No. 05-148

In the Supreme Court of the United States

JESUS MORTERA-CRUZ, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether an alien who is inadmissible by virtue of having illegally reentered the United States and maintaining unlawful presence for more than one year, 8 U.S.C. 1182(a)(9)(C)(i)(I), is eligible to apply for adjustment of status pursuant to 8 U.S.C. 1255(i).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-18) is reported at 409 F.3d 246. The decision of the Board of Immigration Appeals (Pet. App. 19-22) and the decision of the immigration judge (Pet. App. 23-27) are unreported.

JURISDICTION

The court of appeals entered its judgment on May 9, 2005. A petition for rehearing was denied on June 7, 2005 (Pet. App. 28). The petition for a writ of certiorari was filed on July 26, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. An alien "who was inspected and admitted or paroled into the United States" may apply for adjustment

of status to that of lawful permanent residence if, *inter alia*, the alien is "admissible" to the United States. 8 U.S.C. 1255(a). Before 1994, an alien who entered the United States without inspection was not eligible to apply for adjustment of status. In 1994, Congress enacted a provision permitting aliens who entered without inspection to apply for adjustment of status in certain circumstances. 8 U.S.C. 1255(i)(1)(A)(i); see Act of Aug. 26, 1994, Pub. L. No. 103-317, § 506(b), 108 Stat. 1765. To be eligible for adjustment of status under that provision, an alien who entered without inspection must, *inter alia*: (i) be the beneficiary of an immediate relative visa petition filed on or before April 30, 2001, or of an application for labor certification that was filed on or before that date, 8 U.S.C. 1255(i)(1)(B); and (ii) be "admissible" to the United States for permanent residence, 8 U.S.C. 1255(i)(2)(B).

A separate provision of the Immigration and Nationality Act (INA) sets forth certain categories of aliens who, "[e]xcept as otherwise provided in" the INA, are "ineligible to be admitted to the United States." 8 U.S.C. 1182(a). The categories of aliens deemed ineligible for admission under that provision include: (i) aliens who are present "in the United States without being admitted or paroled," 8 U.S.C. 1182(a)(6)(A)(i); and (ii) aliens who "enter[] or attempt[] to reenter the United States without being admitted" and have either been "unlawfully present in the United States for an aggregate period of more than 1 year" or have previously been "ordered removed," 8 U.S.C. 1182(a)(9)(C)(i). Section 1182(a)(6)(A)(i) deems an alien who is present in the country without having been admitted to be inadmissible, but the provision does not otherwise bar the alien from applying for admission (*i.e.*, from abroad). Section

1182(a)(9)(C)(i), in contrast, gives rise to a lifetime bar against admission for aliens who *re*enter the country without inspection and who have accrued more than one year of unlawful presence or have previously been ordered removed. That bar is subject to a discretionary waiver by the Attorney General permitting an alien to reapply for admission from abroad after at least ten years have elapsed since the alien's latest departure from the United States. See 8 U.S.C. 1182(a)(9)(C)(ii).

2. Petitioner is a native and citizen of Mexico who entered the United States without inspection for the first time in 1996. On March 28, 2001, petitioner married a lawful permanent resident, and on April 28, 2001, petitioner's wife filed an immediate relative immigrant visa petition on his behalf. Petitioner's wife subsequently became a naturalized citizen. Pet. App. 2.

At some point after having accumulated more than a year of unlawful presence in the United States, petitioner left the country. Petitioner returned to the United States on June 10, 2001, and he again unlawfully entered without inspection. On April 16, 2002, petitioner pleaded guilty to having illegally entered the United States without inspection in June 2001, in violation of 8 U.S.C. 1325(a). On May 10, 2002, petitioner was charged with being subject to removal as an alien unlawfully present in the United States without having been admitted or paroled. Pet. App. 2.

3. a. On September 25, 2002, petitioner appeared before an immigration judge (IJ). Petitioner conceded that he was removable because he had entered the country illegally in 1996, but he requested permission to adjust his status to that of lawful permanent resident under 8 U.S.C. 1255(i)(1)(A)(i) based on the relative visa petition filed on his behalf by his wife. The government

argued that petitioner was not eligible for adjustment of status by virtue of 8 U.S.C. 1182(a)(9)(C)(i)(I). The government pointed out that an alien must be "admissible" to be eligible for adjustment of status under 8 U.S.C. 1255(i), and contended that petitioner was "inadmissible" pursuant to 8 U.S.C. 1182(a)(9)(C)(i)(I) because he had been unlawfully present in the United States for more than one year and had then reentered the country without being admitted.[1] Petitioner argued in response that, although he had illegally entered the United States in 1996, he had not left the country since that time, and that he therefore had not unlawfully reentered the country in June 2001. While the proceedings were pending before the IJ, the Department of Homeland Security (DHS) approved the visa petition filed on petitioner's behalf by his wife. Pet. App. 3-4.

The IJ ruled that petitioner's guilty plea collaterally estopped him from disputing that he had unlawfully reentered the United States in June 2001. The IJ held that petitioner was inadmissible pursuant to Section 1182(a)(9)(C)(i)(I) because he had illegally reentered the country and had been unlawfully present for more than one year, and that petitioner therefore was ineligible to apply for adjustment of status. Pet. App. 25-26.

b. The Board of Immigration Appeals (BIA) dismissed petitioner's appeal. Pet. App. 19-22. The BIA initially found no clear error in the IJ's finding that petitioner had illegally reentered the United States in June 2001. *Id.* at 21. The BIA then addressed petitioner's

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[1] Section 1182(a)(9)(C)(i) states that "[a]ny alien who—(I) has been unlawfully present in the United States for an aggregate period of more than 1 year * * * and who enters or attempts to reenter the United States without being admitted is inadmissible." 8 U.S.C. 1182(a)(9)(C)(i).

argument that he retains eligibility to apply for adjustment of status pursuant to Section 1255(i) notwithstanding that he is inadmissible under Section 1182(a)(9)(C)(i)(I).

In rejecting that argument, the BIA drew a distinction between an alien who enters the United States without inspection and seeks adjustment of status before leaving the country, and an alien who illegally *re*enters the country without inspection and seeks adjustment of status. According to the BIA, "[a]djustment of status under [Section 1255(i)] was meant to provide a one-time waiver for aliens who entered without inspection, not for aliens with multiple illegal entries as described under section [1182(a)(9)(C)(i)(I)]." Pet. App. 21. The BIA explained that, "[w]hile entry without inspection is an element of inadmissibility under section [1182(a)(9)(C)(i)(I)]," that provision "also requires a reentry and an unlawful presence in the United States for more than 1 year." *Ibid.* The BIA held that an alien covered by that provision is inadmissible and ineligible for adjustment of status. *Id.* at 21-22.

4. The court of appeals affirmed. Pet. App. 1-18. The court held that the BIA's decision was entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), because the decision addressed a statutory ambiguity concerning the relationship between Section 1255(i) and Section 1182(a)(9)(C)(i)(I). Pet. App. 13. The court ruled that the BIA permissibly concluded that an alien who is inadmissible under Section 1182(a)(9)(C)(i)(I) is ineligible to apply for adjustment of status under Section 1255(i). In particular, the court concluded that the BIA had not acted arbitrarily in distinguishing between aliens deemed inadmissible based on their having en-

tered the country without inspection, 8 U.S.C. 1182(a)(6)(A)(i), and aliens deemed inadmissible based on their having *re*entered the country without inspection and having accrued a period of unlawful presence exceeding one year, 8 U.S.C. 1182(a)(9)(C)(i)(I). Pet. App. 18.

The court observed that, when Congress initially enacted Section 1255(i) in 1994 and thereby permitted certain aliens who entered the country without inspection to apply for adjustment of status, the INA did not then provide that an alien who entered the country without inspection was inadmissible. The court explained that, when Congress later amended Section 1182(a)(6)(A)(i) in 1996 to provide that an alien who enters without inspection is deemed inadmissible, Congress did not intend to nullify Section 1255(i) by rendering aliens who entered without inspection ineligible to apply for adjustment of status. The court found it telling that Congress did not repeal Section 1255(i) when it amended Section 1182(a)(6)(A)(i), nor did it otherwise indicate an intention to render Section 1255(i) ineffectual. Accordingly, the court explained, the government had adopted the position that an alien deemed inadmissible under Section 1182(a)(6)(A)(i) retains eligibility to seek adjustment of status under Section 1255(i). Pet. App. 13-15.[2]

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[2] As the court explained, the government's position was grounded in the understanding that the various grounds of inadmissibility set forth in Section 1182(a) are subject to an overarching exception for circumstances in which Congress "otherwise provided" elsewhere in the INA, and that Congress had "otherwise provided" in Section 1255(i) that an alien who has entered without inspection may seek adjustment of status. See Pet. App. 11-12.

The court rejected petitioner's contention that the BIA was required to treat an alien inadmissible under Section 1182(a)(9)(C)(i)(I) in the same manner as an alien inadmissible under Section 1182(a)(6)(A)(i), such that both categories of aliens would retain eligibility to seek adjustment of status under Section 1255(i). The court agreed with the reasoning of the Tenth Circuit in *Berrum-Garcia* v. *Comfort*, 390 F.3d 1158 (2004), which had distinguished between "one-time" illegal entrants subject to inadmissibility under Section 1182(a)(6)(A)(i) and aliens "with multiple illegal entries under section 1182(a)(9)(C)(i)." Pet. App. 16-17. The court of appeals explained that the conduct encompassed by Section 1182(a)(9)(C)(i) is "different from and more culpable than the conduct of a one-time illegal alien" who is inadmissible under Section 1182(a)(6)(A)(i). Pet. App. 18. The court further observed that, unlike Section 1182(a)(6)(A)(i), "application of section 1182(a)(9)(C)(i) to preclude eligibility for adjustment of status * * * does *not* render section 1255(i)(1)(A)(i) a nullity." *Ibid.* The court therefore held "that the decision of the BIA is entitled to *Chevron* deference because the [BIA] was not acting arbitrarily" by ruling that petitioner's inadmissibility under Section 1182(a)(9)(C)(i)(I) rendered him ineligible to seek adjustment of status under Section 1255(i). *Ibid.*

ARGUMENT

Petitioner seeks this Court's review of the question whether an alien who is inadmissible under Section 1182(a)(9)(C)(i)(I), based on his having illegally reentered the country and having maintained a period of unlawful presence of more than one year, retains eligibility to apply for adjustment of status under Section

1255(i). That contention does not warrant this Court's review.

1. The court of appeals in this case correctly upheld the BIA's determination that an alien who is inadmissible under Section 1182(a)(9)(C)(i) is ineligible to apply for adjustment of status under Section 1255(i). As the court explained, when Congress enacted Section 1255(i) in 1994 and permitted aliens who enter without inspection to seek adjustment of status in certain situations, the INA did not deem inadmissible an alien who had entered the country without inspection. There is no basis for concluding that, when Congress later amended Section 1182(a)(6)(A) to provide that an alien who enters without inspection is inadmissible, Congress thereby sought to nullify Section 1255(i), the sole purpose of which was to permit aliens who entered without inspection to seek adjustment of status.

Inadmissibility under Section 1182(a)(6)(A) differs from inadmissibility under Section 1182(a)(9)(C)(i)(I) in that, treating an alien who is inadmissible under the latter provision as ineligible to apply for adjustment of status would not have the effect of wholly nullifying Section 1255(i). It instead would render ineligible for adjustment of status a particular category of aliens who are present in the United States without having been admitted, *i.e.*, those aliens that have unlawfully *re*entered the country and have accrued more than one year of unlawful presence. In light of that distinction between Section 1182(a)(9)(C)(i)(I) and Section 1182(a)(6)(A), and because Congress imposed significantly greater penalties on aliens who are inadmissible under the former provision, see pp. 2-3, *supra*, the BIA reasonably concluded that an alien who is inadmissible under that provision is ineligible to apply for adjustment

of status even though an alien inadmissible under Section 1182(a)(6)(A) retains eligibility to seek adjustment of status. See Pet. App. 13-18.

2. Petitioner contends (Pet. 9-11) that the court of appeals' opinion in this case conflicts with the Ninth Circuit's opinion in *Perez-Gonzalez* v. *Ashcroft*, 379 F.3d 783 (2004). There is no square conflict between the two decisions.

In *Perez-Gonzalez*, the alien unlawfully reentered the country without inspection and the government reinstated his previous removal order pursuant to 8 U.S.C. 1231(a)(5). Under that provision, an alien whose previous removal order is reinstated is deemed ineligible for "any relief." 8 U.S.C. 1231(a)(5). The Ninth Circuit nonetheless ruled that the alien could apply for adjustment of status under Section 1255(i) because he had filed a request to reapply for admission before the government reinstated his removal order. 379 F.3d at 789. The court rejected the government's contention that the alien was ineligible to apply for adjustment of status because he was inadmissible under Section 1182(a)(9)(C)(i) as an illegal reentrant who had accrued more than one year of unlawful presence. The court reasoned that the government's position was contained in an internal guidance memorandum, and that "[a]gency interpretations contained in [such] informal formats * * * are only entitled to 'some deference' as opposed to the rigorous deference owed formal agency interpretations under *Chevron*." *Id.* at 793. The court believed that the government's position was inconsistent with a DHS regulation. *Id.* at 793-794 (discussing 8 C.F.R. 212.2). The court ruled that, "[i]n the absence of a more complete agency elaboration," an alien who is inadmissible under

Section 1182(a)(9)(C)(i) can seek adjustment of status pursuant to Section 1255(i). *Ibid.*

In *Perez-Gonzalez*, there was no formal adjudication before an IJ or decision of the BIA because the alien's previous removal order had been reinstated without a hearing pursuant to 8 U.S.C. 1231(a)(5). In this case, by contrast, an IJ conducted removal proceedings and ordered petitioner removed, and the BIA sustained the IJ's decision and explained why petitioner's inadmissibility under Section 1182(a)(9)(C)(i) renders him ineligible to apply for adjustment of status under Section 1255(i). See Pet. App. 21-22. The court of appeals thus accorded *Chevron* deference to the BIA's conclusion that an alien who is inadmissible under Section 1182(a)(9)(C)(i) is ineligible to seek adjustment of status. See *id.* at 6-7, 12, 18. See generally *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999) (holding that BIA decisions are entitled "to *Chevron* deference as [the BIA] gives ambiguous statutory terms concrete meaning through a process of case-by-case adjudication") (internal quotation marks omitted). Because the court of appeals in this case applied *Chevron* deference to the BIA's interpretation of the relationship between Sections 1182(a)(9)(C)(i)(I) and 1255(i), whereas the Ninth Circuit in *Perez-Gonzalez* declined to accord *Chevron* deference to the government's position on that issue in the absence of a formal agency interpretation, the two decisions are not in square conflict.

There also is no square conflict between the decision below and the Tenth Circuit's recent decision in *Padilla-Caldera* v. *Gonzales*, No. 04-9573, 2005 WL 2651385 (Oct. 18, 2005), which was issued after the filing of the petition in this case. In *Padilla-Caldera*, the Tenth Circuit held that an alien who is inadmissible under Section

1182(a)(9)(C)(i)(I) nonetheless retains eligibility to apply for adjustment of status under Section 1255(i). The Tenth Circuit, like the Ninth Circuit in *Perez-Gonzalez*, declined to accord *Chevron* deference to the government's contrary position, reasoning that the government's position was reflected in an internal memorandum and thus was "not owe[d] rigorous deference." *Id.* at *5. In addition, the court did not address —and thus did not reject—the reasoning adopted by the BIA in this case and upheld by the court of appeals below, *viz.*, that Section 1255(i) contemplates a "one-time waiver" for aliens who enter without inspection but does not extend to an alien who is inadmissible under Section 1182(a)(9)(C)(i) after having unlawfully *re*entered the country without inspection. Pet. App. 21; see *id.* at 16-18. Indeed, the Tenth Circuit had adhered to that distinction in a previous decision holding that an alien who is inadmissible under 8 U.S.C. 1182(a)(9)(C)(i)(II) is ineligible to apply for adjustment of status under Section 1255(i). See *Berrum-Garcia* v. *Comfort*, 390 F.3d 1158, 1167 (2004) (distinguishing between "aliens who are guilty only of illegal entry (the 'first-time' offense)" and aliens "who have reentered in spite of a prior removal order").[3]

[3] The Tenth Circuit in *Padilla-Caldera* sought to distinguish that court's previous decision in *Berrum-Garcia* on the basis that the former case concerned inadmissibility under Section 1182(a)(9)(C)(i)(I) while the latter case concerned inadmissibility under Section 1182(a)(9)(C)(i)(II). See 2005 WL 2651385, at *5. There is no material distinction between those provisions. The former provision applies to aliens who reenter without inspection and have accrued over one year of unlawful presence, and the latter provision applies to aliens who reenter without inspection after having been ordered removed. Inadmissibility on either ground should have the same consequences with respect to eligibility for adjustment of status under Section 1255(i).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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See Pet. App. 17 n.9 (observing that, although this case involves Section 1182(a)(9)(C)(i)(I) and *Berrum-Garcia* involved Section 1182(a)(9)(C)(i)(II), "this is a distinction without a difference").