No. 07-798

IN THE

Supreme Court of the United States

SYED IQBAL ALI,

Petitioner,

v.

MICHAEL B. MUKASEY, UNITED STATES ATTORNEY GENERAL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY FOR PETITIONER

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INTRODUCTION

8 U.S.C. § 1252(a)(2)(B)(ii) provides that "no court shall have jurisdiction to review . . . any . . . decision or action of the Attorney General . . . the authority for which is specified under this subchapter to be in the discretion of the Attorney General." The issue here is whether this section strips courts of jurisdiction to review the decision of an immigration judge ("IJ") denying a motion for a continuance. There is a clear circuit split on this important and recurring issue of federal immigration law. Pet. at 9-17. Seven circuits (the First, Second, Third, Fourth, Fifth, Sixth, and Eleventh) have held that § 1252(a)(2)(B)(ii) does not deprive the courts of jurisdiction to review continuance decisions. The Eighth and Tenth Circuits, along with the Seventh Circuit below, have held that courts do not have such jurisdiction. Under the majority rule, the Petitioner would have had his case reviewed on the merits by the Seventh Circuit.

The Government does not contest either that the split exists or that the majority of circuits are clearly correct that courts have jurisdiction to review continuance decisions. *See* Opp. at 11 ("[T]he majority position represents the better reading of the statute."). In fact, the Government fully agrees that the court below erred and, before the courts of appeals, now takes the position that this section does not bar review of continuance decisions. Opp. at 11-12.

Nonetheless, the Government inexplicably resists having this Court correct that conceded, profound error. Instead, it argues that review is not warranted

for three reasons that bear little relation to this pure question of federal court jurisdiction.

The Government first contends that the 7-3 split will somehow cure itself, because the Government has now reversed its position. But, as this very case illustrates, the circuit courts have *not* always followed the Government's lead on this jurisdictional issue, and the Government offers no other support for the counter-intuitive notion that three circuits will voluntarily overturn their own precedent.

The Government next suggests that erroneously denying aliens judicial review is of no import because it will rarely affect the outcome of removal proceedings. But a correct jurisdictional rule is important for its own sake and, in any event, the circuits that follow the majority view do hold that IJs have abused their discretion in denying continuances. This is especially true when, as here, the alien requests a continuance solely because of the Government's own delay in processing an application or petition that will determine whether the alien is eligible for adjustment of status.

Finally, the Government attempts to muddy the fact that this case is an ideal vehicle to resolve the circuit split on the *jurisdictional* question by prematurely focusing on the *merits* of Petitioner's case. But the fact-bound issue of whether the IJ properly or improperly denied a continuance has nothing to do with the antecedent question, presented here, of whether courts may review such denials. Thus, predictions as to how the Seventh Circuit will resolve the merits issue on remand should have no bearing on whether the Court

resolves the split on the jurisdictional issue dividing lower courts.

In any event, on remand, Petitioner will have a strong argument on the merits because the only reason Petitioner did not have an immigrant visa when he appeared before the IJ was the Government's own delay in processing the naturalization application of Petitioner's son. In precisely these circumstances, numerous cases have held that an IJ abused its discretion in denying a continuance. Moreover, the Seventh Circuit's potential grant of Petitioner's petition for review would, under Seventh Circuit law, remove the voluntary departure bar that the Government asserts prohibits Petitioner from seeking adjustment of status.

I. ONLY THIS COURT CAN RESOLVE THE DEEP SPLIT AMONG THE COURTS OF APPEALS ON WHETHER COURTS HAVE JURISDICTION TO REVIEW AN IMMIGRATION JUDGE'S DENIAL OF A MOTION FOR A CONTINUANCE

The Government's argument that the 7-3 split "may well resolve itself," Opp. at 12, is unrealistic and unnecessarily prolongs uncertainty and disuniformity on this issue throughout the country.

The Government contends that uniformity can be achieved without this Court's intervention because the Government no longer argues that § 1252(a)(2)(B)(ii) precludes review of continuance decisions. Opp. at 12-13. The proceedings below, however, illustrate that the Government's argument is unrealistic. *Notwithstanding* the Government's

agreement with Petitioner on jurisdiction, the Seventh Circuit held that it did *not* have jurisdiction to review the IJ's continuance denial. Pet. App. 10a. Thus, because the courts of appeals are always obligated to ensure that they have jurisdiction, and because the courts of appeals are free to disagree with the Government's current reading of § 1252(a)(2)(B)(ii), there is no reason to think that the Government's change of position will cure the deep split in the courts of appeals.

Moreover, the actual experience in the minority circuits does not, contrary to the Government's contention, Opp. at 13, suggest that future *en banc* review will lead to reversal of the circuit precedent creating the split. The Government first argues that the Seventh Circuit, "may be willing to revisit the question presented *en banc*" because the Government's response to a petition for rehearing *en banc* in *Potdar v. Keisler*, 505 F.3d 680 (7th Cir. 2007), purportedly "urged *en banc* rehearing on the issue of . . . jurisdiction over continuance denials." Opp. at 13-14. In fact, the Government argued that the *Potdar* case did not even fairly *present* the issue whether *continuance* denials are reviewable, because that case did not involve such a denial, but was rather a case where the alien made a motion to *terminate* immigration proceedings. *See* Respondent's Answer with Suggestion for Rehearing En Banc at 7, *Potdar v. Mukasey*, No. 06-2441 (7th Cir., filed Feb. 11, 2008) ("Continuing a proceeding and terminating a proceeding are two different procedural concepts."); *see also* Opp. at 14 n.6. Thus, the Government asked the *panel* to correct its mistake by treating the motion at issue as one to

terminate and to then *deny* the appeal because the refusal to terminate was proper. *See* Answer at 7 ("Although neither the IJ nor the Board addressed Potdar's termination request during his reopened proceedings, the only result of addressing it would have been a denial as DHS was on record as opposing the motion."). *En banc* review will be *denied* if the Government's suggestion is followed and, in all events, will likely be denied because the *Potdar* case is an extremely poor vehicle for resolving whether review is available for continuance denials, since it at least arguably does not present the issue. In any event, the Seventh Circuit has otherwise shown no inclination to grant *en banc* review on this issue. For example, it denied *en banc* review in this case, with only four dissents, Pet. App. 3a n.1, *after* the Government switched positions. Indeed, on February 14, 2008, the Seventh Circuit issued another opinion holding that it did not have jurisdiction to review the denial of a continuance. *See Wood v. Mukasey*, --- F.3d ---, 2008 WL 383286, at *3 (7th Cir. 2008); *see also Gulati v. Mukasey*, No. 06-3221, 2007 WL 2988632 (7th Cir. 2007), *reh'g and reh'g en banc denied* (Dec. 27, 2007).

As to the Eighth Circuit, the Government can point only to a footnote in a panel opinion in *Ikenokwalu-White v. Gonzales*, 495 F.3d 919 (8th Cir. 2007), suggesting that "it may be appropriate for our court to revisit this issue *en banc*," *id.* at 924 n.7, to support its claim that the Eighth Circuit "may well reconsider" its minority position, Opp. at 13. Yet, the Eighth Circuit has taken no steps towards reconsidering *en banc* the question presented, and has continued to apply *Onyinkwa* without hesitation.

See, e.g., *Thiam v. Gonzales*, 496 F.3d 912, 915 (8th Cir. 2007).

Finally, the government does not even *suggest* that the Tenth Circuit *might* reconsider, since it continues to faithfully apply *Yerkovich* without any hint that it is susceptible to alteration. *See, e.g.*, *Kechkar v. Gonzales*, 500 F.3d 1080, 1083 (10th Cir. 2007); *Rivas v. Gonzales*, 220 F. App'x 892, 895 (10th Cir. 2007). By itself, the Tenth Circuit would maintain the split, and so its undisputed contrary position on jurisdiction, standing alone, warrants the Court's review of this issue here.

In short, even though the Government has changed its litigating position, the courts adhering to the minority position continue to apply the jurisdictional bar, and will continue to do so until this Court resolves the question presented.

II. THE JURISDICTIONAL QUESTION PRESENTED IS OF GREAT NATIONAL IMPORTANCE AND IS OUTCOME-DETERMINATIVE IN IMMIGRATION PROCEEDINGS

The question presented by this case is an important issue of federal court jurisdiction that determines whether an alien has access to a court for review of his immigration proceeding, or is instead deported without any judicial review of the Government's action. Far from being a "narrow aspect" of removal procedure, Opp. at 14, judicial review over continuance decisions is highly important because, as the Petition explains and the Government does not dispute, a continuance decision

almost always determines the final outcome of an alien's removal proceeding. Pet. at 21-23.

Nor is there anything to the Government's nihilistic argument that judicial review is virtually meaningless since the Government usually wins. Opp. at 14-15. To be sure, the power to decide a continuance is within the sound discretion of the IJ, so it will typically be upheld, like all decisions adjudicated under an abuse of discretion standard. *See* 8 C.F.R. §§ 1003.29, 1240.6. But this hardly suggests that such review is *unimportant*. Rather, it serves the essential function of eliminating (and deterring) *abuses* of discretion.

For example, in *Badwan v. Gonzales*, 494 F.3d 566 (6th Cir. 2007), a case discussed in the Petition, Pet. at 23, the Sixth Circuit reversed the IJ's decision denying a continuance, pointing out that, except for lacking the translation of a foreign divorce document he sought a continuance to obtain, Badwan would have easily established eligibility for adjustment of status. *Badwan*, 494 F.3d at 569. More typically, numerous cases have found continuance denials improper where the alien sought the continuance because of bureaucratic delay within the Government itself. *See, e.g., Merchant v. U.S. Attorney General*, 461 F.3d 1375, 1379 (11th Cir. 2006) (continuance denial overturned where petitioner awaited adjudication of his employment-based visa application and application for adjustment of status by DHS); *Haswanee v. U.S. Attorney General*, 471 F.3d 1212, 1217 (11th Cir. 2006) (per curiam) (finding an abuse of discretion when the petitioner was waiting for the INS to act on his employment-based visa application); *Bull v. INS*, 790 F.2d 869, 869 (11th

Cir. 1986) (per curiam) (finding an IJ abused its discretion when the petitioner's wife "was merely awaiting government approval of" an immediate relative visa); *Thapa v. Gonzales*, 460 F.3d 323, 335 (2d Cir. 2006) (noting that "Thapa's labor certification was entirely out of his hands at the time of the hearing; there was nothing he could do to move the process along").

These cases demonstrate that meaningful review is needed to ensure that IJs exercise their discretion in a way that does not arbitrarily deny aliens their statutory right to seek adjustment of status. This is, of course, precisely why Congress mandated such review.

III. THIS CASE IS AN IDEAL VEHICLE FOR RESOLVING THE JURISDICTIONAL QUESTION PRESENTED

The only holding challenged here, and upon which the circuits are split, is the *denial* of judicial review. Such denials of review are not excused or affected by whether the required review would come out in petitioner's *favor*—the denial itself is a distinct and palpable injury. And in *every* case this Court might review to resolve this threshold jurisdictional issue, the Court will not reach the *merits*, but simply find jurisdiction and remand for the statutorily required review.

Thus, it is quite obvious that the relative strength of any petitioner's case on the merits is irrelevant to whether it is an appropriate vehicle for resolving whether review is *available*. Accordingly, the Government's extended discussion of Petitioner's merits case here is beside the point, and serves

merely to obfuscate the straightforward question of whether this case is an appropriate vehicle to resolve the split.

In any event, the Government is wrong about the merits of Petitioner's motion for a continuance and adjustment of status application. As discussed in the Petition, the only reason Petitioner sought a continuance before the IJ was government inertia—the Government had not yet acted on the naturalization application of Petitioner's son, Zeeshan, even though Zeeshan's naturalization application had been pending since Petitioner's initial appearance before the IJ in 2003. Pet. at 4. Zeeshan planned to file a family-based visa petition on his father's behalf once the Government processed Zeeshan's naturalization application. Pet. App. 4a, 61a. But the Government continued to drag its feet and, by the time of Petitioner's final hearing before the IJ in 2005, it had still not acted on Zeeshan's naturalization application. Pet. at 4-5. The Government took so long to act on Zeeshan's application that he was forced to bring a mandamus proceeding in the district court under 28 U.S.C. § 1361. *See Ali v. Keisler*, No. 07CV6186 (N.D. Ill., filed Nov. 1, 2007). Subsequently, the Government completed Zeeshan's naturalization application and he became a naturalized United States citizen on January 15, 2008. Opp. at 16 n.6. He immediately filed a Petition for Alien Relative, with the required fee and the supporting documents, on behalf of the Petitioner. But for the Government's extraordinary delay in processing Zeeshan's naturalization application, Petitioner would have been eligible to adjust his status during his removal proceedings.

Thus, Petitioner's case is analogous to the cases discussed above in which the petitioner sought a continuance solely to accommodate the Government's delay in processing a document essential to the petitioner's adjustment of status application. In each of those cases, as here, if the Government had timely processed the document in issue, the Petitioner would have been immediately able to receive an immigrant visa, and hence be eligible for adjustment of status.

Apparently recognizing this flaw, the Government also seeks to obscure the review issue by claiming that certiorari is unwarranted because, in the end, Petitioner is not eligible to seek adjustment of status because he has overstayed his period of voluntary departure. *See* Opp. at 16 (citing 8 U.S.C. § 1229c(d)(1)(B)). In fact, Petitioner can ultimately obtain adjustment of status. Moreover, his current additional difficulties in doing so are a direct consequence of the IJ's erroneous continuance denial. Thus, this problem will arise in virtually every case of an alien seeking review of a continuance denial. The Government should not be allowed to exploit a Catch-22, whereby review of erroneous continuance denials is defeated on the grounds that the erroneous denial altered the alien's status, such that obtaining ultimate relief is more complicated.

Here, if this Court grants the Petition and rules in favor of Petitioner on the jurisdictional question, the merits question before the Seventh Circuit on remand will be whether the IJ abused his discretion in denying the request for a continuance. A decision by the Seventh Circuit in Petitioner's favor, which is likely because of the Government's delay in processing Zeeshan's naturalization application,

would result in the case being remanded to the BIA. The BIA would then presumably reopen Petitioner's adjustment of status proceedings. When reopening occurs, the matter is, by operation of law, returned to the IJ for adjudication on the merits. *See Orichitch v. Gonzales*, 421 F.3d 595, 598 (7th Cir. 2005); *see also* 8 C.F.R. § 1003.2(i) (stating that if the BIA "directs a reopening and further proceedings are necessary, the record shall be returned to the Immigration Court"). Under *Orichitch*, this reopening of Petitioner's immigration proceedings would *vacate* the previous order of removal, *vacate* the grant of voluntary departure, and thereby *eliminate* the statutory bar that would otherwise prohibit Petitioner from seeking adjustment of status. *See Orichitch*, 421 F.3d at 598. Thus, Petitioner is currently in no different circumstance than he would be if the voluntary departure bar of 8 U.S.C. § 1229c(d)(1)(B) did not exist. As such, the bar should not impede this Court granting the Petition.

IV. BECAUSE THE GOVERNMENT HAS CONCEDED ERROR, THIS COURT COULD SUMMARILY REVERSE

The parties agree that the Seventh Circuit erred in holding that it lacked jurisdiction to review the IJ's denial of Petitioner's motion for a continuance. Thus, if the Court does not believe that plenary review is appropriate, the Court could summarily reverse the Seventh Circuit's decision. This Court has recognized that summary reversal is appropriate when the lower court's decision is clearly incorrect, *e.g.*, *Gonzales v. Thomas*, 547 U.S. 183, 185 (2006) (per curiam), particularly when a circuit split exists on the

question presented, *e.g.*, *United States v. Watts*, 519 U.S. 148, 149 (1997) (per curiam). Summary reversal is also warranted when the Government confesses error in the court below. *E.g.*, *Penner v. United States*, 399 U.S. 522, 522 (1970) (per curiam). In this case, because there is a clear circuit split, because the Government agrees that the Seventh Circuit joined the incorrect side of the split, and because, as explained in the Petition and the Government's Opposition, the minority view is obviously inconsistent with the plain language of § 1252(a)(2)(B)(ii), Pet. at 25-30; Opp. at 11-12, summary reversal is warranted.

Alternatively, because of the Government's new litigating position, the Court could, at a minimum, grant, vacate, and remand the case for further proceedings. *See, e.g.*, *Lawrence v. Chater*, 516 U.S. 163, 166-67 (1996) (per curiam) (noting that GVR is appropriate "in light of a wide range of developments, including . . . confessions of error or other positions newly taken by the Solicitor General").

CONCLUSION

The petition should be granted or, in the alternative, the case should be summarily reversed and remanded to the Seventh Circuit to consider the merits.

Respectfully submitted,

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