05-0965-cv

To be Argued By:
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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 05-0965-cv

ADNAN ASIF USMANI and MARGARET POWERS,
Plaintiffs-Appellants,

-vs-

IMMIGRATION AND NATURALIZATION SERVICE,
ACTING OFFICER IN CHARGE ETHAN ENZER
Defendant-Appellee.

ON PETITION FOR REVIEW
FROM THE BOARD OF IMMIGRATION APPEALS

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BRIEF FOR ETHAN ENZER, ACTING OFFICER IN CHARGE OF IMMIGRATION AND NATURALIZATION SERVICE

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STATEMENT OF JURISDICTION

Petitioner filed a petition for writ of habeas corpus under 28 U.S.C. § 2241. The district court issued a final decision denying the petition on January 20, 2005, and Petitioner filed a timely notice of appeal on February 14, 2005.

As described more completely below, in light of the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231, this Court should transform this appeal into a petition for review. *See* § 106. Whether classified as an appeal or as a petition for review, however, this Court lacks jurisdiction to review an order of an Immigration Judge removing an alien when the alien failed to "exhaust[] all administrative remedies available to the alien as of right." 8 U.S.C. § 1252(d)(1).

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether this Court should review Petitioner's claim that he is entitled to adjustment of status when he failed to exhaust administrative remedies as required by 8 U.S.C. § 1252(d)(1) and when he would not be entitled to adjustment of status in any event because he failed to voluntarily depart the United States by the given deadline as required by 8 U.S.C. § 1229c.

United States Court of Appeals

FOR THE SECOND CIRCUIT

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ADNAN ASIF USMANI and MARGARET POWERS,
Plaintiffs-Appellants,

-vs-

IMMIGRATION AND NATURALIZATION SERVICE,
ACTING OFFICER IN CHARGE ETHAN ENZER
Defendant-Appellee .

ON PETITION FOR REVIEW
FROM THE BOARD OF IMMIGRATION APPEALS

BRIEF FOR ETHAN ENZER, ACTING OFFICER IN CHARGE OF IMMIGRATION AND NATURALIZATION SERVICE

Preliminary Statement

Adnan Asif Usmani ("Petitioner"), a native and citizen of Pakistan, and Margaret Powers ("Powers") petition this Court for review of an Immigration Judge's ("IJ") decision ordering Petitioner removed from the United States. The IJ found Petitioner removable on June 22, 1998, but Petitioner waived his right to appeal the IJ's order to the

Board of Immigration Appeals ("BIA") and agreed to voluntarily depart the United States by October 22, 1998.

Instead of departing by the deadline, however, on or around October 22, 1998, Petitioner married Powers, a United States citizen. He then remained in the United States for another four years, until he was taken into custody by the Immigration and Naturalization Service ("INS") on October 17, 2002. Only then did Powers file a Petition for Alien Relative (Form I-130) to obtain a visa for her husband, which was subsequently approved. Despite this approval, Petitioner is ineligible for adjustment of status based on his marriage because he failed to voluntarily depart the United States by October 22, 1998. *See* 8 U.S.C. § 1229c(d).

In this Court, Petitioner seeks a remand to the Immigration Court to obtain an adjustment of status based on his marriage. This Court lacks jurisdiction to consider Petitioner's claims, however, because he failed to exhaust his administrative remedies as required by 8 U.S.C. § 1252(d). Even if this Court were to consider his claims, his petition should be denied because he is statutorily barred from any adjustment of status for ten years because he failed to comply with the voluntary departure order. *See* 8 U.S.C. § 1229c(d).

Statement of the Case

Petitioner was placed into removal proceedings on July 8, 1997. On June 22, 1998, an IJ found Petitioner removable to Pakistan for overstaying his B-2 nonimmigrant visa. The Immigration Judge thereafter granted Petitioner's request for leave to voluntarily depart the United States on or before October 22, 1998. Joint Appendix ("JA") 5.

On October 17, 2002, Petitioner was taken into custody by the INS for the purpose of executing the IJ's final order of removal which became effective when Petitioner failed to depart by October 22, 1998. On October 30, 2002, Powers filed a Petition for Alien Relative (Form I-130) to obtain a visa for Petitioner. JA 7. Powers also filed a request for an administrative stay of removal.

On November 14, 2002, Petitioner filed a petition for writ of habeas corpus in the United States District Court for the District of Connecticut (Dominic J. Squatrito, J.) seeking relief from the IJ's final order of removal. JA 1. On January 20, 2005, the district court dismissed the petition in its entirety by written ruling. JA 8.

On February 14, 2005, Petitioner filed a timely notice of appeal. JA 14. Petitioner remains out on bond pending resolution of the proceedings in this Court and his removal from the United States.

STATEMENT OF FACTS

A. Petitioner's Entry into the United States and Overstaying of Nonimmigrant Visa

Petitioner is a native and citizen of Pakistan. He was admitted to the United States on or about September 21, 1991 as a nonimmigrant B-2 with authorization to remain in the United States for a temporary period not to exceed March 20, 1992.

B. INS Removal Proceedings

When Petitioner remained in the United States without authorization beyond March 20, 1992, the INS[1] initiated proceedings to remove him from the United States. To that end, Petitioner was served with a Notice to Appear on July 8, 1997, which specifically charged him with not being a citizen or national of the United States but a native and citizen of Pakistan, and for being subject to removal from the United States under § 237(a)(1)(B) of the Immigration and Naturalization Act ("INA"), 8 U.S.C. § 1227(a)(1)(B), for remaining in the United States without authorization from the INS beyond March 20, 1992.

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[1] The INS was abolished effective March 1, 2003, and its functions transferred to three bureaus within the Department of Homeland Security. *See* Homeland Security Act, Pub. L. No. 107-296, 116 Stat. 2135, 2178 (codified as amended at 6 U.S.C. § 202 (2002)). For convenience, respondent-appellee is referred to in this brief as the INS.

On June 22, 1998, an IJ found Petitioner removable to Pakistan. However, in lieu of removal, the IJ accepted Petitioner's request to voluntarily depart the United States pursuant to 8 U.S.C. § 1229c by October 22, 1998. JA 2, 5. Petitioner then waived his right to appeal to the BIA. On that same day, Petitioner was advised that his failure to voluntarily depart by October 22, 1998 would result in him being ineligible for various forms of relief, including adjustment of status, for ten years from the date of his voluntary departure date. JA 6. When Petitioner subsequently failed to voluntarily depart by October 22, 1998, the IJ's order of removal to Pakistan became effective. JA 5.

On or about October 22, 1998, Petitioner married Powers, a United States citizen. Petitioner then remained in the United States for four more years until October 17, 2002, when he was taken into custody by the INS. After this, on October 30, 2002, Powers filed a Petition for Alien Relative (Form I-130) to obtain a visa for her husband. That petition was subsequently approved by the INS.

C. District Court Proceedings

On November 14, 2002, Petitioner and Powers filed a petition for writ of habeas corpus in the United States District Court for the District of Connecticut (Dominic J. Squatrito, J.) seeking relief from the order of removal. Petitioner asked for a remand to the Immigration Court to obtain an adjustment of status based on his marriage to Powers. He argued that he was not subject to the ten-year statutory bar on adjustment of status because the voluntary departure order had been "signed by the Court Clerk and

not the judicial authority" and thus the order failed to comply with 8 U.S.C. § 1229c(d). Petitioner's Memorandum in Support of Habeas Petition at 5. Petitioner conceded, however, that he received a written statement titled, "Limitations on discretionary relief for failure to appear" that provided full notice of the ten-year statutory bar on adjustment of status. *Id.*

On March 16, 2004, the government moved to dismiss for lack of jurisdiction because Petitioner had waived his appeal of the removal order to the BIA, and therefore had failed to exhaust his administrative remedies. On January 20, 2005, the district court dismissed Petitioner's habeas petition for lack of subject matter jurisdiction because Petitioner had failed to exhaust his administrative remedies. JA 8-12. The district court noted that the statutory exhaustion requirement of 8 U.S.C. § 1252(d)(1) applies to "all forms of review including habeas corpus." JA 11 (quoting this Court's superseding opinion in *Theodoropoulos v. INS*, 358 F.3d 162, 171 (2d Cir.), *cert. denied*, 125 S. Ct. 37 (2004)). Because Petitioner had failed to exhaust his administrative remedies, the district court declined to address the merits of his claim that he was entitled to adjust his status. JA 11.

Petitioner filed a notice of appeal on February 14, 2005. JA 14.

SUMMARY OF ARGUMENT

Because Petitioner waived his right to an administrative appeal of his final order of removal, and therefore failed to exhaust his administrative remedies, as required by 8 U.S.C. § 1252(d)(1), this Court lacks jurisdiction to review Petitioner's claim that his case should be remanded for consideration of an application for adjustment of status.

Moreover, even if this Court were to decide that it has jurisdiction in this case, Petitioner would not be entitled to any relief because he is statutorily barred by 8 U.S.C. § 1229c(d) from adjusting his status for ten years due to his failure to abide by the conditions of the voluntary departure order which required that he depart the United States by October 22, 1998. Consequently, Petitioner is ineligible for the relief he seeks.

ARGUMENT

I. THIS COURT LACKS JURISDICTION TO REVIEW PETITIONER'S CLAIM THAT HE IS ENTITLED TO ADJUSTMENT OF STATUS BECAUSE HE FAILED TO EXHAUST ADMINISTRATIVE REMEDIES AND HE IS INELIGIBLE FOR ADJUSTMENT OF STATUS IN ANY EVENT

A. Relevant Facts

The relevant facts are set forth in the Statement of Facts above.

B. Governing Law and Standard of Review

1. The REAL ID Act of 2005

On May 11, 2005, as part of a larger Act, the President signed into law the "REAL ID Act of 2005," Pub. L. No. 109-13, Div. B., 119 Stat. 231. Section 106 of the REAL ID Act clarifies the scope of judicial review of removal orders. As relevant here, under § 106, a petition for review to the court of appeals is the *exclusive* means of review of an administrative order of removal. *Id.* § 106(a). Section 106(c) provides that if an alien seeks habeas review of a final order of removal in a "case . . . [that] is pending in a district court on the date" of the Act's enactment (May 11, 2005), "the district court shall transfer the case . . . to the court of appeals" in which a petition for review could have been filed under 8 U.S.C. § 1252, and that court shall adjudicate the case as a petition for review

(without regard to § 1252(b)(1)'s 30-day filing deadline).[2] *See* § 106(c). Congress enacted this mandatory, non-discretionary transfer provision to ensure that every alien would have the opportunity for "one day in the court of appeals" and that "[n]o alien, not even criminal aliens, [would] be deprived of judicial review of [constitutional and purely legal] claims." *See* H.R. Conf. Rep. No. 109-72, at 174-75 (2005). These amendments apply to all cases in which a final order of removal has been entered *before, on, or after* the date of enactment. REAL ID Act § 106(b).

The REAL ID Act provides for the transfer of habeas cases pending in the district court to the court of appeals, but the text is ambiguous as to its application to habeas cases pending *on appeal* on May 11, 2005. Although this ambiguity, along with the Act's repeal of habeas jurisdiction, could be interpreted to preclude any further proceedings in these cases, there is no reason to believe that Congress would have intended such arbitrary and unjust results. *See Sorrells v. United States*, 287 U.S. 435, 450 (1932) ("To construe statutes so as to avoid absurd or glaringly unjust results, foreign to the legislative purpose, is, as we have seen, a traditional and appropriate function of the courts."). Dismissal would serve no congressional objective and would be patently inconsistent with Congress's express intent to provide all aliens with one chance for judicial review in the Court of Appeals. *See* H.R. Conf. Rep. No. 109-72, at 174-75.

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[2] This Court would be the proper transferee court under § 106(c) because it is the "circuit in which the immigration judge completed the proceedings," 8 U.S.C. § 1252(b)(2). *See* JA 5 (proceedings completed in Hartford, Connecticut).

Rather, the Act should be interpreted to convert the instant habeas appeal into a petition for review. *See* REAL ID Act §§ 106(a)(1)(B) (providing that a petition for review in "appropriate court of appeals" is "sole and exclusive means for judicial review of an order of removal"), 106(c) (providing that pending habeas petitions in district courts shall be treated as petitions for review and transferred to appropriate court of appeals); *see also Langhorne v. Ashcroft*, 377 F.3d 175, 177 (2d Cir. 2004) (treating habeas petition as petition for direct review), *cert. denied*, 125 S. Ct. 1347 (2005); *Lopez v. Heinauer*, 332 F.3d 507, 511 (8th Cir. 2003) (ruling that district court lacked habeas jurisdiction, but deeming case transferred to court of appeals as petition for review). That course is fully consistent with Congress's intent in the REAL ID Act to provide one opportunity for direct review in the Court of Appeals for all aliens. *See Bonhometre v. Gonzales*, ___ F.3d ___, No. 04-2037, 2005 WL 1653641, at *2 (3d Cir. July 15, 2005) ("In the Real ID Act, however, Congress was silent as to what was to be done with an appeal from a district court habeas decision that is now pending before a court of appeals. Despite this silence, it is readily apparent, given Congress' clear intent to have all challenges to removal orders heard in a single forum (the courts of appeals), . . . that those habeas petitions that were pending before this Court on the effective date of the Real ID Act are properly converted to petitions for review and retained by this Court.") (citations omitted).

In order to treat this case as a petition for review, the Court should substitute the Attorney General for the current respondent (the Acting Officer in charge of the

INS office in Hartford, Connecticut). *See* 8 U.S.C. § 1252(b)(3)(A). This conversion does not affect the standard of review in this Court, as this Court reviews the denial of a habeas petition *de novo*. *See Kamagate v. Ashcroft*, 385 F.3d 144, 151 (2d Cir. 2004). The issue presented in this case, whether this Court has jurisdiction over the case, is subject to *de novo* review. *See Duamutef v. INS*, 386 F.3d 172, 178 (2d Cir. 2004).

2. Exhaustion of Administrative Remedies

It is well settled that before an alien can seek judicial review of a removal order, the alien is statutorily required to exhaust all administrative remedies available. *See* INA § 242(d)(1), 8 U.S.C. § 1252(d)(1) ("A court may review a final order of removal only if . . . the alien has exhausted all administrative remedies available to the alien as of right"). The statutory exhaustion requirement applies equally to direct petitions for review and habeas review of removal orders. *Theodoropoulos*, 358 F.3d at 168 (alien's "failure to exhaust his administrative remedies deprived the district court of subject matter jurisdiction to entertain his habeas petition").

This Court has repeatedly recognized the many important purposes of the administrative exhaustion doctrine, which include "ensur[ing] that the . . . agency responsible for construing and applying the immigration laws and implementing regulations, has had a full opportunity to consider a petitioner's claims before they are submitted for review by a federal court," *Theodoropoulos*, 358 F.3d at 171, "protecting the authority

of administrative agencies, limiting interference in agency affairs, and promoting judicial efficiency by resolving potential issues and developing the factual record," *Beharry v. Ashcroft*, 329 F.3d 51, 56 (2d Cir. 2003), as well as "preventing the 'frequent and deliberate flouting of administrative processes [that] could weaken the effectiveness of an agency,'" *Bastek v. Federal Crop Ins. Co.*, 145 F.3d 90, 93-94 (2d Cir. 1998) (quoting *McKart v. United States*, 395 U.S. 185, 193-195 (1969)).

Moreover, the Supreme Court and this Court have made clear that, when statutorily required, exhaustion of administrative remedies is jurisdictional and must be strictly enforced, without exception. *See McCarthy v. Madigan*, 503 U.S. 140, 144 (1992) ("Where Congress specificially mandates, exhaustion is required."); *Booth v. Churner*, 532 U.S. 731, 741 n.6 (2001) (holding "we will not read futility or other exceptions into statutory exhaustion requirements where Congress has provided otherwise"); *Bastek*, 145 F.3d at 94 ("Statutory exhaustion requirements are mandatory, and courts are not free to dispense with them.").

While stressing the mandatory nature of the statutory exhaustion requirement, this Court in *Theodoropoulos* acknowledged "[t]here may be some limited circumstances in which an exception to the general rule [of statutory exhaustion] might apply," based on the Supreme Court's discussion in *Booth*, *supra*, suggesting "that a party cannot be required to exhaust a procedure from which there is no possibility of receiving any type of relief." 358 F.3d at 173 (citing *Booth*, 532 U.S. at 736 & n.4). Subsequently, this Court held that it could consider non-exhausted claims "if

it is necessary to avoid manifest injustice." *Marrero Pichardo v. Ashcroft*, 374 F.3d 46, 53 (2d Cir. 2004). In other words, in the immigration context, administrative exhaustion of each and every claim raised in the course of the removal proceedings is statutorily mandated in all but the most unusual circumstances and only when "manifest injustice" would otherwise result. *See id.*

C. Discussion

1. Petitioner Failed To Exhaust His Administrative Remedies

This Court, in *Bastek*, explained the important distinction between statutory and judicial exhaustion:

> Statutory exhaustion requirements are mandatory, and courts are not free to dispense with them. Common law (or "judicial") exhaustion doctrine, in contrast, recognizes judicial discretion to employ a broad array of exceptions that allow a plaintiff to bring his case in district court despite his abandonment of the administrative review process.
>
> . . . .
>
> Faced with unambiguous statutory language requiring exhaustion of administrative remedies, "[w]e are not free to rewrite the statutory text."

Bastek, 145 F.3d at 94 (quoting *McNeil v. United States*, 508 U.S. 106, 111 (1993)). Additionally, § 1252(d)(1) expressly requires exhaustion of administrative remedies prior to seeking federal court review of a final order of removal.

Because Petitioner failed to comply with the statutory exhaustion requirement of 8 U.S.C. § 1252(d)(1), this Court should dismiss his claims for lack of jurisdiction. After being found removable by the IJ on June 22, 1998, Petitioner was granted the benefit of voluntary departure in lieu of removal and waived his right to appeal to the BIA. *See Marrero Pichardo*, 374 F.3d at 52 (waiver of right to appeal to BIA is failure to exhaust for jurisdictional purposes).

Furthermore, even though, as explained below, Petitioner could have filed a motion to reopen with the IJ to raise the same claims he now makes before this Court, Petitioner chose not to do so. Although this Court has not squarely addressed whether the filing of a motion to reopen is necessary to satisfy the exhaustion requirement of § 1252(d), if Petitioner had filed such a motion he would likely have satisfied that requirement. *See United States v. Copeland*, 376 F.3d 61, 67 (2d Cir. 2004) (explaining in the context of § 1326(d), that the exhaustion requirement is satisfied when alien files a motion to reopen deportation hearing and appeals denial of that motion to the BIA even when an alien failed to appeal the original deportation order); *cf. Zhang v. Reno*, 27 F. Supp. 2d 476, 477 (S.D.N.Y. 1998) (citing *Arango-Aradondo v. INS*, 13 F.3d 610, 614 (2d Cir. 1994) and

concluding that motion to reopen not required to satisfy exhaustion requirement because it is not a remedy that is available by right).

Petitioner argues that his case should not be barred for failure to exhaust his claim for an adjustment of status based on his marriage to a United States citizen, contending that he falls within one of three "exceptions" to the exhaustion requirement. None of these exceptions help him.

Petitioner relies primarily on the "manifest injustice" exception to statutory exhaustion. However, that narrow exception applied by this Court in *Marrero Pichardo*, 374 F.3d at 52-54, is not applicable to this case. In *Marrero Pichardo*, the petitioner was subject to a removal order based on multiple New York State DUI convictions. *Marrero Pichardo*, 374 F.3d at 49. After the removal order became administratively final, this Court held in a separate case that such DUI convictions are not crimes of violence and therefore are not aggravated felonies for purposes of removal. *See Dalton v. Ashcroft*, 257 F.3d 200, 208 (2d Cir. 2001). Although the petitioner in that case had waived his right to appeal to the BIA, this Court excused his failure to exhaust administrative remedies to avoid manifest injustice because of the unusual circumstances of an intervening change in the law. *Marrero Pichardo*, 374 F.3d at 52-54.

In this case, unlike in *Marrero Pichardo*, there has been no intervening change in the law that would affect Petitioner's status as a removable alien. Ignoring this, Petitioner argues that it is not the fact that there was an

intervening change in the law that is critical, but the fact that there was a *subsequent act*, his marriage to a United States citizen. *See* Pet. Brief at 14 ("Yet another similarity between Usmani's case and the case of *Marrero Pichardo* . . . . [T]heir legal remedies did not arise until a subsequent act occurred."). But in *Marrero Pichardo*, unlike here, the subsequent change in circumstances -- the change in law -- made it "virtually certain" that the petitioner's claim would be granted. 374 F.3d at 54. Here, Petitioner's marriage had no impact on the likelihood of success of his attempt to stay in the United States. As described more completely below, *supra* at Part C.2., Petitioner's failure to voluntarily depart made him ineligible for adjustment of status for ten years.

Petitioner's invocation of the futility exception in *Booth* is similarly unhelpful. In direct opposition to the settled precedent from the Supreme Court and this Court, Petitioner argues that there is a futility exception to the statutory exhaustion doctrine. *See* Pet. Brief at 5, 15-18. Yet the Supreme Court has stated unequivocally: "[W]e stress the point . . . that we will not read futility or other exceptions into statutory exhaustion requirements where Congress has provided otherwise." *Booth*, 532 U.S. at 741 n.6. Additionally, in *Marrero Pichardo*, this Court reaffirmed that there is no common law futility exception to the statutory exhaustion requirement of § 1252(d)(1). *See Marrero Pichardo*, 374 F.3d at 52 ("This Circuit recently held that section 1252(d)(1) is a statutory exhaustion requirement and, accordingly, common law 'exceptions -- including futility -- [are] simply not available.'") (quoting *Theodoropoulos*, 358 F.3d at 172).

Finally, Petitioner argues that exhaustion should be excused because there was no possibility of receiving relief from the agency, but this argument, too, is meritless. As a preliminary matter, although Petitioner discusses cases that have suggested the possibility of this type of "limited futility" exception to the exhaustion requirement, *see, e.g.*, *United States v. Sosa*, 387 F.3d 131, 136 (2d Cir. 2004) (describing *Theodoropoulos* as holding that exhaustion excused where administrative procedure lacks power to provide relief), he identifies no cases from this Court that have relied on this exception to excuse an alien's failure to exhaust.

In any event, even if a "limited futility" exception exists for cases where the administrative procedure lacks power to grant relief, Petitioner's case would not fall within this exception. Petitioner could have presented his claims to the Immigration Court -- and thus served the purposes of the exhaustion doctrine -- but chose not to do so. Specifically, because Petitioner was granted voluntary departure in lieu of removal, he was not subject to a final administrative order of removal until October 23, 1998. *See* 8 U.S.C. § 1229c(a)(1); *see also* JA 5 (granting Petitioner's request for voluntary departure and providing that if he fails to depart by October 22, 1998, an order directing his removal to Pakistan shall become "immediately effective"). Petitioner had 90 days from that date -- the date his order of removal became effective -- to file a motion to reopen with the IJ. *See* 8 C.F.R. § 1003.23(b)(1). Thus, Petitioner could have filed a timely motion to reopen with the IJ along with the alien relative petition, the application to adjust status, and any other required supporting documents on October 22, 1998 (or

within 90 days from that date). *See* 8 C.F.R. § 1003.23(b)(3). Notably, because the relief Petitioner seeks was not available to him at the time he was granted voluntary departure and arose because of events subsequent to that order, Petitioner was permitted to file such a motion to reopen so as to raise his claims. *See* 8 C.F.R. § 1003.23(b)(3) (explaining "[a] motion to reopen for the purpose of providing the alien an opportunity to apply for any form of discretionary relief will not be granted . . . unless the relief is sought on the basis of circumstances that have arisen subsequent to the hearing."). In sum, Petitioner could have asked the Immigration Court for the relief he now seeks in 1998 but instead he waited more than four years -- after he was arrested and detained by the INS -- to apply for such relief in the federal courts.

Moreover, even if, as Petitioner believes, he could not file a motion to reopen until the INS approved Power's alien relative petition on October 30, 2002, this Court has held that even an untimely motion to reopen could satisfy the exhaustion requirement. In *Copeland*, this Court interpreted 8 C.F.R. § 1003.23(b)(1) as granting "the IJ [the] power to reopen [the petitioner's] case despite the untimeliness of his motion [to reopen]." 376 F.3d at 67 n.4. *See* 8 C.F.R. § 1003.23(b)(1) (IJ "may upon his or her own motion at any time, or upon motion of the Service or the alien, reopen or reconsider any case"). Based on this interpretation, the *Copeland* Court found a petitioner's untimely motion to reopen, and subsequent appeal from the denial of that motion, satisfied the exhaustion requirement of § 1326(d). Thus, just as the petitioner in *Copeland*, Petitioner could have filed a motion to reopen

in 2002, and thereby presented his request for adjustment of status to the agency in the first instance.

In sum, because Petitioner could have presented his claims to the agency through a motion to reopen, he cannot argue that the administrative procedure lacked the power to grant him the relief he requested and he cannot satisfy any "limited futility" exception to the exhaustion doctrine.

2. Petitioner Is Not Entitled To Adjustment of Status Because He Failed To Voluntarily Depart

Even if Petitioner had exhausted his claims, however, he would not be entitled to relief because he is subject to a ten-year statutory bar on adjustment of status for his failure to comply with the terms of his voluntary departure order in October 1998.

The immigration laws provide that an alien who is the beneficiary of an approved alien relative petition is eligible to adjust his status to that of a spouse of a United States citizen. *See* 8 U.S.C. § 1255(e) (allowing adjustment of status based on bona fide marriages entered into while admissibility or deportation proceedings). This benefit is not available, however, to aliens who are granted the privilege of voluntary departure but fail to so depart within the time specified. Specifically, 8 U.S.C. § 1229c(d) states in relevant part that an alien who fails to voluntarily depart within the time specified "shall . . . be ineligible for a period of 10 years for any further relief under this section and sections 1229b, 1255, 1258, and 1259 of this title."

Thus, even if this Court had jurisdiction to review Petitioner's claims, he is statutorily barred from the relief he seeks, *i.e.*, adjustment of status based on his marriage to Powers, because he failed to voluntarily depart by October 22, 1998. It is undisputed that Petitioner agreed to voluntarily depart the United States by October 22, 1998. Indeed, as Petitioner himself concedes, he was afforded the substantial benefit of voluntary departure pursuant to 8 U.S.C. § 1229c in lieu of removal to Pakistan. *See* Pet. Brief at 7. Had he voluntarily departed, he would have been eligible for readmission under normal immigration procedures.

As Petitioner further concedes, he was advised as part of his removal proceedings that if he failed to voluntarily depart by October 22, 1998, he would be subject to a civil penalty and would be ineligible for various forms of relief under the INA for ten years. JA 6. However, he chose to violate the voluntary departure order knowing that there would be severe consequences for such conduct. Thus, because he failed to voluntarily depart pursuant to 8 U.S.C. § 1229c, he is ineligible to adjust his status under 8 U.S.C. § 1255 for ten years, or until October 22, 2008.

In an attempt to circumvent the ten-year bar on adjustment of status under § 1229c(d), Petitioner vaguely alleges that the IJ's voluntary departure order was somehow technically improper. *See* Pet. Brief at 7 ("[T]he petitioners contend that the immigration judge's order failed to comply with 8 U.S.C. § 1229c(d)."). Petitioner's claim is somewhat unclear, but he seems to argue that the IJ (as opposed to the Immigration Court) failed to inform

Petitioner of the penalties for violating the voluntary departure order. However, that argument is without merit.

First, Petitioner has never presented this argument to the IJ or the BIA and thus has failed to exhaust his administrative remedies on this claim. In addition, Petitioner cites no authority for his argument. Section 1229c(d) states in relevant part that "[t]he order permitting the alien to depart voluntarily shall inform the alien of the penalties under this subsection." To that end, the IJ completed an EOIR-6 "Order of the Immigration Judge" form, JA 5, and included the statutorily required written notice of penalties to Petitioner on a standard V-6 Form, JA 6. The V-6 form, which Petitioner concedes receiving, *see* Memorandum in Support of Habeas Petition at 5, requires the signature of either the IJ or the clerk. In Petitioner's case, the clerk signed the notice and certified that the notice had been sent to Petitioner.

Petitioner contends that the written notice of penalties was not part of the IJ's signed order, but he cites no authority for this proposition or for the proposition that, if the notice was not part of the order, this minor technicality on the signature line of the written notice of penalties -- a notice he concedes he received -- precludes enforcement of those statutory penalties. By statute, he is ineligible for adjustment of status because he failed to comply with the conditions of his voluntary departure order, and Petitioner has cited no authority to the contrary.

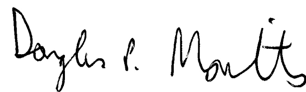
Conclusion

For the foregoing reasons, this Court should treat this case as a petition for review, and deny Petitioner's petition for review of the IJ's final order of removal.

Dated: July 25, 2005

Respectfully submitted,

KEVIN J. O'CONNOR
UNITED STATES ATTORNEY



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Addendum

8 U.S.C.A. § 1229c. Voluntary departure

(a) Certain conditions

(1) In general

The Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense under this subsection, in lieu of being subject to proceedings under section 1229a of this title or prior to the completion of such proceedings, if the alien is not deportable under section 1227(a)(2)(A)(iii) or section 1227(a)(4)(B) of this title.

(d) Civil penalty for failure to depart. If an alien is permitted to depart voluntarily under this section and fails voluntarily to depart the United States within the time period specified, the alien shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and be ineligible for a period of 10 years for any further relief under this section and sections 1229b, 1255, 1258, and 1259 of this title. The order permitting the alien to depart voluntarily shall inform the alien of the penalties under this subsection.

8 U.S.C.A. § 1252. Judicial review of order of removal

(d) Review of final orders

A court may review a final order of removal only if--

(1) the alien has exhausted all administrative remedies available to the alien as of right, and

(2) another court has not decided the validity of the order, unless the reviewing court finds that the petition presents grounds that could not have been presented in

the prior judicial proceeding or that the remedy provided by the prior proceeding was inadequate or ineffective to test the validity of the order.

REAL ID Act of 2005, PL 109-13 (HR 1268)
May 11, 2005

SEC. 106. JUDICIAL REVIEW OF ORDERS OF REMOVAL.

(a) IN GENERAL.--Section 242 of the Immigration and Nationality Act (8 U.S.C. 1252) is amended--

(1) in subsection (a)--

(B) by adding at the end the following:

"(5) EXCLUSIVE MEANS OF REVIEW.--Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this Act, except as provided in subsection (e). For purposes of this Act, in every provision that limits or eliminates judicial review or jurisdiction to review, the terms 'judicial review' and 'jurisdiction to review' include habeas corpus review pursuant to section 2241 of title 28, United States Code, or any other habeas corpus provision, sections 1361 and 1651 of such title, and

review pursuant to any other provision of law (statutory or nonstatutory).”;

(2) in subsection (b)(9), by adding at the end the following: “Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 of title 28, United States Code, or any other habeas corpus provision, by section 1361 or 1651 of such title, or by any other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact.”;

(b) EFFECTIVE DATE.--The amendments made by subsection (a) shall take effect upon the date of the enactment of this division and shall apply to cases in which the final administrative order of removal, deportation, or exclusion was issued before, on, or after the date of the enactment of this division.

(c) TRANSFER OF CASES.--If an alien’s case, brought under section 2241 of title 28, United States Code, and challenging a final administrative order of removal, deportation, or exclusion, is pending in a district court on the date of the enactment of this division, then the district court shall transfer the case (or the part of the case that challenges the order of removal, deportation, or exclusion) to the court of appeals for the circuit in which a petition for review could have been properly filed under section 242(b)(2) of the Immigration and Nationality Act (8 U.S.C. 1252), as amended by this section, or under section 309(c)(4)(D) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1101 note). The court of appeals shall treat the transferred case as if it had been filed pursuant to a petition for review

under such section 242, except that subsection (b)(1) of such section shall not apply.

8 C.F.R. § 1003.23 Reopening or reconsideration before the Immigration Court.

(b) Before the Immigration Court--
(1) In general. An Immigration Judge may upon his or her own motion at any time, or upon motion of the Service or the alien, reopen or reconsider any case in which he or she has made a decision, unless jurisdiction is vested with the Board of Immigration Appeals. Subject to the exceptions in this paragraph and paragraph (b)(4), a party may file only one motion to reconsider and one motion to reopen proceedings. A motion to reconsider must be filed within 30 days of the date of entry of a final administrative order of removal, deportation, or exclusion, or on or before July 31, 1996, whichever is later. A motion to reopen must be filed within 90 days of the date of entry of a final administrative order of removal, deportation, or exclusion, or on or before September 30, 1996, whichever is later. A motion to reopen or to reconsider shall not be made by or on behalf of a person who is the subject of removal, deportation, or exclusion proceedings subsequent to his or her departure from the United States. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider shall constitute a withdrawal of such motion. The time and numerical limitations set forth in this paragraph do not apply to motions by the Service in removal proceedings pursuant to section 240 of the Act. Nor shall such limitations apply to motions by the Service in exclusion or deportation proceedings, when the basis of the motion is fraud in the

original proceeding or a crime that would support termination of asylum in accordance with § 1208.22(e) of this chapter.

(3) Motion to reopen. A motion to reopen proceedings shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits and other evidentiary material. Any motion to reopen for the purpose of acting on an application for relief must be accompanied by the appropriate application for relief and all supporting documents. A motion to reopen will not be granted unless the Immigration Judge is satisfied that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing. A motion to reopen for the purpose of providing the alien an opportunity to apply for any form of discretionary relief will not be granted if it appears that the alien's right to apply for such relief was fully explained to him or her by the Immigration Judge and an opportunity to apply therefore was afforded at the hearing, unless the relief is sought on the basis of circumstances that have arisen subsequent to the hearing. Pursuant to section 240A(d)(1) of the Act, a motion to reopen proceedings for consideration or further consideration of an application for relief under section 240A(a) (cancellation of removal for certain permanent residents) or 240A(b) (cancellation of removal and adjustment of status for certain nonpermanent residents) may be granted only if the alien demonstrates that he or she was statutorily eligible for such relief prior to the service of a notice to appear, or prior to the commission of an offense referred to in section 212(a)(2) of the Act that renders the alien inadmissible or removable under sections 237(a)(2) of the Act or (a)(4), whichever is earliest. The Immigration Judge has discretion to deny a motion to

reopen even if the moving party has established a prima facie case for relief.