No. 15-1138

In the Supreme Court of the United States

HENRY BERNARDO, ON BEHALF OF M&K ENGINEERING, INC., PETITIONER

v.

JEH JOHNSON, SECRETARY OF HOMELAND SECURITY, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Congress has provided that "no court shall have jurisdiction to review" certain enumerated immigration decisions, as well as "any other decision or action" by the Secretary of Homeland Security "the authority for which is specified" to be in his discretion by any provision between 8 U.S.C. 1151 and 1381. 8 U.S.C. 1252(a)(2)(B). Section 1155 of Title 8 specifies that "[t]he Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval" of any immigrant petition approved by him. 8 U.S.C. 1155.

The question presented is whether the Secretary's decision to revoke the approval of an immigrant visa petition is subject to judicial review.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-59a) is reported at 814 F.3d 481. The opinion of the district court (Pet. App. 60a-65a) is not published in the *Federal Supplement* but is available at 2014 WL 6905107.

JURISDICTION

The judgment of the court of appeals was entered on January 29, 2016. The petition for a writ of certiorari was filed on March 10, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress has limited judicial review of discretionary decisions by the Secretary of Homeland Security, providing:

> Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review—
>
> > (i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or
> >
> > (ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

8 U.S.C. 1252(a)(2)(B). "[T]his subchapter" encompasses 8 U.S.C. 1151 through 1381. *Ibid.* Subparagraph (D) provides that Subparagraph (B) does not preclude judicial review of "constitutional claims or questions of law" raised in a petition for review of a final order of removal filed in a court of appeals. 8 U.S.C. 1252(a)(2)(D). Petitioner's case does not arise in that posture, nor does it present constitutional claims or questions of law. It also does not involve asylum under 8 U.S.C. 1158.

2. The Secretary has broad discretion regarding the admission of aliens to the United States. For alien workers residing in the United States, there is generally a three-step process for becoming a lawful permanent resident through an employer's sponsorship.

First, the employer must request and obtain a certification from the Department of Labor that there are no U.S. workers "able, willing, qualified * * * and available" at the time of application for a visa and admission to the United States, and that the alien's employment will not adversely affect wages and working conditions of others similarly employed in the United States. 8 U.S.C. 1182(a)(5)(A)(i).[1]

Second, if the labor certification is approved, the employer must obtain approval by United States Citizenship and Immigration Services (USCIS) of an immigrant visa petition, known as the Immigrant Petition for Alien Worker, USCIS Form I-140. See 8 U.S.C. 1154(b); see also 8 U.S.C. 1154(a)(1)(E) and (F); 8 C.F.R. 204.5.

Third, the alien must file an application for adjustment of status to that of a lawful permanent resident, which the Secretary of Homeland Security "may" grant. See 8 U.S.C. 1255(a). But that application cannot be granted unless an "immigrant visa is immediately available" to the applicant. 8 U.S.C. 1255(a)(3). Alien workers often must wait years after applying for such a visa to become available, as there are "long queues for the limited number of visas available each year." *Scialabba* v. *Cuellar de Osorio*, 134 S. Ct. 2191, 2196 (2014) (opinion of Kagan, J.); see 8 U.S.C. 1151(a)(2)

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[1] This labor-certification requirement does not apply to all alien workers, but no exemption or exception applies here. *E.g.*, 8 U.S.C. 1182(a)(5)(A)(ii).

and (d), 1152(a)(2) (setting worldwide and country-level caps on immigrant visas).

At any time in this process, the Secretary may revoke the prior approval of an immigrant visa petition:

> The Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 1154 of this title.

8 U.S.C. 1155.[2] The Secretary has promulgated regulations governing revocations. See 8 C.F.R. 205.1, 205.2. Revocation is automatic under certain enumerated circumstances, such as upon the death of the petitioner or beneficiary. 8 C.F.R. 205.1(a)(3)(i)(B) and (C). A USCIS officer may also revoke the approval of a visa petition on any other ground "when the necessity for the revocation comes to [its] attention." 8 C.F.R. 205.2(a). Before approval is revoked on such a non-automatic basis, the petitioner is given "written notification of the decision that explains the specific reasons for the revocation." 8 C.F.R. 205.2(c). If the officer ultimately decides to revoke a Form I-140 visa petition, the petitioner may file an administrative appeal to the USCIS Administrative Appeals Office (AAO). 8 C.F.R. 205.2(d); see 8 C.F.R. 103.3. Review is *de novo*. See *Soltane* v. *U.S. Dep't of Justice*, 381 F.3d 143, 145 (3d Cir. 2004); *In re Christo's, Inc.*, 26 I. & N. Dec. 537, 537 n.2 (A.A.O. 2015).

3. On February 11, 2004, M&K Engineering, Inc. (M&K), through its owner and president Henry Ber-

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[2] Section 1155 permits revocation of any kind of visa petition approved under Section 1154, not merely employment-based visa petitions. 8 U.S.C. 1155; see 8 U.S.C. 1154.

nardo, filed a request for labor certification for Samuel Freitas, an alien worker, to work as an assistant delivery supervisor. Pet. App. 3a. Freitas was already living in the United States and working for M&K. See D. Ct. Doc. 1, ¶¶ 33-34 (June 21, 2013) (Compl.). The Department of Labor granted the labor certification and M&K then filed an I-140 immigrant visa petition with USCIS for the benefit of Freitas. Pet. App. 3a. USCIS approved the visa petition on March 13, 2007. *Ibid.* Frietas in turn filed an application for adjustment of status on the basis of that visa petition. Compl. ¶ 20.

On September 22, 2010, USCIS issued a Notice of Intent to Revoke the approval of the I-140 immigrant petition. Pet. App. 3a. The notice alleged that petitioner "was trying to circumvent Immigration Laws by committing Fraud," and "requested additional information and documents." *Ibid.* After petitioner submitted additional evidence, the Director of the USCIS Texas Service Center issued a decision revoking the approval of the I-140 petition. *Ibid.* He stated that "the evidence does not indicate that the beneficiary had met the minimum experience requirements" before requesting labor certification, and that "the new evidence contradicts evidence already on the record." *Ibid.* USCIS in turn denied Freitas's pending application for adjustment of status on the grounds that approval of the underlying visa petition had been revoked. Compl. ¶ 28.

Petitioner appealed to the AAO. On June 28, 2013, it affirmed the revocation decision and dismissed petitioner's administrative appeal. Pet. App. 3a-4a.

4. In July 2013, petitioner commenced this action in federal district court challenging the revocation of

the I-140 immigrant visa petition. Pet. App. 4a. The AAO thereafter *sua sponte* withdrew its decision, reopened the matter, and requested additional evidence, which petitioner provided. *Ibid.* After considering the additional evidence, the AAO dismissed the appeal again, "finding again that there were inconsistencies in the evidence, and that [petitioner] had failed to prove that Freitas had the necessary work experience." *Ibid.*; see D. Ct. Doc. 20-1, at 2-4 (Mar. 28, 2014) (AAO Decision).

The district court dismissed the action for lack of jurisdiction. Pet. App. 60a-65a. The court held that 8 U.S.C. 1252(a)(2)(B)(ii) barred judicial review because the Secretary's authority to revoke approval of a visa petition is specified by 8 U.S.C. 1155 to be in his discretion. Pet. App. 64a-65a. "[T]he language of the statute is plain," the court explained. *Id.* at 65a. "The words 'may, at any time, for what []he deems' immediately preceding 'good and sufficient cause' grant discretionary decision-making authority to the Secretary." *Ibid.* (quoting 8 U.S.C. 1155).

The court of appeals affirmed. Pet. App. 1a-28a. The court joined "seven of [its] sister circuits" in concluding that the decision to revoke approval of a visa petition under Section 1155 "is discretionary, and so not subject to judicial review." *Id.* at 6a; see *Jilin Pharm. USA, Inc.* v. *Chertoff*, 447 F.3d 196, 201-206 (3d Cir. 2006); *Ghanem* v. *Upchurch*, 481 F.3d 222, 224 (5th Cir. 2007); *Mehanna* v. *USCIS*, 677 F.3d 312, 315-316 (6th Cir. 2012); *El-Khader* v. *Monica*, 366 F.3d 562, 568 (7th Cir. 2004); *Abdelwahab* v. *Frazier*, 578 F.3d 817, 821-822 (8th Cir. 2009); *Green* v. *Napolitano*, 627 F.3d 1341, 1344-1346 (10th Cir. 2010); *Sands* v. *U.S. Dep't of Homeland Sec.*, 308 Fed. Appx. 418,

419-420 (11th Cir.) (per curiam), cert. denied, 558 U.S. 817 (2009).

The court of appeals recognized that a Ninth Circuit panel, over a dissent, had reached a contrary result in *ANA International Inc.* v. *Way*, 393 F.3d 886 (2004). Pet. App. 7a. But the court rejected the Ninth Circuit's approach as contrary to the statutory text. The court explained that Section 1252(a)(2)(B)(ii) bars judicial review "when Congress itself set out the Attorney General's discretionary authority in the statute." *Id.* at 2a (quoting *Kucana* v. *Holder*, 558 U.S. 233, 247 (2010)). And the court found that decisions to revoke approval of visa petitions under Section 1155 fit the bill: "Decisions made under that subchapter as to the revocation of previously approved visa petitions are made discretionary by statute." *Ibid.* "At least three language choices in § 1155 dictate this conclusion: 'may,' 'at any time,' and 'for what he deems to be good and sufficient cause.'" *Id.* at 8a. "Together," the court held, "these phrases in the statute determine the question of discretion." *Id.* at 10a.

Judge Lipez dissented. Pet. App. 29a-59a. He recognized that Section 1155 "includes the words 'may,' 'at any time,' and 'deems,' which suggest an exercise of discretion," but in his view the phrase "good and sufficient cause" supplied an objective legal standard that made revocation decisions susceptible to judicial review. *Id.* at 31a.

ARGUMENT

The decision below is correct and does not warrant further review. The First Circuit here joined the overwhelming majority of circuits in holding that 8 U.S.C. 1252(a)(2)(B) precludes judicial review of a decision to revoke approval of a visa petition under 8

U.S.C. 1155. The Ninth Circuit is the only circuit to reach the contrary conclusion, and it has not addressed the continuing validity of its position in light of this Court's decision in *Kucana* v. *Holder*, 558 U.S. 233 (2010). The circuit split here accordingly could dissipate without this Court's intervention.

Furthermore, the availability of judicial review in the Ninth Circuit but not elsewhere has limited real-world impact on the Department of Homeland Security (DHS), sponsoring employers, or aliens. It does not affect the substantive standard for revoking the approval of a visa petition, and revocation decisions are already reviewable administratively. Revocation decisions are also rarely litigated even in the Ninth Circuit, and when they are the standard of review is highly deferential. The result is that the availability of judicial review in the Ninth Circuit almost never makes a practical difference. Indeed, notwithstanding the size of the Ninth Circuit's immigration docket, the government has identified only a handful of cases in the last 12 years where judicial review of a revocation decision has arguably altered the underlying outcome.

This case in turn is a poor vehicle for resolving the question presented. At a minimum, this Court should afford the Ninth Circuit the first opportunity to assess *Kucana*'s impact on its position. Moreover, if the split persists, the appropriate vehicle for resolving it, if at all, would be a rare case where the availability of judicial review is outcome dispositive. Here, in light of the deferential standard of review and petitioner's intensely fact-bound underlying arguments, it is far from clear that petitioner could prevail even if judicial review were available.

1. The court of appeals correctly held that Sections 1252(a)(2)(B) and 1155 together preclude judicial review of the Secretary's decision to revoke the approval of an immigrant visa petition. The presumption in favor of judicial review of administrative action is overcome "when a statute's language or structure demonstrates that Congress wanted an agency to police its own conduct." *Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645, 1651 (2015); see *Kucana*, 558 U.S. at 237. Congress has made that demonstration here.

a. Section 1252(a)(2)(B) expressly precludes judicial review of certain enumerated decisions, as well as "any other decision or action" the authority for which is "specified under this subchapter" to be in the "discretion" of the Secretary. 8 U.S.C. 1252(a)(2)(B)(ii).[3] "Read naturally, the word 'any' has an expansive meaning." *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 219 (2008) (citations omitted). Section 1155 is part of the same subchapter as Section 1252(a)(2)(B), and it specifies that the authority to revoke approval of visa petitions is in the Secretary's discretion: It states that the Secretary "may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him." 8 U.S.C. 1155. Judicial review of such decisions is therefore precluded.

"At least three language choices in § 1155 dictate this conclusion: 'may,' 'at any time,' and 'for what he deems to be good and sufficient cause.'" Pet. App. 8a. First, as this Court has repeatedly stated, the word "'may' suggests discretion." *Kucana*, 558 U.S. at 247

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[3] Section 1252(a)(2)(B) does not bar review of constitutional and statutory claims raised in a petition for review of a final order of removal. 8 U.S.C. 1252(a)(2)(D). Petitioner raises no such claims.

n.13 (quoting *Zadvydas* v. *Davis*, 533 U.S. 678, 697 (2001)); *Jama* v. *Immigration & Customs Enforcement*, 543 U.S. 335, 346 (2005) ("'may' customarily connotes discretion").

Second, the temporal phrase "at any time" immediately after "may," further "connotes a level of discretion." *Jilin Pharm. USA, Inc.* v. *Chertoff*, 447 F.3d 196, 203 (3d Cir. 2006); see Pet. App. 9a; *El-Khader* v. *Monica*, 366 F.3d 562, 567 (7th Cir. 2004); Notably, Congress added "at any time" to replace a "now-defunct notice requirement," Pet. App. 9a, and thereby "strengthen[ed] the discretion of the Secretary of Homeland Security to revoke approval of petitions," *id.* at 10a (quoting *Jilin*, 447 F.3d at 203).

Third, "the language 'for what [the Secretary] deems to be good and sufficient cause' makes clear that what constitutes 'good and sufficient cause' is within the Secretary's discretion." Pet. App. 10a (brackets in original). The determination of whether "good and sufficient cause" exists is itself "highly subjective, and there exist no strict standards for making this determination." *Id.* at 13a (quoting *El-Khader*, 366 F.3d at 567); see *Firstland Int'l, Inc.* v. *United States INS*, 377 F.3d 127, 131 (2d Cir. 2004) ("the substance of the decision that there should be a revocation is committed to the discretion of the Attorney General"). And the fact that the Secretary "deems" what constitutes good cause under Section 1155 further reinforces the point. To "deem" means "to sit in judgment upon"; "to come to view, judge, or classify after some reflection." *Webster's Third New International Dictionary* 589 (1993). The word "deems" in the clause specifies that it is the Secretary—not a court—that is to adjudge whether good and sufficient cause warrants revoking

a visa petition. Pet. App. 10a; see *Mehanna* v. *USCIS*, 677 F.3d 312, 315 (6th Cir. 2012) ("[T]he statute leaves it to the Secretary's opinion, judgment, or thought, whether there exists 'good and sufficient cause' to revoke a petition."); *Ghanem* v. *Upchurch*, 481 F.3d 222, 225 (5th Cir. 2007) ("We interpret the phrase 'for what he deems' as vesting complete discretion in the Secretary to determine what constitutes good and sufficient cause."); *Jilin*, 447 F.3d at 203 ("This language indicates that Congress committed to the Secretary's discretion the decision of when good and sufficient cause exists to revoke approval.").

This Court's decision in *Webster* v. *Doe*, 486 U.S. 592 (1988), powerfully supports that interpretation. *Webster* held that a decision to terminate an employee is committed to agency discretion by law—and therefore not subject to judicial review—where the statute authorized the Director of the Central Intelligence Agency, "in his discretion," to terminate an employee "whenever he shall deem such termination necessary or advisable in the interests of the United States." *Id.* at 594 (quoting 50 U.S.C. 403(c)) (now codified at 50 U.S.C. 3036(e) (Supp. I 2013)). Respondent seeks (Pet. 22) to distinguish *Webster* on the basis that the statute there included the phrase "in his discretion," while Section 1155 does not. But *Webster*'s rationale does not rest on that phrase. Instead, this Court emphasized that the statute allowed termination when the Director "shall *deem* such termination necessary or advisable," "not simply when the dismissal *is* necessary or advisable to those interests." 486 U.S. at 600 (emphases in original). This Court explained that this phrasing "fairly exudes deference to the Director,"

and "foreclose[s] the application of any meaningful judicial standard of review." *Ibid.* So too here.

Petitioner's suggestion (Pet. 21-22) that Section 1252(a)(2)(B) only applies when a statute includes the word "discretion" is contrary to the principle that Congress need not "use magic words in order to speak clearly" on matters of jurisdiction. *Henderson* v. *Shinseki*, 562 U.S. 428, 436 (2011). Furthermore, it is "rejected by *Kucana* itself." Pet. App. 11a. As *Kucana* explains, Section 1252(a)(2)(B)(ii) expressly exempts decisions on asylum applications from its bar. 558 U.S. at 247 n.13. But the word "discretion" does not appear in the asylum statute. Instead, like Section 1155, it uses the permissive "may": "[T]he Attorney General may grant asylum." 8 U.S.C. 1158(b)(1)(A). Section 1252(a)(2)(B)(ii) therefore must encompass statutes that do not use the word "discretion," otherwise this express exception would be superfluous. See *Zhu* v. *Gonzales*, 411 F.3d 292, 294-295 (D.C. Cir. 2005).

The court of appeals also correctly explained the difference in statutory language that establishes that the denial of a visa petition is reviewable, but revocation of a previously-approved petition is not. See Pet. App. 26a. For example, Congress provided that the Secretary "shall" approve a skilled-worker visa petition if he determines that the facts stated in the petition are true and that the alien is eligible. 8 U.S.C. 1154(b); see 8 U.S.C. 1153(b)(3)(A). By contrast, Congress provided that the Secretary "may, at any time," revoke a prior approval "for what he deems to be good and sufficient cause." 8 U.S.C. 1155. Revocation (unlike denial) is therefore in the Secretary's discretion and unreviewable under Section 1252(a)(2)(B).

Amici Law Professors argue (Br. 17-18) that the court of appeals' holding suggests that the Secretary could circumvent judicial review of decisions to deny visa petitions by simply granting those petitions "and then immediately revoking them" for the same reason. *Id.* at 18. But the presumption of regularity weighs against speculation that this might ever occur. See *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996). And if USCIS were to revoke approval of a petition immediately after granting it, without apparent further justification, that decision might be reviewable for being, in substance, a denial. Cf. *United States* v. *Fleischman*, 339 U.S. 349, 364 (1950) ("A stratagem so transparent does not cast a shadow of substance."). In any event, this case involves no such gamesmanship. USCIS revoked the visa petition here years after it was approved, and based in part on new evidence. See Compl. ¶ 25; AAO Decision 2-13.

b. Petitioner contends (Pet. 23) that revocation decisions are not discretionary because, in agency adjudications, a good-cause determination "calls for an objective assessment of the evidentiary record—not a freewheeling policy determination." This argument is fundamentally misguided and would defeat Congress's manifest design. Section 1252(a)(2)(B)(ii)'s clear purpose is to preclude judicial review of discretionary decisions that courts otherwise might second-guess. Indeed, this Court has identified Section 1252(a)(2)(B) as an example of a provision that is "aimed at protecting the Executive's discretion from the courts." *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 486 (1999). But when there is "no meaningful standard against which to judge the exercise of discretion," a decision is "committed to agency discre-

tion by law" and therefore unreviewable even without Section 1252(a)(2)(B). 5 U.S.C. 701(a)(2); *Lincoln* v. *Vigil*, 508 U.S. 182, 191 (1993) (citation omitted). If petitioner were correct that agency decisions are exempt from judicial review only if they are completely "freewheeling," Section 1252(a)(2)(B)(ii) would do little or no work.

Petitioner's argument is also at odds with *Kucana*, which held that an agency cannot make its authority discretionary (and therefore unreviewable) through regulations because Section 1252(a)(2)(B) depends on *statutory* provisions—not agency interpretations—to define its scope. See 558 U.S. at 245-247. *Congress* must "specif[y]" that the decision is discretionary. 8 U.S.C. 1252(a)(2)(B)(ii). Petitioner provides no basis for departing from that reasoning and making Section 1252(a)(2)(B) depend instead on whether an agency has channeled its discretion through the articulation of objective standards to apply in individual cases. See *ANA International Inc.* v. *Way*, 393 F.3d 886, 899 (9th Cir. 2004) (Tallman, J., dissenting) ("It is impermissible statutory interpretation to seize upon agency practice to read the explicit grant of discretion ('may, at any time, for what he deems to be') out of the statute."). Indeed, if such objective guidance rendered a decision reviewable, that would create a perverse incentive for the Secretary or other officials *not* to adopt regulations, policies, or interpretations that bring predictability and clarity to the administration of the immigration laws, instead leading to arbitrary outcomes under the "freewheeling" approach petitioner advocates.

Petitioner contends (Pet. 25-27) that the court of appeals "failed to account for the structure" of Section

1252(a)(2)(B), and in particular the relationship between subparagraphs (i) and (ii). But the court cannot be faulted for not addressing that argument, as petitioner did not properly present it below: The court found that argument waived and declined to reach it because petitioner "d[id] not develop [it] in his brief; he raised it for the first time at oral argument." Pet. App. 24a n.17; see *id.* at 25a n.18.

In any event, as this Court explained in *Kucana*, subparagraphs (i) and (ii) both reach "decisions of the same genre, *i.e.*, *those made discretionary by legislation*." 558 U.S. at 246-247 (emphasis added). That perfectly describes visa-revocation decisions, which are made discretionary by Section 1155, not by regulation. A decision to revoke approval of a visa petition is also a "substantive" immigration decision, not merely an "adjunct" procedural ruling like a denial of a motion to reopen. *Id.* at 247-248. When approval is revoked, the alien becomes unable to obtain the underlying visa and unable to become a lawful permanent resident on that basis. See *Mehanna*, 677 F.3d at 317 (revocation fits within the class *Kucana* described). Denial of the related application for adjustment of status also leads to the termination of work authorization. 8 C.F.R. 274a.14(b); see 8 C.F.R. 274a.12(c)(9).

2. There has long been a lopsided circuit split on this issue, but this Court's review is not warranted to resolve it.

a. The First Circuit in this case joined the Third, Fifth, Sixth, Seventh, Eighth, and Tenth circuits in holding that 8 U.S.C. 1155 and 1252(a)(2)(B)(ii) together preclude judicial review of a decision to revoke approval of an immigrant visa petition. See Pet. App.

6a-7a (collecting cases). In an unpublished, non-precedential opinion, an Eleventh Circuit panel has agreed with the majority approach. *Sands* v. *U.S. Dep't of Homeland Sec.*, 308 Fed. Appx. 418, 419-420 (per curiam), cert. denied 558 U.S. 817 (2009). The Ninth Circuit is the only court of appeals to reach the opposite result, and it did so over a spirited dissent. *ANA*, 393 F.3d at 889; see *id.* at 895 (Tallman, J., dissenting). The government did not petition for en banc review or certiorari when the Ninth Circuit created the split in *ANA*.

Petitioner correctly notes (Pet. 4, 14) that this circuit split has persisted since *Kucana*. *E.g.*, *Green* v. *Napolitano*, 627 F.3d 1341, 1345 (10th Cir. 2010) ("Our view * * * that a visa-revocation decision is discretionary is unaltered by [*Kucana*]"). But the Ninth Circuit has not addressed *ANA*'s continuing validity in light of *Kucana*. It is therefore uncertain whether the Ninth Circuit would continue to abide by its outlier position going forward. The *ANA* panel majority relied on the BIA's interpretation of the "good cause" standard to conclude that revocation decisions are judicially reviewable. See 393 F.3d at 894. But as explained above, *Kucana* calls that rationale into question by establishing that the availability of judicial review under Section 1252(a)(2)(B) depends on statutory language set forth in discretionary terms, not how the agency has chosen to apply statutorily-conferred discretionary authority. This circuit split accordingly could dissipate without this Court's intervention.

b. Regardless, the availability of judicial review in the Ninth Circuit (but not elsewhere) is also insufficiently important to warrant this Court's intervention.

The divide in the circuits does not affect the standards DHS uses to decide whether to revoke approval of a visa petition or to grant or deny an application for adjustment of status; those standards are uniform nationwide. Those decisions also are already subject to review in the administrative process, and thus are already exposed to scrutiny and the possibility of reversal if an error has occurred. The only question is whether decisions to revoke approval of a visa petition are subject to judicial review. And in the event that a visa petitioner seeks judicial review of a revocation decision in the Ninth Circuit, the standard of review is highly deferential and limited to the administrative record. See *Love Korean Church* v. *Chertoff*, 549 F.3d 749, 754 (9th Cir. 2008); see also *Tandel* v. *Holder*, No. 09-cv-01319, 2009 WL 2871126, at *1 (N.D. Cal. Sept. 1, 2009) ("[T]he hurdle that a plaintiff must overcome to overturn the agency's decision is set very high").

Revocation decisions in turn are rarely litigated even in the Ninth Circuit—and litigation even more rarely changes the underlying outcome. The government has identified only 22 cases within the Ninth Circuit in the 12 years since *ANA* was decided, in which a party sought judicial review of the merits of a decision to revoke approval of a visa petition. In 16, the government prevailed and thus judicial review had no practical impact.[4] In three of the six remaining,

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[4] *Herrera* v. *USCIS*, 571 F.3d 881 (9th Cir. 2009); *Park* v. *Mukasey*, 514 F.3d 1384 (9th Cir. 2008); *Mi Ae Lee* v. *Holder*, 533 Fed. Appx. 732 (9th Cir. 2013); *Smethurst* v. *Holder*, 413 Fed. Appx. 970 (9th Cir. 2011); *Wah Yuet (USA), Inc.* v. *Holder*, 370 Fed. Appx. 785 (9th Cir. 2010); *Top Set Int'l, Inc.* v. *Neufeld*, 318 Fed. Appx. 578 (9th Cir. 2009); *Woong Joo Yoon* v. *INS*, 236 Fed. Appx. 270 (9th Cir. 2007); *R.E.M. Int'l* v. *Neufeld*, 210 Fed. Appx.

courts decided only threshold questions.[5] Only three times did the alien obtain a remand to the agency.[6] In all three, the government did not seek further review.

During the 12 years since the Ninth Circuit's decision in *ANA* created a circuit conflict, two petitions for certiorari have been filed from other circuits raising this question. This Court denied both. See *Karpeeva* v. *Department of Homeland Sec.*, 132 S. Ct. 590 (2011) (No. 11-365); *Sands* v. *Department of Homeland Sec.*, 558 U.S. 817 (2009) (No. 08-1330). This Court should do the same here.

3. This would also be a poor vehicle for resolving the question presented. If this Court were to grant review on this issue despite its denial of review on two prior occasions, the appropriate vehicle would be a case in which a party sued in the Ninth Circuit to

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656 (9th Cir. 2006); *Santos* v. *Gonzales*, 204 Fed. Appx. 711 (9th Cir. 2006); *Agyeman* v. *Gonzales*, 155 Fed. Appx. 961 (9th Cir. 2005); *Liu* v. *Schiltgen*, 120 Fed. Appx. 65 (9th Cir. 2005); *Al-Bassrei* v. *USCIS*, No. 14-cv-00374, 2014 WL 6633120 (D. Or. Nov. 21, 2014); *Koth* v. *USCIS*, No. 12-cv-00996, 2014 WL 583485 (W.D. Wash. Feb. 14, 2014); *Aran* v. *Napolitano*, No. 10-cv-00862, 2010 WL 4906549 (D. Ariz. Nov. 24, 2010); *Chung Hak Hong* v. *USCIS*, 662 F. Supp. 2d 1195 (C.D. Cal. 2009); *Tandel*, 2009 WL 2871126. In one case (not included above) an alien raised such a challenge but it apparently was never addressed. See *Kassem* v. *Napolitano*, No. 08-cv-00010, 2010 WL 1267119 (E.D. Cal. Mar. 30, 2010).

[5] *V. Real Estate Grp., Inc.* v. *USCIS*, 85 F. Supp. 3d 1200, 1213 (D. Nev. 2015) (denying motion to dismiss); *Carlsson* v. *USCIS*, No. 12-cv-07893, 2015 WL 1467174, *14 (C.D. Cal. Mar. 23, 2015) (granting limited discovery); *Friderici* v. *Napolitano*, No. 09-cv-04170, 2010 WL 1838712, *5 (N.D. Cal. May 5, 2010) (denying motion for summary judgment).

[6] *Love Korean Church*, 549 F.3d at 752; *Rahman* v. *Napolitano*, 814 F. Supp. 2d 1098, 1110 (W.D. Wash. 2011); see *Brar* v. *Ridge*, No. C04-1401, 2005 WL 1459679, at *1 (W.D. Wash. June 21, 2005).

challenge the revocation, the court exercised jurisdiction, and the petitioner prevailed. Such a case would give the Ninth Circuit the opportunity to assess *ANA*'s continuing validity in light of *Kucana*, and also establish that the resolution of the question presented actually altered the outcome of the underlying visa revocation. This case instead arises out of the First Circuit, which follows the approach of the great majority of circuits; the Ninth Circuit has not yet assessed *Kucana*'s impact on *ANA*; and petitioner presses no argument that he would actually prevail on the merits if he had sued in the Ninth Circuit. Petitioner's underlying arguments challenging the revocation are deeply fact-intensive, see Pet. App. 3a-4a, and he would face a "very high" hurdle even under the rule he advocates. *Tandel*, 2009 WL 2871126, at *1.

Indeed, petitioner would be unable to prevail, as the AAO's decision is supported by substantial evidence. For his visa petition, petitioner had to prove that, by February 2004, Freitas had two or more years of experience in the field of managing or supervising deliveries. AAO Decision 5; see 8 U.S.C. 1153(b)(3)(A)(i) (skilled worker positions require "at least 2 years training or experience"). Freitas in turn relied solely on his alleged experience working as a delivery manager in Brazil in 1992 to 1996. AAO Decision 5. The AAO found that petitioner failed to carry his burden because Freitas had made a series of inconsistent representations regarding the nature and dates of that employment and lacked supporting documentation, and because petitioner told USCIS that Freitas "didn't have much experience" before he was hired in the United States and had "worked his way up to supervisor." Compl. ¶ 29. Petitioner seeks to

explain some of those inconsistencies as "mere error," *id.* at ¶ 32, but misses the point that the errors cast doubt on whether he actually had the experience he claimed. Petitioner points to a self-serving declaration supporting his assertions, *ibid.*, but the AAO reviewed all of the new evidence and concluded that it added yet more inconsistencies and thus cast further doubt on his claims. See AAO Decision 9-13. Petitioner also has no explanation for some of the inconsistencies—including petitioner's statement that Freitas had to "work his way up" to the position he allegedly already possessed the skills to fill. Compl. ¶ 29.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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