In The
# Supreme Court of the United States

**ALEKSANDER STOLAJ;**
**DIELLA STOLAJ,**
*Petitioners*

v.

**ERIC H. HOLDER, JR.,** ATTORNEY GENERAL,
*Respondent.*

## Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

## PETITION FOR A WRIT OF CERTIORARI
with Appendix

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether the five-year limitations period of 8 U.S.C. § 1256(a) permits the government to initiate removal proceedings after the five-year period has passed based on the noncitizen's ineligibility for permanent resident status at the time it was granted, where the final removal order rescinds the noncitizen's permanent resident status. This question has divided the circuits with the Third Circuit Court of Appeals concluding that the government is barred from initiating removal proceedings on this basis. In the decision below, the Sixth Circuit Court of Appeals joined the Fourth, Eighth, and Ninth Circuits in reaching the opposite conclusion.

2. The primary evidence against the Petitioners consisted of out-of-court testimonial statements. The party offering this testimony made no effort to secure the witness's presence and the Immigration Court denied the Petitioners' application for a subpoena. Were the Petitioners deprived of their due process right to a full and fair hearing where the government's evidence was actually consistent with their claim that they were unaware of a scheme to fraudulently obtain asylum?

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## PETITION FOR WRIT OF CERTIORARI

Petitioners Aleksander Stolaj and Diella Stolaj respectfully petition that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Sixth Circuit entered in this case on August 19, 2009.

There is a split among the circuits as to whether 8 U.S.C. § 1256(a) permits the government to initiate removal proceedings after the expiration of that statute's five-year limitations period when the basis for the removal proceeding is the noncitizen's ineligibility for permanent resident status at the time of adjustment of status, where the final removal order rescinds the noncitizen's permanent resident status. The decision below, concluding that the statute does permit the initiation of removal proceedings beyond the five-year period, is contrary to the statute's plain language and is premised on an unreasonable interpretation of the statute. The position put forth by the Petitioners was adopted by the Fourth Circuit in Garcia v. Attorney General of U.S., 553 F.3d 724 (3rd Cir. 2009). The Sixth Circuit has joined the Fourth, Eighth, and Ninth Circuits in reaching

the opposition conclusion. See Kim v. Holder, 560 F.3d 833 (8th Cir. 2009); Asika v. Ashcroft, 362 F.3d 264 (4th Cir. 2004); Biggs v. INS, 55 F.3d 1398 (9th Cir. 1995).

The substance of the government's claim that Petitioners obtained lawful permanent resident status by fraud or misrepresentation was that they were willing participants in an asylum fraud scheme that involved a notario and an INS Asylum Office supervisor. To meet this burden, the government relied on the out-of-court testimonial statements made by a witness at the INS officer's criminal trial. The Petitioners or someone whose interests aligned with theirs did not have an opportunity to cross examine the notario. The government did not call him or the former INS supervisor as a witness in Petitioners' removal proceedings nor did it allege that the witnesses were unavailable. The Immigration Judge ("IJ") denied Petitioners' application to subpoena these witnesses.

The relied-upon hearsay testimony actually exonerated Petitioners because the declarants suggested that the Petitioners were unaware of

any fraudulent conduct, they only paid what was a reasonable fee for assistance in the asylum process, and the illegal activity occurred only after Petitioners received asylum.

Petitioners have a due process right to a full and fair hearing. Under the facts of this case, that right included a right to cross-examine the witnesses against them, or at minimum an effort by the government to produce those witnesses.

## OPINIONS BELOW

The opinion of the Sixth Circuit Court of Appeals, App., *infra*, B1, is reported at 577 F.3d 61 (6th Cir. 2009). The opinion of the Board of Immigration Appeals, App., *infra*, C1, is unreported. The IJ's decision, App., *infra*, D1, is unreported.

## STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit, App., *infra*, A1, was entered on November 25, 2009. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1).

## RELEVANT PROVISIONS INVOLVED

At all times relevant to this case, 8 U.S.C. § 1256(a) provided in relevant part:

> If, at any time within five years after the status of a person has been otherwise adjusted under the provisions of section 1255 or 1259 of this title or any other provision of law to that of an alien lawfully admitted for permanent residence, it shall appear to the satisfaction of the Attorney General that the person was not in fact eligible for such adjustment of status, the Attorney General shall rescind the action taken granting an adjustment of status to such person and canceling removal in the case of such person if that occurred and the person shall thereupon be subject to all provisions of this chapter to the same extent as if the adjustment of status had not been made. Nothing in this subsection shall require the Attorney General to rescind the alien's status prior to commencement of procedures to remove the alien under section 1229a of this title, and an order of removal issued by an immigration judge shall be sufficient to rescind the alien's status.

## STATEMENT

### (i) Nature of the Case

This case presents two important and recurring questions. The first is whether the section 1256(a)'s statute of limitations for the initiation of rescission proceedings applies to the initiation of removal proceedings where the proceedings are based on the noncitizen's ineligibility for permanent resident status at the time of adjustment of status and the final removal order rescinds the noncitizen's permanent resident status. There is a circuit split on this question.

The second question is whether it is a violation of noncitizens' due process rights in removal proceedings to allow the government to rely on hearsay evidence without making an effort to call the declarant as a witness or allow the noncitizen to subpoena the declarants, especially where the hearsay evidence is ambiguous, is the primary evidence of removability, and there was no meaningful opportunity to cross-examine the witness in a prior proceeding.

**(ii) Factual Background**

Diella Stolaj and her husband, Aleksander Stolaj, are citizens of Albania. They were lawfully admitted to the U.S. as nonimmigrants on February 26, 1996. On December 18, 1996, they each filed timely, separate applications for asylum with the former Immigration and Naturalization Service ("INS"). Mr. Stolaj subsequently withdrew his application and proceeded as a derivative beneficiary of Ms. Stolaj's application.

On February 6, 1997, the INS approved Mrs. Stolaj's asylum application and they each received asylee status. The INS later adjusted their statuses to that of lawful permanent residents, retroactive to October 1, 1997.

**(iii) Agency Proceedings**

On July 9, 2003, Immigration and Customs Enforcement ("ICE")[1] initiated removal proceedings against the Stolajs. ICE alleged that they were inadmissible at the time of their adjustment of status because they obtained

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[1]ICE is a successor agency to the INS.

asylum through fraud or misrepresentations. 8 U.S.C. § 1227(a)(1)(A); 8 U.S.C. §§ 1182(a)(6)(C)(i), (a)(7)(A)(i)(I).

On December 13, 2006, an IJ in Detroit, Michigan, sustained the removal charges. App. A1. The IJ credited the out-of-court statements of a witness who conspired with an INS Asylum Office supervisor to fraudulently obtain asylum for several applicants.

The Stolajs timely appealed to the BIA. On June 26, 2008, the BIA denied their appeal. The BIA found that they were subject to removal and that ICE met its burden of proof. App. B1.

**(iv) Petition for Review**

The Stolajs timely petitioned for review to the Sixth Circuit. The court denied his petition for review in a published decision on August 19, 2009. 577 F.3d 651, App. B1. The Court held that ICE was not time-barred from initiating the removal, ICE met its burden of proof, and Petitioners received a full and fair hearing.

The court denied their petition for panel and en banc rehearing. App. A1.

## REASONS FOR GRANTING THE WRIT

The Court should grant the writ to resolve a split among the circuits. The circuit split concerns whether 8 U.S.C. § 1256(a) permits the government to initiate removal proceedings after the expiration of the five-year period based on the noncitizen's ineligibility for permanent resident status at the time of adjustment of status, where the final removal order rescinds the noncitizen's permanent resident status. The decision below, concluding that the statute does permit the initiation of removal proceedings beyond the five-year period, is contrary to the statute's plain language and is premised on an unreasonable interpretation of the statute.

Petitioners had a due process right to a full and fair hearing. Under the facts of this case, that right included a right to cross-examine the witnesses against them, or at least an effort by the government to produce those witnesses.

ICE's primary evidence was the transcribed testimony of a witness at the criminal trial of a corrupt INS supervisor. The Petitioners did not have any opportunity to cross examine the witness. ICE did not call the witness or the former INS supervisor as a witness in Petitioners' removal proceedings nor did it allege that the witnesses were unavailable.

The IJ did not let Petitioners' subpoena these witnesses to clarify the ambiguities in the statements. The relied-upon hearsay testimony actually exonerated Petitioners because the declarants suggested that the Petitioners were unaware of any fraudulent conduct, they only paid what was a reasonable fee for assistance in the asylum process, and any illegal activity occurred only after Petitioners were granted asylum.

## I. Section 1256(a) Provides A Five-Year Statute Of Limitations On Initiating Removal Proceedings Against A Noncitizen Who Was Ineligible For Permanent Resident Status At The Time It Was Granted.

The Sixth Circuit's decision below is in conflict with the Third Circuit's decision in Garcia, 553 F.3d at 726-28. See Stolaj, 577 F.3d at 655-57; see also

Kim, 560 F.3d 833 (8th Cir.); Asika, 362 F.3d 264 (4th Cir.); Biggs, 55 F.3d 1398 (9th Cir.).

The Third Circuit's decision represents the better reading of 8 U.S.C. § 1256(a). The plain language of that statute imposes a five-year statute of limitations on the initiation of removal proceedings against a noncitizen where the proceeding is based on an allegation that the noncitizen was ineligible for permanent resident status at the time he or she received adjustment of status. Garcia, 553 F.3d at 727-28.

### A. The plain language of section 1256(a) provides a five-year statute of limitations period

The Sixth Circuit misconstrued the plain language of 8 U.S.C. § 1256(a). Stolaj, 577 F.3d at 656. There is no dispute that rescission proceedings against a permanent resident who is accused of being ineligible for adjustment of status must be initiated within five years of the grant of adjustment of status.

Rescission proceedings are unwieldy and rarely instituted. Over the last five years, rescission

proceedings were approximately 1/100 of one percent of all Immigration Court proceedings. http://www.justice.gov/eoir/statspub/fy08syb.pdf at page 16 (last visited February 15, 2010). If the government successfully pursues rescission proceedings against a permanent resident, the noncitizen loses that status but the government must then go through another set of proceedings to establish the noncitizen's removability.

To avoid the need for multiple proceedings, Congress amended section 1256(a) to permit ICE to combine the two proceedings into a single removal proceeding.[2] In that proceeding, ICE can allege, as it did against the Stolajs, that a noncitizen is removable because he or she was inadmissible at the time of adjustment of status. 8 U.S.C. § 1227(a)(1)(A). The order of removal "shall be sufficient to rescind the alien's status." 8 U.S.C. § 1256(a).

As the Third Circuit noted, the amendment to section 1256(a) has two clear provisions. The first is

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[2]Illegal Immigration and Immigrant Responsibility Act of 1996, § 378(a), Pub. L. No. 104-208.

that the government may remove a noncitizen without first taking steps to rescind an adjustment of status. The second is that the removal order is sufficient to rescind the noncitizen's status. See Garcia, 553 F.3d at728.

When Congress amended section 1256(a) by adding the last sentence, it provided ICE with an easier and more efficient way to remove certain lawful permanent residents. It did not provide ICE with a way to avoid the five-year statute of limitations. This is clear from the provision stating that a removal order will rescind the noncitizen's permanent resident status. 8 U.S.C. § 1256(a).

### B. The BIA's interpretation of the statute is unreasonable

Even if the language of 8 U.S.C. § 1256(a) is not plain, the BIA's interpretation is unreasonable. The Third Circuit correctly declined to defer to the BIA's interpretation because the statute is a statute of limitations, which is not within the BIA's area of expertise. Garcia, 553 F.3d at 727; see also Iavorski v. INS, 232 F.3d 124, 133 (2nd Cir. 2000); Coghlan v. NTSB, 470 F.3d 1300, 1304 (11th Cir. 2006).

The BIA's interpretation is unreasonable. By permitting ICE to initiate removal proceedings at any time based on a claimed ineligibility for adjustment of status, it would disrupt the long-settled expectations of permanent residents and their families. As time marches on, it becomes increasingly difficult for a permanent resident to marshal the evidence and witnesses necessary to rebut an allegation of fraud or ineligibility in the adjustment of status process. If the defect in the adjustment of status proceeding was one that could have been corrected or waived, the more time that passes the more likely it is that the permanent resident would be unable to do so because of a change in family or employment status.

Take, for example, a noncitizen who adjusted her status based on her marriage to a U.S. citizen. Years later, ICE could conclude that she was ineligible for adjustment of status because she was convicted of a crime that rendered her inadmissible, even though the adjudicating officer at the time knew about the conviction and believed that the conviction did not trigger a ground of inadmissibility. Had the adjudicating

officer concluded that the noncitizen was inadmissible, she could have applied for a waiver under 8 U.S.C. § 1182(h). Without a statute of limitations, ICE could years later seek to remove the noncitizen because of this change in interpretation and the noncitizen may no longer have a qualifying relative for the waiver or for the adjustment of status application itself.

Or, for example, once a noncitizen gains permanent resident status, he can petition for other family members to join him in the U.S. If ICE succeeds in removing the noncitizen because it later determined there was a defect in the adjustment of status process, it would throw into doubt the validity of the immigration statuses of his family members.

The five year statute of limitations period serves an important purpose. It gives some assurance to permanent residents, their families, and their employers that mistakes in the adjustment of status process, whether inadvertent or otherwise and whether made by the government or the noncitizen, will not forever cast doubt on their

status here. There has to be some finality to the process.

Rescission is a "harsh" penalty. Quintana v. Holland, 255 F.3d 161, 164 (3rd Cir. 1958). The government has the entire adjudications process and an additional five years to make sure it reaches the correct result. The government performs a lengthy background check before adjudicating any application for a benefit and it has plenty of time to catch any potential ineligibilities. See, e.g., Kashkool v. Chertoff, 553 F. Supp. 2d 1131 (D. Ariz. 2008) (six year adjudication delay); Aslam v. Mukasey, 531 F. Supp. 2d 736, 743 (E.D. Va. 2008) (three year delay).

That ICE finds it difficult to remove a lawful permanent resident is no reason for the government to renounce the restrictions imposed by Congress. See Gertsenshteyn v. U.S. Dept. of Justice, 544 F.3d 137, 148 (2nd Cir. 2008). The rule of lenity applies to this case and any ambiguities should be resolved in favor of the noncitizens. See Leocal v. Ashcroft, 543 U.S. 1, 12 n.8 (2004).

Over fifty years ago, the Court articulated the principle of narrow construction as an overall guide to statutory interpretation of the immigration laws, stating that,

> 'We resolve the doubts in favor of that [narrow] construction because deportation is a drastic measure and at times the equivalent of banishment or exile.' It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.

Fong Haw Tan v. Phelan, 68 S. Ct. 374, 376 (1948).

## II. Due Process Required The Immigration Court To Provide Petitioners With An Opportunity To Cross-Examine The Witness Against Them Given The Ambiguity In The Hearsay Statements

ICE bore the burden of establishing by clear and convincing evidence that the Stolajs gained lawful permanent resident status through fraud or misrepresentation by bribing John Shandorf, an Asylum Office supervisor. 8 U.S.C. § 1229a(c)(3)(A); Stolaj, 577 F.3d at 657. The only evidence offered by ICE to meet their burden of proof was the transcribed testimony of Luigji Berishaj from the criminal case against Mr. Shandorf. The IJ credited the hearsay testimony over the Stolajs' testimony. However, a careful reading of Mr. Berishaj's testimony shows that it is completely consistent with the Stolajs' testimony.

The party offering the hearsay, ICE, did not attempt to call Mr. Berishaj as a witness nor did it seek to establish his unavailability for trial. The Stolajs applied for a subpoena to compel his testimony but the IJ denied their request. Given the ambiguities in Mr. Berishaj's hearsay statements, due process required an opportunity to

cross-examine Mr. Berishaj or at least a demonstration of his unavailability.

### A. Petitioners had a right to cross-examine the witness against them

Noncitizens in removal proceedings have a right to cross-examine witnesses presented by the government. 8 C.F.R. § 1240.10(a)(4). The right to confront and cross-examine witnesses is an important aspect of any fact-based inquiry. "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine witnesses." Goldberg v. Kelly, 397 U.S. 254, 269 (1970); see also See Olabanji v. INS, 973 F.2d 1232 (5th Cir. 1992) (reversing deportation order where adverse lay and expert witnesses where unavailable for cross-examination); Hernandez-Garza v. INS, 882 F.2d 945 (5th Cir. 1989) (error to admit witness affidavit where INS failed to conclusively demonstrate it sought witnesses' presence at hearing). While the rules of evidence do not strictly apply in removal proceedings, noncitizens are guaranteed a full and fair hearing. Matter of Wadud, 19 I&N Dec. 182 (BIA 1984);

Hassan v. Gonzales, 403 F.3d 429, 435 (6th Cir. 2005).

ICE offered the transcript of Mr. Berishaj's testimony at Mr. Shandorf's criminal trial as the sole evidence of the Stolajs' removability, but it never even attempted to show that it sought Mr. Berishaj or Mr. Shandorf's presence at the hearing. This out-of-court statement is testimonial and it is inadmissible hearsay. Crawford v. Washington, 541 U.S. 36, 51-52 (2004). ICE may not use an affidavit from an absent witness unless it first establishes that, despite reasonable efforts, it was unable to secure the presence of a witness. Ocasio v. Ashcroft, 375 F.3d 105, 107 (1st Cir. 2004); see also Hernandez-Guadarrama v. Ashcroft, 394 F.3d 674, 681-82 (9th Cir. 2005).

The Stolajs attempted to remedy ICE's failure to try to secure the presence of the witnesses by applying for subpoenas. 8 C.F.R. § 1003.35(b)(2). Even though ICE was the party offering the hearsay evidence, the IJ placed the burden on the Stolajs to prove that Mr. Berishaj and Mr. Shandorf would only testify if subpoenaed. The IJ flipped the burden of proof because as the party offering the out-of-court statement, ICE bore the burden of

producing the witnesses or establishing their unavailability. These witnesses could have even testified telephonically or via televideo from a court or government office near their residence. 8 C.F.R. § 1003.35(b)(4).

### B. Denial of the right to confront the hearsay declarant prejudiced Petitioners

The primary evidence against the Stolajs was Mr. Berishaj's testimony at Mr. Shandorf's criminal trial. It was the only evidence, outside of perceived inconsistencies in the Stolajs' testimony, that ICE offered to prove that the Stolajs obtained asylum through fraud.

However, the evidence does not even establish this and it was, at best, ambiguous. The Stolajs testified that Mr. Berishaj helped them fill out and file their asylum applications. They testified that when they completed and mailed the applications, they did not pay Mr. Berishaj.

The IJ completely credited the testimony that Mr. Berishaj gave in the other proceeding. Mr. Berishaj testimony was essentially consistent with

the Stolajs' testimony, a point overlooked by the IJ and BIA. Mr. Berishaj frequently translated for applicants at their asylum interviews, so he was friendly with many of the officers at the Asylum Office. Mr. Berishaj testified that he developed a friendship with Mr. Shandorf and that Mr. Shandorf helped him navigate the asylum process for his clients. Early in their relationship, Mr. Berishaj did not pay Mr. Shandorf for his assistance, other than to buy him dinner or drinks.

At some point, Mr. Berishaj began doing more than translating. He began assisting applicants through the entire asylum process even though he was not an attorney. The Stolajs were the third clients that Mr. Berishaj helped apply for asylum. Mr. Berishaj called Mr. Shandorf and met him in person to ask him to help the Stolajs through the asylum process. Mr. Berishaj did not pay Mr. Shandorf for his help. Initially, there was no expectation of payment.

It was only *after* the Stolajs received asylum that what began as friendly assistance turned into something criminal. Mr. Berishaj treated Mr. Shandorf to drinks at a local restaurant to thank

him for his help, "if he had anything to do with the grant" of asylum to the Stolajs. Mr. Berishaj was not even sure if Mr. Shandorf was responsible for the asylum grant.

After Mr. Berishaj paid for drinks, Mr. Shandorf said "I deserve more." Mr. Shandorf demanded payment of at least $1,000. It was only then that Mr. Berishaj contacted Mr. Stolaj and asked for payment. Mr. Berishaj testified that he did not tell Mr. Stolaj that the payment was to go to an INS officer. Rather, he told Mr. Stolaj that "[he] had somebody helping [Mr. Stolaj] get the asylum, so we need to give him some money." Mr. Stolaj paid him $2,000, which according to Mr. Berishaj was less than what a lawyer would have charged.

Thus, contrary to the IJ's conclusion, the Stolajs were unknowing and unwilling participants in a bribery scheme. Rather, at worst, they were victims of an extortion attempt by an INS supervisor with the power to revoke what they thought were they lawful grants of asylum.

Even though Mr. Berishaj's out-of-court statements seemed to favor the Stolajs, the IJ

found that it established that the Stolajs obtained asylum through fraud because they bribed an INS officer. Mr. Berishaj's statements do not support this conclusion. Because he was not available to testify, ICE and the Stolajs did not have an opportunity to explore this ambiguity.

The Stolajs never had the opportunity to cross-examine Mr. Berishaj. At Mr. Shandorf's criminal trial, Mr. Shandorf did not have an incentive to Mr. Berishaj about the extent of the Stolajs' involvement and the exact timing, because Mr. Berishaj's testimony that Mr. Shandorf later demanded payment for this and other cases was sufficient to establish his guilt.

The failure to subpoena Mr. Berishaj and Mr. Shandorf prejudiced the Stolajs. It resulted in the rescission of their permanent resident status and their removal. There was no opportunity for clarification of the ambiguities in Mr. Berishaj's testimony or for those witnesses to explain that the Stolajs were unwitting victims of an extortion scheme. The Stolajs did not receive the full and fair hearing that they were entitled to.

## CONCLUSION

Petitioners respectfully submit that the Sixth Circuit erred in the following respects:

There is a five-year statute of limitations for initiating removal proceedings based on a noncitizen's ineligibility for permanent resident status at the time that adjustment of status is granted.

Petitioners did not receive a full and fair hearing because the Immigration Judge relied on an ambiguous out-of-court testimonial statement from the government's witness, the government made no effort to secure the witness's presence at the hearing, and the Immigration Judge denied Petitioners' request to subpoena the witness.

Therefore, Petitioners respectfully pray that the Court grant their petition for writ of certiorari and reverse the decision of the Sixth Circuit Court of Appeals.

Respectfully Submitted,
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