to an alien who is not inadmissible under 8 U.S.C. 1182. See 8 U.S.C. 1201(g); 22 C.F.R. 42.31(a). Although petitioner is now subject to a period of inadmissibility under 8 U.S.C. 1182(a)(9)(A)(i) and (ii) after having been removed from the United States, that period may be waived by the Attorney General or USCIS. See 8 U.S.C. 1182(a)(9)(A)(iii). The granting of such a request, of course, would be committed to the sound discretion of the responsible government officials—just as is true for a grant of adjustment of status. See *INS* v. *Abudu*, 485 U.S. 94, 105 (1988); 71 Fed. Reg. 27,588 (2006).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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