No.

In the Supreme Court of the United States

VLADIMIR IOURI AND VERA YURIY,

Petitioners,

v.

ALBERTO GONZALES,
ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Orders of removal often include periods of voluntary departure that permit aliens to leave the country on their own terms. Voluntary departure saves the government the cost of expelling an alien from the country, while allowing the alien to leave for a destination of his or her choosing and to avoid various penalties associated with forced deportation. After exhausting administrative remedies, an alien who has been adjudicated removable may petition for judicial review in the federal courts of appeals. Filing a petition for review does not automatically stay either deportation or voluntary departure, however. An alien must move the court for such relief.

Against this background, the question presented is:

Whether the Second Circuit erred by holding, in express disagreement with the rule applied by the Sixth, Eighth, and Ninth Circuits, that a motion to stay deportation does not necessarily also include a request to stay the running of the voluntary departure period.

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OPINIONS BELOW

The modified opinion of the court of appeals (App., *infra*, 1a-22a) is reported at 487 F.3d 76. The court's original opinion (App., *infra*, 23a-41a), prior to modification on petition for rehearing, is reported at 464 F.3d 172.

JURISDICTION

The Court of Appeals issued its initial opinion on September 11, 2006. Petitioner sought rehearing on October 10, 2006. The Court of Appeals denied rehearing and issued a modified opinion on May 24, 2007. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY & REGULATORY PROVISIONS INVOLVED

Section 240B of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1229c(b)(1), provides in relevant part: "[t]he Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense if, at the conclusion of a proceeding under section 240, the immigration judge enters an order granting voluntary departure * * *."

Section 304 of the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1252(b)(3)(B), provides in relevant part: "[s]ervice of the petition on the officer or employee does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise."

8 C.F.R. § 1240.26(d) provides in relevant part: "[u]pon granting a request made for voluntary departure * * * the immigration judge shall also enter an alternate order of removal."

8 C.F.R. § 1241.1(f) provides in relevant part: "[An order of deportation] shall become final * * * upon overstay of the voluntary departure period * * *."

STATEMENT

This case presents a question of immigration law that has deeply divided the courts of appeals. Expressly rejecting the rule applied by the Sixth, Eighth, and Ninth Circuits, the Second Circuit instead joined the First and Seventh Circuits in holding that a motion filed under Section 304 of the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 (IIRIRA), 8 U.S.C. § 1252(b)(3)(B), to "stay the removal of an alien" does not also include a motion to stay the time accorded the alien to depart the country voluntarily. That holding has significant practical consequences for affected aliens: the determination that aliens failed to seek a stay of their voluntary departure period subjects them to a range of harsh penalties, including ineligibility for adjustment of status.

This conflict of authority is producing bizarre inconsistencies in the administration of the national immigration system. As a result of the divergent approaches taken by the courts of appeals, an alien in the Sixth, Eighth, and Ninth Circuits may obtain adjustment of status and remain lawfully in the United States while an identically situated alien in the First, Second, and Seventh Circuits will be expelled from the country. If petitioners here—an elderly, law-abiding married couple—lived in Cleveland, St. Louis, or Los Angeles, they would be lawful permanent residents of the United States; because they reside instead in New York, they are subject to deportation.

This sort of divergent application of federal immigration law is intolerable. Because the Second Circuit's rule also encourages wasteful litigation, is inconsistent with federal immigration policy, leads to profoundly inequitable results, and cannot be squared with the approach taken by this Court to the interpretation of questions of immigration law, further review is warranted.

1. Statutory Background. When an immigration judge (IJ) orders the removal of an alien, the order often includes a

period of voluntary departure. See Immigration and Nationality Act (INA) § 240B, 8 U.S.C. § 1229c; see also 8 C.F.R. § 1240.26.[1] This alternative to forced removal is an important and frequently invoked element of federal immigration policy: the Department of Justice made voluntary departure available to more than 22,000 aliens in 2006. See U.S. Department of Justice, Executive Office for Immigration Review, *FY 2006 Statistical Year Book*, tbl. 14 (Feb. 2007), *available online at* http://www.usdoj.gov/eoir/statspub/fy06syb.pdf. In addition to saving the government the cost of removal proceedings and transportation expenses, voluntary departure allows the alien to avoid various penalties associated with forced removal. See 8 U.S.C. § 1182(a)(9)(A)(ii). Aliens may appeal an IJ's removal order or offer of voluntary departure to the Board of Immigration Appeals (BIA). See 8 C.F.R. § 1003.1. If the BIA rules against the alien on appeal, he or she may petition for judicial review in a federal court of appeals. 8 U.S.C. § 1252.

Stiff penalties apply if an alien is granted voluntary departure but remains in the country past the running of the departure period. First, the order of voluntary departure automatically converts into an order of removal. 8 C.F.R. § 1241.1(f). In addition to incurring all the penalties associated with removal, aliens who overstay the voluntary departure period must pay a fine of at least $1,000 and as much as $5,000. 8 U.S.C. § 1229c(d). The alien also becomes ineligible for an administrative adjustment of their immigration status for a term of ten years. *Ibid*.

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[1] Prior to the enactment of IIRIRA, the process of expelling an alien from the country was termed "deportation"; IIRIRA recharacterizes the process as "removal." Although actions seeking expulsion of aliens that were initiated prior to enactment of IIRIRA are still termed "deportation proceedings," these differences in terminology have no substantive implications for the question presented here.

Against this general background, two statutory provisions are particularly relevant to this case. First, prior to 1996, filing a petition for review before a court of appeals automatically stayed both deportation and the running of the period for voluntary departure. See 8 U.S.C. § 1105a(a)(3)(b) (1994) (superseded by Pub. L. No. 104-208, 110 Stat. 3009-546 (1996)) (automatic stay of deportation upon petition for review); *Contreras-Aragon* v. *INS*, 852 F.2d 1088, 1091 (9th Cir. 1988) (en banc) (holding that the INA required automatic stay of voluntary departure); *Foti* v. *INS*, 308 F.2d 779, 784 (2d Cir. 1962) (acknowledging automatic stay of voluntary departure along with automatic stay of deportation). In 1996, however, Congress enacted IIRIRA, a comprehensive revision of the immigration laws. Among many other things, the law provides that filing a petition for review no longer *automatically* stays removal—instead, an alien must seek a stay. IIRIRA Section 304, 8 U.S.C. § 1252(b)(3)(B).

Although the law is silent as to judicial stays of voluntary departure, the courts of appeals have almost unanimously concluded that they have the power to stay voluntary departure pending review of an order of removal. See *Bocova* v. *Gonzales*, 412 F.3d 257, 266 (1st Cir. 2005); *Thapa* v. *Gonzales*, 460 F.3d 323, 325 (2d Cir. 2006); *Obale* v. *Attorney General*, 453 F.3d 151,157 (3rd Cir. 2006); *Vidal* v. *Gonzales*, 491 F.3d 250, 252 (5th Cir. 2007); *Nwakanma* v. *Ashcroft*, 352 F.3d 325, 327 (6th Cir. 2003); *Lopez-Chavez* v. *Ashcroft*, 383 F.3d 650, 654 (7th Cir. 2004); *Rife* v. *Ashcroft*, 374 F.3d 606, 615-16 (8th Cir. 2004); *El Himri* v. *Ashcroft*, 344 F.3d 1261, 1262 (9th Cir. 2003). Only the Fourth Circuit holds that it lacks the power to stay voluntary departure. See *Ngarurih* v. *Ashcroft*, 371 F.3d 182, 194 (4th Cir. 2004).

Second, while this case was pending, Congress again revised the immigration laws. Of particular relevance here, the REAL ID Act of 2005, Pub. L. 109-13, § 106(d), 119 Stat. 231, 311 (2005), eliminated a jurisdiction-stripping provision of the IIRIRA. Prior to the REAL ID Act, compelled removal

of the alien from the country—but not voluntary departure—stripped the court of jurisdiction to continue hearing an alien's appeal. This rule was repealed by the REAL ID Act, so that an alien's forced departure no longer strips the appellate court of jurisdiction to decide the alien's petition for review. As a result, there is no material distinction in the function served by staying removal and staying voluntary departure; stays of both sorts allow the alien to remain in the country and to preserve the status quo during the pendency of judicial review.

2. Immigration Proceedings. Petitioners Vladimir Iouri and Vera Yuriy are a married couple in their late sixties. They are natives of the former Soviet Union and citizens of the now independent Ukraine. App., *infra*, 4a. Petitioner Iouri entered the United States in April 1993 as a nonimmigrant visitor. *Id*. at 5a. Petitioner Yuriy followed her husband to the United States in August 1993, also as a nonimmigrant visitor. *Ibid*. Immediately following their entry into the United States petitioners sought asylum, with petitioner Iouri claiming that he had been persecuted because of his membership in the Ukraine Orthodox Church and expressing a fear of future persecution should he be returned to Ukraine. *Id*. at 5a-6a. The IJ found petitioners' claims not credible and denied asylum relief, but granted petitioners' request for voluntary departure. *Id*. at 7a.

The BIA summarily affirmed the IJ's decision on November 27, 2002, granting petitioners a new voluntary departure period lasting until December 27, 2002. Prior to the expiration of the voluntary departure period, petitioners sought a stay of deportation from the Second Circuit on December 26, 2002, filing their petitions for review on December 26 and 27, 2002. *Id*. at 8a.[2]

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[2] The Second Circuit treated the stay as granted. The Second Circuit's Clerk's Office informs us that, upon the filing of an unopposed motion to stay deportation in these circumstances, the U.S.

Around the same time, on November 25, 2002, the Immigration and Naturalization Service approved "immediate relative" petitions filed on petitioners' behalf by their only child, a daughter who is a United States citizen. App., *infra*, 8a. These petitions made petitioners eligible for lawful permanent residence. In January 2003, petitioners accordingly filed a motion before the BIA seeking to reopen proceedings so that they could apply for administrative adjustment of their status on the basis of the approved immediate relative petitions. The BIA denied their motion because, in its view, petitioners had overstayed their voluntary departure period and therefore were statutorily barred from receiving adjustment of status under 8 U.S.C. § 1229c(d). *Ibid*. Petitioners filed additional petitions for review before the Second Circuit to challenge that ruling.

3. The Second Circuit's Decision. The court below denied both sets of petitions. App., *infra*, 1a-22a. After rejecting the challenge to the denial of asylum, the court affirmed the BIA's conclusion that petitioners were ineligible for adjustment of status because they had overstayed their voluntary departure period. The court held that "an alien who wishes to stay the period for voluntary departure must explicitly ask for such a stay," reasoning that a request to stay voluntary departure was not subsumed within the motion to stay deportation that petitioners *did* file. *Id*. at 15a.

In its initial opinion (App., *infra*, 23a-41a), the court—failing to recognize that the jurisdiction-stripping provision of IIRIRA had been repealed—placed substantial reliance on the section of IIRIRA providing that removal, but not voluntary departure, eliminates a court's jurisdiction to resolve an appeal from a decision of the BIA. Believing that "[deporta-

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Attorney's Office and the Department of Homeland Security will refrain from deporting the alien until the court's review is complete.

tion] strips this Court of jurisdiction to hear [petitioners'] petition for review" (App., *infra*, 35a), the court concluded:

> The relief sought by a stay of deportation * * * is different from that sought by a stay of voluntary departure. Whereas a stay of deportation is aimed at preserving the court's jurisdiction, a stay of the voluntary departure period is a way for the alien to extend the benefits of the privilege of voluntary departure beyond the date the alien was initially afforded.

Id. at 36a. Given these perceived differences in the two forms of relief, the court declined to "construe [petitioners'] stay of deportation automatically to include a stay of the period for voluntary departure." *Id*. at 37a.

Because the REAL ID Act of 2005 had repealed the jurisdiction-stripping provision of IIRIRA that underlay the Second Circuit's decision, petitioners sought rehearing. The court denied the petition. It did issue an amended opinion that deleted its erroneous statutory analysis, but insisted without explanation that "[n]otwithstanding the repeal of the IIRIRA transitional rules," stays of removal and stays of voluntary departure "continue to differ in both their practical and equitable respects." App., *infra*, 18a n.8. Thus, the court reiterated, "an alien who wishes to stay the period for voluntary departure must explicitly ask for such a stay." *Id*. at 15a. In reaching this conclusion, the Second circuit expressly "disagree[d]" with the approach of the Eighth and Ninth Circuits, which (the Second Circuit acknowledged) "have held that where an alien files a motion to stay removal before the period for voluntary departure expires, such a motion should be construed as including a motion to stay the voluntary departure period." *Id*. at 15a. Instead, the Second Circuit aligned itself with the First and Seventh Circuits, "both of which have held that an alien who wishes to stay the period for voluntary departure must explicitly ask for such a stay." *Ibid*.

While denying relief, the court below observed that "we are sympathetic to the position Petitioners find themselves in." App., *infra*, 20a. The court noted that both are "in their mid-to-late 60's and have been in the United States for more than a decade, without event. Their only child is a United States citizen, and the 'immediate relative' petitions she submitted on her parents' behalf have already been approved." *Id*. at 22a. Moreover, the court added, "it appears that any delay on Petitioners' part may be attributable to counsel's failure to recommend that they seek to extend their voluntary departure period before overstaying that period, an omission that thereby made them ineligible for adjustment of their status based on approved 'immediate relative' petitions." *Ibid*. The court nevertheless concluded that petitioners' failure expressly to seek a stay of voluntary departure was fatal to their position.

Following the Second Circuit's issuance of its modified opinion, petitioners moved the court of appeals to stay its mandate pending this Court's consideration of the present petition for certiorari, noting that the conflict in the circuits would make the petition a substantial one. Over the government's objection, the court granted petitioners' motion.

REASONS FOR GRANTING THE PETITION

This case squarely presents a recurring and frequently litigated question of immigration law that has deeply divided the courts of appeals. In direct conflict with decisions of the Sixth, Eighth, and Ninth Circuits but in accord with holdings of the First and Seventh, the Second Circuit ruled that a motion to stay of deportation should not be understood also to request a stay of voluntary departure.

Review by this Court is essential. The decision below is producing intolerable inconsistency in the administration of the national immigration system. The practical result of the divergent views among the lower courts with respect to the question presented is that aliens situated identically to petitioners will be *expelled from the country* in some circuits and

granted permanent lawful residence in others, with these radically divergent outcomes turning on nothing more than the location of their appeals.

In addition, wholly apart from deepening the conflict among the circuits, the position adopted by the Second Circuit in this case is interfering with the fair and efficient administration of the law. There is *never* any situation in which an alien seeking to stay removal pending resolution of a petition for judicial review will not also desire to stay expiration of a voluntary departure order. Forcing aliens to distinguish their request for the latter from their request for the former will thus serve no practical purpose. But precisely because it serves no purpose that would likely occur to a petitioning alien, such a requirement creates a predictable litigation trap. This trap, moreover, will ultimately inhibit finality in immigration proceedings and generate substantial *additional* work for immigration authorities and courts: when aliens' counsel fails to file two express motions, as here, aliens may pursue claims for ineffective assistance of counsel (see *Desta* v. *Ashcroft*, 365 F.3d 741, 748 (9th Cir. 2004)), thereby delaying their removal and effectively reopening their cases. The net effect of the Second Circuit's rule will therefore simultaneously be to "impede access to the courts in [often] meritorious cases," while undermining "Congress's deliberate effort * * * to relieve the courts from the need to * * * devote their scarce judicial resources" to the immigration docket. *Kenyeres* v. *Ashcroft*, 538 U.S. 1301, 1305 (2003) (Kennedy, J., in chambers) (noting the "significant" importance of questions over when and how to issue judicial stays in immigration cases). Such a result should not be tolerated.

Obviously, the First and Seventh Circuits, and now the Second, have concluded that there are reasons why aliens should be required to individuate their requests for stays of removal and of deportation. We agree with the position of the Sixth, Eighth, and Ninth Circuits that those reasons—if they have any validity at all—are insufficient to outweigh the

wasteful and unfair consequences of such a rule. But whatever the correct outcome on the merits, it is clear that the conflict on this issue should be settled one way or other. The petition for a writ of certiorari therefore should be granted.

I. THE COURTS OF APPEALS ARE DIVIDED OVER WHETHER A MOTION TO STAY REMOVAL CONTAINS A REQUEST TO STAY VOLUNTARY DEPARTURE.

As the Second Circuit itself acknowledged, the decision below deepens a conflict among the courts of appeals over whether a motion to stay deportation, filed before the time to depart voluntarily has run, also should be understood to include a request to stay voluntary departure. See App., *infra*, 15a. As a result of this split, aliens across the country are receiving dramatically disparate treatment in the application of the immigration laws by the courts of appeals. "Given the significant nature of the issue and the acknowledged disagreement among the lower courts" (*Kenyeres*, 538 U.S. at 1305 (Kennedy, J., in chambers)), this Court's review is necessary to restore uniformity to the administration of the Nation's immigration system.

A. The Second Circuit's Holding That A Motion To Stay Removal Does Not Also Include A Motion To Stay Voluntary Departure Directly Conflicts With Decisions From The Sixth, Eighth, And Ninth Circuits.

1. The Second Circuit concluded in this case that a stay of deportation does not "include a stay of the period for voluntary departure," so that "an alien who wishes to stay the period for voluntary departure must explicitly ask for such a stay." App., *infra*, 18a, 15a. Two other courts of appeals have reached the same conclusion. See *Alimi* v. *Ashcroft*, 391 F.3d 888, 892-93 (7th Cir. 2004) (holding that a "stay of removal [does not] also extend [] the time for voluntary departure" because to hold otherwise "would be incompatible with the structure of § 1229c;" hence "a stay of removal and extra

time for voluntary departure [must be] treated as distinct subjects that must be separately addressed"); *Bocova* v. *Gonzales*, 412 F.3d 257, 268-70 (1st Cir. 2005) (because "there may be cases in which an alien is entitled to a stay of removal but not a stay of voluntary departure," "an alien must ask explicitly for a stay of voluntary departure; a motion that prays only for a stay of removal will not suffice").

As the Second Circuit recognized in expressly "disagree[ing]" with their holdings (App., *infra*, 15a), three other courts of appeals have reached the opposite conclusion, holding that a motion to stay deportation also necessarily contains a request to stay the period for voluntary departure. See *Macotaj* v. *Gonzales*, 412 F.3d 704 (6th Cir. 2005), *modified on pet. for reh'g*, 424 F.3d 464 (6th Cir. 2005); *Rife* v. *Ashcroft*, 374 F.3d 606 (8th Cir. 2004); *Desta* v. *Ashcroft*, 365 F.3d 741 (9th Cir. 2004).[3]

In *Desta* v. *Ashcroft*, the Ninth Circuit considered a case in which, as here, the petitioner had filed a motion to stay removal within the time set for departure. Although the motion did not expressly request a stay of voluntary departure, the Ninth Circuit held that a "motion to stay removal, filed before the * * * voluntary departure period ha[s] expired," is sufficient to preserve the court's "power * * * to stay voluntary departure." 365 F.3d at 745. The court went on to conclude that "the same substantive standards govern motions to stay removal and motions to stay voluntary departure," and hence "if the standard to stay removal is satisfied, the stan-

[3] The Fourth Circuit's decision that courts lack the authority ever to stay voluntary departure (*Ngarurih* v. *Ashcroft*, 371 F.3d 182, 194 (4th Cir. 2004)) is also relevant to the conflict here, insofar as it is at odds with the decisions from the Sixth, Eighth, and Ninth Circuits holding that they will stay voluntary departure upon a motion to stay removal. Granting review of the question presented here will necessarily also resolve this additional jurisdictional question on which the Fourth Circuit disagrees with the First, Second, Sixth, Seventh, Eighth, and Ninth Circuits.

dard to stay voluntary departure is necessarily satisfied." *Id*. at 748 (citations omitted). Thus, in direct conflict with the ruling below, the Ninth Circuit held:

> where an alien files a motion to stay removal before the period of voluntary departure expires, *we will construe the motion to stay removal as including a timely motion to stay voluntary departure. In granting a motion to stay removal * * * the court will also be staying the time remaining for the alien to depart voluntarily.*

Id. at 479 (emphasis added).

In *Rife* v. *Ashcroft*, the Eight Circuit also considered a situation in which the petitioners had "filed a motion to stay removal before their voluntary departure period expired," but had "fail[ed] to file a motion expressly seeking a stay of their voluntary departure period." 374 F.3d at 616. That court concluded that "a motion to stay voluntary departure complements and in many cases may be ancillary to a motion to stay removal pending judicial review." *Ibid*. (citing *Desta*, 365 F.3d at 749). Thus, although the Eighth Circuit (unlike the Ninth) believed that there may be "cases where the equities relevant to the two types of stay will balance differently," it nevertheless held that, if "the alien files a motion to stay removal before the period of voluntary departure expires, *we will deem the grant of that motion to include a stay of the voluntary departure period*." *Ibid*. (emphasis added). Because the Second Circuit treated the stay of deportation here as granted, the outcomes in *Rife* and this case are irreconcilable.

Finally, in *Macotaj* v. *Gonzales*, which presented the same material facts, the Sixth Circuit endorsed the Ninth Circuit's analysis. It held:

> "the same substantive standards govern motions to stay removal and motions to stay voluntary departure. Thus, if the standard to stay removal is satisfied, the

> standard to stay voluntary departure is necessarily satisfied. * * * A motion to stay voluntary departure is thus in many ways 'ancillary' to a motion to stay removal, and *it is reasonable to construe a motion to stay removal to include a request to stay voluntary departure*."

Macotaj, 424 F.3d at 467 (emphasis added) (quoting *Desta*, 365 F.3d at 748). The Second Circuit's decision cannot be reconciled with this holding.

This conflict in the circuits is deep, settled, and widely acknowledged; "[t]he courts on each side of the split have considered the contrary opinions of their sister Circuits and have adhered to their own expressed views." *Kenyeres*, 538 U.S. at 1305 (Kennedy, J., in chambers). Thus, the First Circuit noted that the Seventh "has rejected" the approach of the Eighth and Ninth Circuits, and has aligned itself with the Seventh. *Bocova*, 412 F.3d at 268. See also *Alimi*, 391 F.3d at 892 (the Ninth Circuit's decision in *Desta* "does not persuade us"). The Sixth Circuit, in rejoinder, expressly rejected the position of the First and Seventh Circuits, seeing "no practical justification for [their] rationales." *Macotaj*, 424 F.3d at 467 n.1.[4] Such disarray demands this Court's attention.

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[4] Indeed, there are conflicts within the conflicts. The First Circuit, while agreeing with the Seventh that an express motion to stay voluntary departure is required, has rejected the Seventh Circuit's imposition of an exhaustion requirement mandating that the alien first seek an administrative stay of voluntary departure. *Bocova*, 412 F.3d at 269. On the other side of the coin, the Sixth and Ninth Circuits have held that *every* stay of deportation will stay voluntary departure, while the Eighth Circuit has suggested that the equities may balance differently as to the two types of relief. As the Seventh Circuit put it, early in the life of the conflict, "[o]ne court has" held that "stay of removal [gives aliens] an extension [of voluntary departure] automatically," "[a]nother has rejected [that position]," "[s]till a third has split the difference, holding that a stay of re-

2. Each court implicated by the split in this case squarely decided the question presented on materially identical facts. The Second Circuit below nevertheless suggested that the decisions of the Eighth and Ninth Circuits might be distinguished on the ground that "their prior case law had given petitioners reason to believe that they need not file a motion for a stay of voluntary departure" (App., *infra*, 20a), while that concern is "absent here." *Id.* at 21a. We note that the Second Circuit made no attempt to distinguish the Sixth Circuit's conflicting decision on this ground. But the asserted distinction is, in any event, insubstantial.

First, the Eighth and Ninth Circuits' decisions rested upon a concern for the burdensome costs to both petitioners and the courts that would be imposed by a holding that a motion to stay removal does not also include a motion to stay voluntary departure (see, *e.g.*, *Desta*, 365 F.3d at 748), and on the nature of an order of removal as itself including the "complimentary" order to depart voluntarily (see, *e.g.*, *Rife*, 374 F.3d at 616). The Eighth and Ninth Circuits (and the Sixth, as well) thus announced blanket rules that would apply in all cases—including cases arising in the future, where issues of notice could not be present—holding on legal, and not case-specific, grounds that motions to stay removal would be treated as also seeking to stay voluntary departure. The Second Circuit's ruling cannot be reconciled with these holdings on any theory.[5]

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moval does not automatically extend the time for voluntary departure but adding that the court may elect to treat the one as accomplishing the other," and "[y]et another [the Fourth Circuit] has held that appellate courts can never add to the time available for voluntary departure." *Alimi*, 391 F.3d at 891. Since that writing, four more circuits have weighed in.

[5] In fact, the Eighth and Ninth Circuits' brief references to prior Circuit case law were case-specific observations that addressed the equities of actually *issuing* stays, and were irrelevant to the courts'

Moreover, Second Circuit precedent does not support the court of appeals' suggestion that petitioners in this case *were* on notice that they had to file a separate motion. The court stated that in *Ballenilla-Gonzalez* v. *INS*, 546 F.2d 515 (2d Cir. 1976), it had "expressed approval for procedures" that permitted appellate review to go forward "without prejudice to voluntary departure." App., *infra*, 21a. But *Ballenilla-Gonzalez* is an inapposite case that addressed the question whether the court should automatically *reinstate* an expired period of voluntary departure when a petitioner files *a petition for review* (not a stay application) *after* the time to depart has expired. The court there merely noted that the petitioner in that case had not "follow[ed] the procedure of filing a petition for review within the 30-day period fixed by the Board for voluntary departure." 546 F.2d at 521. The court never addressed whether the petitioners in *Ballenilla-Gonzalez* should have filed a separate motion to stay voluntary departure. Such a vague reference to unspecified "procedures" relating to an entirely different question could not possibly have put petitioners here on notice that the court would refuse to regard a *timely* motion to stay removal as also requesting a stay of voluntary departure.

In fact, pre-IIRIRA case law from the Second Circuit implied that a petition for review *did* trigger an automatic stay

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conclusion that a motion to stay deportation necessarily includes a motion to stay voluntary departure. See *Desta*, 365 F.3d at 749 (noting that the case did not involve "ineffective assistance of counsel" because "[b]ased on the prior state of the law, Desta (and his counsel) would have been justified in thinking that the period of voluntary departure would be automatically stayed"); *Rife*, 374 F.3d at 616 (noting that approving a stay was "particularly appropriate in this case" because "past practice" may have given the petitioners "reason to believe that the stay of removal included a stay of their voluntary departure period as well"). Neither of these case-specific observations was relevant to either court's underlying reasoning for its broad holding regarding the significance of a motion to stay removal.

of both deportation and voluntary departure, just as in the Eighth and Ninth Circuits. See *Foti v. INS*, 308 F.2d 779, 784 (2d Cir. 1962) (noting that "[a]fter an automatic stay and ultimate adverse decision by [the court]," a deportee still has the option to depart voluntarily). As a matter of plain statutory law, moreover, "[u]nlike motions to stay removal, which [are] explicitly required by IIRIRA, [there is] no such provision for requiring an affirmative request to stay voluntary departure." *Desta*, 365 F.3d at 749. Thus no underlying facts or characteristics of any of the First, Second, Sixth, Seventh, Eighth, or Ninth Circuits' holdings distinguish one from the others, except the legal conclusions they reach. This Court should grant review to resolve this manifest conflict of authority.

B. The Capriciousness In The Administration Of National Immigration Laws Resulting From The Split At Issue Here Should Not Be Tolerated.

1. The practical result of the divergent views among the lower courts with respect to the question presented is that aliens like petitioners will be expelled from the country in some circuits and granted permanent lawful residence in others. Here, for example, if petitioners had been able to file their appeal and stay requests in the Sixth, Eighth, or Ninth Circuit, the court would have construed the stay of removal as a concurrent stay of voluntary departure. As a result, petitioners would still have been eligible for administrative relief when they moved the BIA to reopen their case, and they would now be lawful permanent residents pursuant to their daughter's immediate relative petition. Instead, petitioners had the misfortune of petitioning for review in the Second Circuit. See 8 U.S.C. § 1252(b)(2). On the basis of no more than their location, petitioners now face the "harsh measure" of deportation. *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 459 (1987).

This sort of outcome is not uncommon. The petitioners in *Alimi*, for example, faced precisely the same situation. If they

had been able to file for review in the Sixth, Eighth, or Ninth Circuits and been granted a stay of removal, "today [they] would be lawful permanent residents" based on their family member's "application[s] for immediate-family visas." *Alimi*, 391 F.3d at 892. Instead, the Alimis were adjudicated removable because they filed their petition for review in the Seventh Circuit.

Aliens without ongoing proceedings before the BIA are also receiving drastically disparate treatment because of the conflict at issue in this case. Already at least three other petitioners in the Second Circuit have faced the harsh consequences of the holding below. See *Tedjo* v. *Gonzales*, 214 Fed. App'x. 69, 73 (2d Cir. 2007) (holding that petitioner "waived [voluntary departure] by failing to file a [separate] motion for a stay of the voluntary departure order" (citing the instant case)); *Hayat* v. *Gonzales*, 205 Fed. App'x. 904 (2d Cir. 2006) (same); *Xiao Feng Huang* v. *INS*, 204 Fed. App'x. 99 (2d Cir. 2006) (same). These aliens are now liable for a $5,000 fine and are ineligible for administrative relief for the next decade. 8 U.S.C. § 1229c(d). They also have been or will be forcibly removed (see 8 C.F.R. § 1241.1(f)) and are now ineligible for readmission under any circumstance to the United States for the next ten years. See 8 U.S.C. § 1182(a)(9)(A)(ii). But if any of these aliens had instead been located in the Sixth, Eighth, or Ninth Circuits, they would have been permitted to depart voluntarily for a destination of their choosing. 8 C.F.R. § 1240.26. They also would have been able to seek reentry to the United States or to obtain administrative relief immediately.

2. While any conflict among the courts of appeals on a matter of federal law or procedure is a matter for concern, certiorari review is particularly appropriate where a split of authority results in such disparate outcomes in the administration of the nation's immigration laws. The Constitution requires Congress to implement a "uniform rule of naturalization." U.S. Const. Art. I, § 8, cl. 4; see also *Graham* v.

Richardson, 403 U.S. 365, 382 (1971) (acknowledging that the Naturalization Clause imposes an "explicit constitutional requirement of uniformity" in the execution of "laws on the subject of citizenship"); *Henderson* v. *Mayor of New York*, 92 U.S. 259, 273 (1875) ("It is * * * clear that the matter of [immigration laws] ought to be, the subject of a uniform system or plan. The laws which govern the right to land passengers in the United States from other countries ought to be the same in New York, Boston, New Orleans, and San Francisco."); Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. Rev. 493, 537 (2001) (arguing that the Constitution permits "exercise[] [of the immigration power] only in a manner that is geographically consistent across the nation"). The divergence in the lower courts' resolution of the question presented here is plainly generating drastic variation in the administration of the Nation's immigration laws. In such circumstances, this Court's intervention is warranted.

II. THIS CASE PRESENTS AN ISSUE OF GREAT PRACTICAL IMPORTANCE.

This lack of uniformity involves a matter of substantial importance, and the resolution of the question presented will have systematic consequences for the administration of the national immigration system. See *Kenyeres*, 538 U.S. at 1305 (noting the "significant nature" of a circuit split over the standard for granting a judicial stay of deportation). The conflict among the lower courts is producing substantial disparities in the treatment of aliens in a common factual circumstance that arises with great frequency.

1. The factual scenario that underlies the dispute at issue in this case occurs frequently throughout the Nation. Last year nearly 12,000 aliens commenced petitions to review orders of removal in the federal courts. See *2006 Judicial Business of the United States Courts*, tbl. B-3, *available online at* http://www.uscourts.gov/judbus2006/completejudicialbusine

ss.pdf. Almost half of those cases (5,862) were filed in the Ninth Circuit; more than one fifth (2,640) were filed in the Second Circuit. *Ibid.* As we have noted, approximately 10% of all removal orders in 2006 (over 22,000) permitted voluntarily departure. See U.S. Department of Justice, Executive Office of Immigration Review, *FY 2006 Statistical Year Book*, tbl. 14 (Feb. 2007), *available online at* http://www.usdoj.gov/eoir/statspub/fy06syb.pdf. On the whole in 2006, the federal courts of appeals considered more than 1,100 petitions to review removal orders that included voluntary departure. *Ibid*. The issue presented here could arise in all such cases. *Cf. Desta*, 365 F.3d at 749 (noting that if it had not decided that a stay of removal also stays voluntary departure, "*hundreds* of aliens [would be] unable to take advantage of the voluntary departure that had been granted by the IJ and BIA" (emphasis added)).

This prospect is not theoretical. Under the rule announced in *Desta*, for example, the Ninth Circuit regularly stays voluntary departure without an express motion. See, *e.g.*, *Flores* v. *Gonzales*, No. 07-71291, 2007 WL 2162693 (9th Cir. July 27, 2007) (applying *Desta* to grant a stay of voluntary departure upon a single motion to stay removal); *Cardenas* v. *Gonzales*, No. 07-71090, 2007 WL 2162668 (9th Cir. July 27, 2007) (same); *Garcia* v. *Gonzales*, No. 07-70728, 2007 WL 2162639 (9th Cir. July 27, 2007) (same); *Neri* v. *Gonzales*, No. 07-70571, 2007 WL 2162484 (9th Cir. July 27, 2007) (same); *Romero* v. *Gonzales*, No. 04-71296, 2007 WL 2161640 (9th Cir. July 27, 2007) (same); *Larios* v. *Gonzales*, No. 07-70447, 2007 WL 2162364 (9th Cir. July 27, 2007) (same).

Even in the Second Circuit, where aliens are now directed to file separate motions, many petitioners will face severe prejudice without ever having had an opportunity (however chimerical) to act on the rule promulgated below. Aliens who filed for review prior to resolution of the instant case cannot now seek to comply with the Second Circuit's requirement

that they file a separate motion to stay voluntary departure. Here, for instance, petitioners filed for review on December 26 and 27, 2002. Their case was not finally resolved until May 24, 2007, more than four years later. Such protracted litigation is not uncommon in the immigration context, where resolution of petitions to review removal orders often takes as long as three or four years. See, *e.g.*, *Romero* v. *Gonzales*, No. 04-71296, 2007 WL 2161640 (9th Cir. July 27, 2007) (petition filed Mar. 22, 2004, over three years before the disposition of the petition); *Xiao Feng Huang* v. *INS*, 204 Fed. App'x. 99 (2d Cir. 2006) (petition filed Mar. 3, 2003, over three years before the disposition of the petition). Review by this Court is warranted where, as here, "a considerable number of suits are pending in the lower courts which will turn on resolution of * * * [the] conflict among the circuits as to [the question presented]." *Massachusetts Trustees* v. *United States*, 377 U.S. 235, 237 (1964).

2. Moreover, resolution of the question presented is important "for both substantive and procedural reasons." *Alimi*, 391 F.3d at 892. Courts on each side of the dispute in this case agree that the question presented here has significant implications both for enforcement of federal immigration law and for sound judicial management.

The Sixth, Eighth and Ninth Circuits have expressed concern that the approach taken by the First, Second, and Seventh Circuits will undermine the goals of voluntary departure. If petitioners are required to depart "while they petition for review * * * they may not be able to return to this country even if they are eventually successful on the merits of their petitions"—since, "[b]y definition, aliens seeking asylum contend that they are subject to persecution when they return to their own countries, where they risk further harm, potentially including imprisonment or even death." *Desta*, 365 F.3d at 748. The Sixth, Eighth, and Ninth Circuits accordingly have found that it "serves the purposes of our asylum law, as well as the interests of justice, to construe motions to

stay removal as including motions to stay voluntary departure." *Ibid*. The First, Second, and Seventh Circuits, by contrast, premised their holdings on a different understanding of federal immigration law and policy, reasoning that voluntary departure is intended to "provide[] an incentive to depart without dragging out the process and without requiring the agency and courts to devote resources to the matter." *Alimi*, 391 F.3d at 892. These courts also have opined that the government and courts will be placed at a disadvantage if aliens do not *expressly* seek a stay of voluntary departure because those responding to the stay application may not be aware that this relief is being sought.

We believe that the Sixth, Eighth, and Ninth Circuits have the better of this argument. One way or the other, however, resolution of this conflict is necessary to best achieve the goals of the federal voluntary departure program and to achieve proper balance in the resolution of stay applications.

III. THE SECOND CIRCUIT'S DECISION IS WRONG.

The significance of the conflict in the courts of appeals itself warrants review of the decision below by this Court. It should be added, however, that the decision below is incorrect. It (1) ignores the reality that voluntary departure and deportation are different facets of a single order, (2) will inhibit finality in immigration proceedings and generate substantial additional work for an already strained court system, and (3) is inconsistent with this Court's precedent.

A. Because Voluntary Departure And Removal Are Complementary Facets Of The Same Administrative Order, There Is No Point To Requiring An Individual Statement Of The Desire To Stay Both.

There is no practical reason from any standpoint to require differentiating an alien's motion to stay removal from his or her motion to stay voluntary departure. From an alien's point of view, there would never be any reason to distinguish the requests, because any alien who is granted voluntary de-

parture and seeks to stay removal pending judicial review will *inevitably* want also to stay voluntary departure.

Nor could there be any point in distinguishing motions to stay voluntary departure and removal from a reviewing court's point of view. As the First Circuit itself has recognized, voluntary departure and removal are complimentary facets of the same administrative order. See *Bocova*, 412 F.3d at 267 ("[O]rders of removal and grants of voluntary departure are entered as alternate orders that comprise different facets of a single ukase." (citing 8 C.F.R. § 1240.26(d)). See also *Desta*, 365 F.3d at 748 (describing "[a] motion to stay voluntary departure [as] 'ancillary' to a motion to stay removal"); *Macotaj*, 424 F.3d at 467 (same); *Rife*, 374 F.3d at 616 (describing voluntary departure as "complement[ary]" and "ancillary" to removal). As a consequence, there is every reason for a court to expect that a stay of one would stay the other.

Agencies involved in administering the immigration system also treat voluntary departure and removal as integrated. When an immigration judge issues an order for voluntary departure, he or she includes an "alternate order [of] removal." 8 C.F.R. § 1240.26(d). And when "an immigration judge issues an alternate order of removal in connection with a grant of voluntary departure, [the removal order] shall become final [only] * * * upon overstay of any voluntary departure period * * *." 8 C.F.R. § 1241.1(f). The Department of Justice therefore acknowledges that "[v]oluntary departure is considered a form of removal." U.S. Department of Justice, Executive Office of Immigration Review, *supra*, at Q1. A motion to stay removal filed during the period for voluntary departure is therefore *directed at the voluntary departure order*—which is, at the time, the only order that operates upon the alien. Concluding that a motion to stay the order of removal also includes a motion to stay the period of voluntary departure therefore finds logical support in the relevant statutes

and regulations; the object of the motion to stay is, at the time of filing, actually the order to depart voluntarily.

A contrary conclusion, moreover, rests on an absurd premise. If a motion to stay removal is thought not also to seek a stay of voluntary departure, the court must believe that an alien who does not file a separate motion to stay voluntary departure is either (a) electing to suffer the substantial "penalties attached to forfeiting a grant of voluntary departure: a considerable fine and a 10-year prohibition on 'any further relief under this section and sections 240A, 245, 248, and 249,'" even if the appeal ultimately is successful (*Desta*, 365 F.3d at 746-47 (quoting *Zazueta-Carrillo* v. *Ashcroft*, 322 F.3d 1166, 1177 (9th Cir. 2003) (Berzon, J., concurring))); or (b) planning to depart while his or her litigation to gain the right to remain in the country is pending, even though "'[a]n alien's departure in these circumstances could in effect void the asylum appeal, because the alien might not be able to return to the United States if he or she successfully petitioned for relief through judicial review.'" *Ibid.* (quoting the same). It is inconceivable that any alien would make either such choice.[6]

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[6] Requiring an alien to depart to avoid the imposition of penalties during the pendency of an appeal is particularly troubling given the high error rate within the immigration system. Judge Posner noted in a recent opinion that the Seventh Circuit had "reversed the Board of Immigration Appeals in whole or part in a staggering 40 percent of the 136 petitions to review * * * on the merits" over the prior year. *Benslimane* v. *Gonzales*, 430 F.3d 828, 829 (7th Cir. 2005). He concluded that "the adjudication of [immigration] cases at the administrative level has fallen below the minimum standards of legal justice." *Id.* at 830. Similar judicial criticism of immigration adjudications is voluminous. For a small sampling, see *Ssali* v. *Gonzales*, 424 F.3d 556, 563 (7th Cir. 2005) ("this very significant mistake suggests that the Board was not aware of the most basic facts of [the petitioner's] case"); *Sosnovskaia* v. *Gonzales*, 421 F.3d 589, 594 (7th Cir. 2005) ("[T]he procedure that the [immigration judge] employed in this case is an affront to [petitioner's]

In rejecting petitioners' argument, the court below, as well as the circuits with which it agreed, relied largely on the rationale that "the Government deserves prompt notice of precisely what relief a petitioner seeks" because stays of removal and voluntary departure seek different types of relief and "the equities involved in the two types of stays may also differ." App., *infra*, 18a & n.8. See *Bocova*, 412 F.3d at 267; *Alimi*, 391 F.3 at 892. But given the reality that no rational alien would seek to stay removal but not voluntary departure, there can be no serious prospect of confusion about the alien's request on the part of the government or the court. As the Sixth Circuit put it: "It is, of course, important that courts understand what relief litigants are seeking. At the same time, the possibility of misunderstanding in this immigration setting strikes us as minimal." *Macotaj*, 424 F.3d at 467 n.1. Nor, for that matter, has any court offered an explanation of how or illustration of when the equities might balance differently as to a stay of removal on the one hand and a stay of voluntary departure on the other. The distinction identified by the court below therefore is wholly illusory.[7]

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right to be heard."); *Wang* v. *Attorney General*, 423 F.3d 260, 269 (3d Cir. 2005) ("[T]he tone, the tenor, the disparagement, and the sarcasm of the [immigration judge] seem more appropriate to a court television show than a federal court proceeding."); *Fiadjoe* v. *Attorney General*, 411 F.3d 135, 154-55 (3d Cir. 2005) (finding that the immigration judge's "hostile" and "extraordinarily abusive" conduct toward the petitioner "by itself would require a rejection of his credibility finding"); *Lopez-Umanzor* v. *Gonzales*, 405 F.3d 1049, 1054 (9th Cir. 2005) ("[T]he [immigration judge's] assessment of Petitioner's credibility was skewed by prejudgment, personal speculation, bias, and conjecture."); *Korytnyuk* v. *Ashcroft*, 396 F.3d 272, 292 (3d Cir. 2005) ("[I]t is the [immigration judge's] conclusion, not [petitioner's] testimony, that strains credulity.") (quotations omitted).

[7] Judge Easterbrook's opinion for the Seventh Circuit in *Alimi* also reasoned that "[t]he United States offers benefits for *voluntary* de-

B. The Availability Of An Ineffective Assistance Of Counsel Claim Means That The Second Circuit's Rule Adds Great Inefficiency To the Resolution Of Immigration Cases.

In addition to ignoring the nature of orders of deportation and removal, the Second Circuit's rule actually will increase the burden on courts by leading aliens to pursue claims for ineffective assistance of counsel. Such claims are available in immigration proceedings, as the Second Circuit itself has recognized. See, *e.g.*, *Iavorski* v. *INS*, 232 F.3d 124, 128 (2d Cir. 2000). When an alien has representation, the attorney must provide competent counsel. *Ibid.* The Second Circuit has further noted that "[i]neffective assistance of counsel in * * * a deportation case occurs when * * * * '(1) competent counsel would have acted otherwise,' and (2) '[the alien] was prejudiced by [ ] counsel's performance.'" *Id*. at 128-29 (citations omitted). Surely under the rule promulgated below in this case, competent counsel will file a motion to stay voluntary departure; if they do not, the alien will be prejudiced. See *Desta*, 365 F.3d 748 ("By failing to protect an alien's ability to depart voluntarily, an attorney would be severely prejudicing his client.")

The availability of an ineffective assistance of counsel claim will increase the court's work load in cases like this

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parture; an alien cannot resist to the bitter end and still claim those benefits." 391 F.3d at 892 (emphasis in original). This rationale, however, would seem to be an argument for not allowing stay of voluntary departure *at all*; if such stays are permissible, the Seventh Circuit's view provides no basis for differentiating stays of removal and of voluntary departure. In any event, as the Sixth Circuit observed, "it hardly seems unfair to allow a petitioner to seek judicial review of a possibly erroneous administrative decision and still take advantage of a benefit that was granted by the immigration judge (the right of voluntary departure) and actually renewed by the BIA on the petitioner's appeal to the agency." *Macotaj*, 424 F.3d at 467 n.1.

one: courts will have to adjudicate such claims if and when counsel fail to file a separate motion to stay voluntary departure. See, *e.g.*, *Iavorski*, 232 F.3d at 127; see also *Qeraxhiu* v. *Gonzales*, 206 Fed. App'x. 476 (6th Cir. 2006) (petitioner filed a motion to reopen before the BIA claiming ineffective assistance of counsel; subsequently filed a petition for review of the BIA decision denying the motion). In response to the rule adopted by the Second Circuit in this case, numerous such claims may be filed each year. See *Desta*, 365 F.3d at 749 (noting that if it had not decided that a stay of deportation also stays voluntary departure, "hundreds of aliens" would be prejudiced each year).

In addition, the availability of an ineffective assistance claim provides an end-run around the Second Circuit's resolution of the question presented here. The Second Circuit has previously held that where an alien is prejudiced by ineffective assistance of counsel in an immigration case, the court will equitably toll the filing deadline for a motion, rendering the omitted motion timely filed. *Iavorski*, 232 F.3d at 127 (equitably tolling to time to file a motion to reopen on the basis of ineffective assistance). If successful in their ineffective assistance claim, then, aliens whose counsel fail expressly to seek a stay of voluntary departure could ultimately obtain the same relief as is now available in the Sixth, Eighth, and Ninth Circuits—but only after substantial additional litigation. The rule promulgated below therefore threatens to load the courts' dockets with substantial additional work, possibly for no practical benefit at all.

C. The Decision Below Offends This Court's Command To Resolve Ambiguities In Favor Of Aliens.

Finally, the Second Circuit's holding plainly resolves the ambiguity at issue in this case against aliens, departing from this Court's "'longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien.'" *INS* v. *St. Cyr*, 533 U.S. 289, 320 (2001) (quoting *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 449 (1987)). See,

e.g., *Barroso* v. *Gonzales*, 429 F.3d 1195, 1204-05 (9th Cir. 2005) (concluding that a "timely filing of a motion to reopen or reconsider [before the BIA] automatically tolls the voluntary departure period" on the ground that it accords with the "'principle of construing any lingering ambiguities in deportation statutes in favor of the alien'" (quoting *St. Cyr*, 533 U.S. at 320 (quoting *Cardoza-Fonseca*, 480 U.S. at 449))).

The rule that courts must construe ambiguities in favor of aliens is based on the recognition that imposing a "forfeiture [of] residence in this country" is a "drastic measure and at times equivalent to banishment of exile." *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10 (1948). See also *Cardoza-Fonseca*, 480 U.S. at 449 (describing removal as "always a harsh measure"). Although stricter readings of immigration rules "might find support in logic," courts should "not assume that Congress meant to trench on [aliens'] freedom beyond that which is required by the narrowest" understanding of the law. *Ibid*; see also *INS* v. *Errico*, 385 U.S. 214, 225 (1966) (same); *Costello* v. *INS*, 376 U.S. 120, 128 (1964) (same). Here, although no express statutory or regulatory provision dictated its result, the Second Circuit applied a rule that causes aliens "substantial prejudice * * * through no fault of their own." *Desta*, 365 F.3d at 749. In contrast, the approach taken by the Sixth, Eighth, and Ninth Circuits resolves the ambiguity in the aliens' favor, while also causing only "incidental [and "relatively minimal"] prejudice * * * to the government." *Ibid*. The court below erred when it rejected the holdings of those courts of appeals.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 2007

APPENDIX A

United States Court of Appeals,
Second Circuit.

Vladimir IOURI and Vera Yuriy,
Petitioners,
v.
John ASHCROFT, Attorney General of the United States,
Respondent.

Docket Nos. 02-4992(L), 02-4998 (CON),
03-40132 (CON), 03-40134 (CON).

Argued: March 22, 2005.
Decided: Sept. 11, 2006.
Amended: Sept. 13, 2006.
On Petition for Rehearing: Decided May 24, 2007.
Amended: May 24, 2007.

Before: SOTOMAYOR, RAGGI, and HALL, Circuit Judges.

On consideration of the petition for rehearing, the opinion issued on September 11, 2006, is modified in order to clarify that, following the repeal of IIRIRA's transitional rules, our court no longer lacks jurisdiction to review petitions for stays of deportation. For ease of reference, a fully revised opinion shall issue this date.

1. We delete the following sentences of the opinion found at 464 F.3d at 178-79:

> Petitioners here, however, are subject to the transitional rule of IIRIRA because deportation proceedings against them commenced prior to April 1, 1997, and a final deportation order was entered after Octo-

> ber 30, 1996. Pub.L. No. 104-208, § 309(c)(4), 110 Stat. 3009, 3009-546, 3009-625. Two changes made applicable by the transitional rules are relevant here.

In place of those deleted sentences, we insert the following:

> Petitioners here, however, are subject to the rule of IIRIRA, as amended by the REAL ID Act of 2005, because a final deportation order was entered after October 30, 1996. Pub.L. No. 104-208, § 309(c)(4), 110 Stat. 3009, 3009-546, 3009-625; REAL ID Act of 2005, Pub.L. 109-13, § 106(d), 119 Stat. 231, 311. Two changes made applicable by IIRIRA are relevant here.

2. In the opinion at 464 F.3d at 179, we delete the phrase "-a permanent rules case-."

3. We delete the following sentences of the opinion found at *Iouri v. Ashcroft*, 464 F.3d 172, 180 (2d Cir.2006):

> Such stays are particularly important in cases governed by IIRIRA's transitional rules because removal of an alien strips this Court of jurisdiction to hear their petition for review. *See Elian*, 370 F.3d at 900. Thus, if we deny a stay of deportation, we deprive ourselves of the opportunity to review a claim, and as a result, we may end up returning an alien to the very persecution he or she was fleeing in the first place.

4. We modify footnote 8, 464 F.3d at 180, to read as follows:

> Under IIRIRA's transitional rules, the relief sought by stays of deportation was particularly significant because removal of an alien under those rules stripped this Court of jurisdiction to hear their petition for review. See *Elian*, 370 F.3d at 900. During

the course of this appeal, Congress repealed the IIRIRA transitional rules, reestablishing our jurisdiction to hear the appeals of aliens in spite of their departure. *See Obale v. Att'y Gen.*, 453 F.3d 151, 160 n. 9 (3d Cir.2006) ("Congress enacted 8 U.S.C. § 1252(b)(3)(B) in order to permit judicial review of a removal order even if the alien has departed the United States."). This enactment did not, however, render a stay of deportation and a stay of voluntary departure functionally the same. Notwithstanding the repeal of the IIRIRA transitional rules, these two forms of relief continue to differ in both their practical and equitable respects. Consequently, the Government deserves prompt notice of precisely what relief a petitioner seeks. Indeed, providing such notice is a petitioner's responsibility. Under Federal Rule of Appellate Procedure 18, which governs stays pending review of an agency decision, a motion for a stay must include "the reasons for granting the relief requested and the facts relied on." Fed. R.App. P. 18(a)(2)(B)(i). In this case, Petitioners styled their motion as a "stay of deportation" and, in support, noted that because stays are no longer automatically issued they are "subject to being physically deported from the United States at any time" and that a "denial of a Stay of Deportation will allow the INS to act to deport them and render [the] Petition for Review moot." It is clear, then, that the reasons offered by Petitioners for granting their stay were aimed at halting their deportation rather than extending their period for voluntary departure. Petitioners thus failed to give appropriate notice that they sought relief in the form of a stay of voluntary departure. As a result, they are now not entitled to that relief. *See Thapa*, 460 F.3d at 336-37 (stating that the equities relevant to a stay of a voluntary departure order and a stay of an order of

removal may balance differently and concluding that granting Thapa's motion for a stay of the voluntary departure order did not necessitate granting his motion for a stay of the order of removal).

5. We delete the following sentence of the opinion found at 464 F.3d at 181: "Whereas a stay of deportation is aimed at preserving the court's jurisdiction, a stay of the voluntary departure period is a way for the alien to extend the benefits of the privilege of voluntary departure beyond the date the alien was initially afforded." In its place, we insert: "Whereas a stay of deportation is aimed at preventing forcible removal, a stay of the voluntary departure period is a way for the alien to extend the benefits of the privilege of voluntary departure beyond the date the alien was initially afforded."

6. Finally, we delete footnote 9, found at 464 F.3d at 181.

The petition for rehearing is **DENIED**.

HALL, Circuit Judge.

Vladimir Iouri and Vera Yuriy ("Petitioners"), natives of the former Soviet Union and citizens of the now independent Ukraine, petition for review from a November 27, 2002 decision of the Board of Immigration Appeals ("BIA") summarily affirming an Immigration Judge's ("IJ") order finding Petitioners incredible and denying their application for asylum, withholding of return, and relief under the Convention Against Torture ("CAT"). Petitioners also seek review of a May 29, 2003 order of the BIA denying their motion to reopen immigration proceedings. The purpose of the motion to reopen was to adjust their status to that of lawful permanent residents on the basis of approved "immediate relative" petitions filed on Petitioners' behalf by their daughter, a United

States citizen. The BIA denied the motion because by the time it was filed, Petitioners had remained in the United States beyond the period granted for voluntary departure and were, therefore, statutorily barred from seeking adjustment of status.

On petition for review, Petitioners raise two issues. First, whether the BIA erred by failing to take into account their advanced age in assessing their credibility. Second, whether their voluntary departure period should be deemed stayed, tolled, or otherwise extended by their having timely filed for a petition for review and moved for a stay of deportation in their underlying asylum case.

I. Background

Petitioners-husband and wife-are natives of the former Soviet Union and citizens of the now independent Ukraine. Iouri entered the United States on or about April 4, 1993 as a non-immigrant visitor. Yuriy followed on or about August 3, 1993, also as a non-immigrant visitor. Soon after his wife's arrival, Iouri sought asylum claiming that as a member of the Ukraine Orthodox Church, he was persecuted and has a well-founded fear of future persecution due to his religious beliefs and affiliation.[1]

In his asylum application, Iouri claims that he has long been mistreated due to his religious beliefs. In particular, he asserts that under Communist rule, his family was unable to practice their religion openly, and as a child, he was punished in school for attending Easter services. His application also recounts alleged mistreatment while he served in the army. In Hungary, for example, Iouri asserts he refused to shoot protestors due to his moral and religious convictions, and as a result, he was mistreated and threatened with punishment. Iouri claims his commanding officer arrested him while he

[1] Yuriy is claimed as a dependent.

was praying.[2] Beyond that, Iouri contends he was generally mocked, threatened, and forced to serve in an "atmosphere of general hostility."

According to Petitioners, conditions did not improve with *perestroika* and independence. They report receiving threatening letters and phone calls; letters they sent were opened and inspected; and the Russian Orthodox and Ukranian Catholic churches, backed by the government, did "their best to declare [Petitioner's] religion out-of-law."

Iouri's asylum application, however, made no mention of any specific incidents of abuse or violence against him or his wife. Indeed, Iouri mentioned specific incidents for the first time during an asylum interview and in an addendum to his application submitted to the IJ in June 1999. In the addendum, Iouri claimed that (1) he was attacked in December of 1991 and threatened with death if he did not stop attending religious services; (2) his apartment was vandalized in March of 1992; and (3) in February of 1993, his apartment was again broken into and vandalized, and he was beaten and admitted to the hospital with a ruptured kidney.

A hearing was held on July 6, 2000 at which both Petitioners testified. With regard to the 1991 incident, Iouri claimed for the first time that he was knocked unconscious, suffered injuries to his head and chest, and was hospitalized for seven days. As to the 1992 vandalism incident, he testified that graffiti with death threats was painted on the wall, and when he attempted to report the incident, police informed him the case was closed and advised him to stop practicing his religion. When Yuriy testified, she could not remember the date of the third incident, stating that it occurred either in

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[2] After leaving the army, Iouri claims he studied to be a merchant mariner but was unable to get a job because he refused to fight in Hungary. He states that he eventually found a job in a toy factory where he met his wife. He alleges that the KGB warned his managers about his and his wife's "political unreliability."

December of 1992 or February of 1993. She also testified that her husband was attacked on the street, not in the apartment. When brought to her attention that submitted documents indicated the attack occurred in her home, she changed her testimony and stated that a fourth incident in which her husband was beaten occurred sometime in December of 1992. Her husband, however, did not testify to that effect, and there is no mention in any of the documents of a December 1992 attack.

The IJ denied Petitioners' application finding that Iouri's testimony was not credible. Specifically, the IJ found his testimony to be "generally halting and vague with regards to some significant events." As to the 1991 incident, the IJ noted that this had not been mentioned anywhere else and there were no documents corroborating that he had been hospitalized. The IJ also noted inconsistencies in the testimony between Iouri and his wife-i.e., she claimed he was attacked in 1993 on the street, not in the apartment, and she testified to a fourth incident never once mentioned by Iouri. Finally, the IJ explained that Iouri was vague in describing the tenets of his faith.[3]

Although the IJ denied Petitioners' application for asylum, he granted their request to voluntarily depart pursuant to former Immigration and Nationality Act ("INA") § 244(e)(1), 8 U.S.C. § 1254(e) (repealed 1996). Petitioners were warned that if they failed to depart voluntarily, the order granting voluntary departure would be withdrawn and they would be ordered deported to the Ukraine. They were also warned, by written order, of the statutory consequences of failing to depart; specifically, they would be ineligible for certain immi-

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[3] In this regard, the IJ noted that Petitioners submitted a letter in support of their asylum application from a rector at a Russian Orthodox Church that Petitioners attend in the United States which, according to other materials is, in fact, the church that caused them problems in the Ukraine.

gration relief, including adjustment of status, for a term of five years. *Id.* §§ 1252b(e)(2) & (5). Petitioners filed a timely appeal which tolled the first thirty days of their voluntary departure period. On November 27, 2002, the BIA summarily affirmed the IJ's decision and granted Petitioners a new period of voluntary departure lasting until December 27, 2002.

Petitioners filed their petitions for review with this court on December 26, 2002 and December 27, 2002. Along with the petitions for review, Petitioners also requested that we grant them a stay of deportation. They did not, however, specifically request a stay of their voluntary departure period or seek an extension of the departure period from the Immigration and Naturalization Service's ("INS") District Director. Nor did they depart. Instead, they filed a motion before the BIA to reopen proceedings in order to apply for adjustment of status on the basis of approved "immediate relative" petitions filed on their behalf by their daughter, now a United States citizen. The BIA denied their motion because they had overstayed their departure period and were, therefore, statutorily barred from applying for adjustment of status. This appeal followed.

II. Discussion

A. Asylum Application

Because the BIA summarily affirmed the IJ's decision to deny Petitioners' application for asylum, we review the IJ's decision directly. *Twum v. INS,* 411 F.3d 54, 58 (2d Cir.2005). In turn, our scope of review is "exceedingly narrow." *Wu Biao Chen v. INS,* 344 F.3d 272, 275 (2d Cir.2003) (internal quotation marks omitted). In reviewing a denial of an application for asylum, we "defer to the immigration court's factual findings as long as they are supported by 'substantial evidence,'" and "we will not disturb a factual finding if it is supported by 'reasonable, substantial and probative' evidence in the record when considered as a whole." *Id.* (quoting *Diallo v. INS,* 232 F.3d 279, 287 (2d Cir.2000)).

Factual findings "are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B).

When it comes to credibility determinations, we afford "particular deference" to the IJ in applying the substantial evidence test. *Zhou Yun Zhang v. INS*, 386 F.3d 66, 73 (2d Cir.2004) (internal quotation marks omitted). Thus, we look to see whether the IJ has provided "specific, cogent" reasons for her findings and whether those findings bear a "legitimate nexus" to the credibility determinations. *Id.* at 74 (internal quotation marks omitted). Where a credibility determination is based on specific examples of "inconsistent statements" or "contradictory evidence," a "reviewing court will generally not be able to conclude that a reasonable adjudicator was compelled to find otherwise." *Id.* (internal quotation marks omitted).

Here, the IJ clearly set forth specific and cogent reasons for his adverse credibility finding, stating:

> Again, for all the reasons: the internal discrepancies, the external inconsistencies with information on documents and the addendum to the I-589 request for asylum, the general vagueness of the testimony, the lack of key details and specifics with regard to the most critical portions of the claim, and the significant discrepancies between the testimony of the two respondents; for all these reasons, I find that the testimony does not rise to the level of believability and consistency in detail to provide us with a plausible and coherent account of the basis for the fear, and for that reason a negative credibility finding is made for each respondent.

Tr. 14-15.

These findings are supported by substantial evidence. As noted above, there were significant discrepancies between Iouri's initial asylum application, the addendum, and his tes-

timony. For example, the addendum did not note his hospitalization following the first incident and nowhere in the initial asylum application did he mention any of these incidents. More telling are the discrepancies between the testimony of the two Petitioners. Not only did Yuriy testify that the February 1993 incident occurred while her husband was on the street, whereas he testified that it occurred in the couple's home, a fact his spouse would be unlikely to mistake, but she also testified to a fourth incident occurring in December of 1992 which is mentioned nowhere in her husband's testimony, the supporting asylum application, or even the addendum. These inconsistencies are sufficient to support the IJ's adverse credibility findings. *See Gao v. U.S. Atty. Gen.*, 400 F.3d 963, 964 (2d Cir.2005) (holding adverse credibility supported by substantial evidence where "numerous discrepancies as to dates and surrounding details [and petitioner's] testimony at his asylum hearing differed substantially from his initial written asylum application and first asylum interview . . .").

Nevertheless, Petitioners argue that the IJ and BIA should have considered the passage of time and their advanced age in assessing their credibility. As the government correctly points out and as Petitioners acknowledge, however, this particular argument was not raised before the BIA and Petitioners therefore failed to exhaust their administrative remedies. Accordingly, this argument has been waived. *See Foster v. INS*, 376 F.3d 75, 78 (2d Cir.2004) ("To preserve a claim, we require '[p]etitioner to raise *issues* to the BIA in order to preserve them for judicial review.'" (quoting *Cervantes-Ascencio v. INS*, 326 F.3d 83, 87 (2d Cir.2003))).[4] We there-

[4] Even if we did consider Petitioners' argument, it is without merit. Neither the passage of time nor Petitioners' advanced age adequately explains the inconsistencies here. With the passage of time and age, one expects memory to fade. Details such as dates may be forgotten or inaccurately recalled, but here Iouri totally

fore deny the petitions for review of the underlying asylum application and petition for withholding of return.[5]

B. Voluntary Departure

As noted, Petitioners were granted-both by the IJ and the BIA-discretionary relief of voluntary departure in lieu of deportation pursuant to former INA § 244(e)(1).[6] "If adhered to, voluntary departure produces a win-win situation." *Bocova v. Gonzales*, 412 F.3d 257, 265 (1st Cir.2005). "For aliens, voluntary departure is desirable because it allows them to choose their own destination points, to put their affairs in order without fear of being taken into custody at any time, to avoid stigma and various penalties associated with forced removals . . . and it facilitates the possibility of return to the United States . . . ." *Lopez-Chavez v. Ashcroft*, 383 F.3d 650, 651 (7th Cir.2004). For the government, it expedites departures and reduces the costs that are typically associated with deporting individuals from the United States. *See*

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failed to mention in his initial asylum application-an application filed shortly after his arrival in the United States-several grave incidents which go to the heart of his claim. It was more than five years later that he mentioned them, first in the addendum and then while testifying before the IJ. Similarly, his wife testified to an incident never before mentioned. The severity of these incidents, coupled with the fact that they were not mentioned until sometime later, suggests this is more than a case of mere forgetfulness due to either age or passage of time. Accordingly, the IJ cannot be faulted for failing to excuse the inconsistencies or improved recollections on these grounds.

[5] Petitioners have not sought review of their CAT claim.

[6] Section 244(e)(1) provides that "the Attorney General may, in his discretion, permit any alien under deportation proceedings . . . to depart voluntarily from the United States at his own expense in lieu of deportation if such alien shall establish . . . that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure . . . ." 8 U.S.C. § 1254(e)(1).

Thapa v. Gonzales, 460 F.3d 323, 328 (2d Cir.2006) *Azarte v. Ashcroft*, 394 F.3d 1278, 1284 (9th Cir.2005).

Following the BIA's decision to affirm the IJ, Petitioners were required to depart the United States by December 27, 2002. They did not. Instead, on January 23, 2003, they moved before the BIA to have their proceedings reopened in order to adjust their status based on "immediate relative" petitions filed on Petitioners' behalf by their daughter and approved by the INS on November 25, 2002. Because they had overstayed their time for voluntary departure, however, the BIA denied the motion. *See* 8 U.S.C. § 1252b(e)(2)(A) (repealed 1996) (aliens who fail to depart within the period for voluntary departure, "other than because of exceptional circumstances, shall not be eligible for [adjustment or change of status under section 245] for a period of 5 years after the scheduled date of departure . . . .").

The BIA's conclusions of law are reviewed *de novo* but where the BIA has applied the correct law, we review its decision to deny reopening for abuse of discretion. *Guan v. BIA*, 345 F.3d 47, 48 (2d Cir.2003). To get around the otherwise clear statutory bar to their seeking adjustment of status, Petitioners contend that either (1) their period for voluntary departure does not commence until this Court issues the mandate in the underlying asylum case or (2) because they sought a stay of deportation, we should enter a *nunc pro tunc* order staying their voluntary departure period. Either way, Petitioners argue the BIA erred in not granting their motion to reopen.

i. When does Petitioners' time to depart voluntarily begin to run?

Citing the Ninth Circuit's decision in *Contreras-Aragon v. INS*, 852 F.2d 1088, 1092 (9th Cir.1988), Petitioners first argue that their period for voluntary departure does not begin to run until we issue a mandate denying their petition for review in their underlying asylum case. *Contreras-Aragon*,

however, is an "old law" case. At the time of *Contreras-Aragon*, the INA provided for automatic stays of deportation upon the filing of a petition for review. 8 U.S.C. § 1105a(a)(3) (repealed 1996). The *Contreras-Aragon* court reasoned that it was inconceivable "that Congress made such provision but intended to require aliens granted voluntary departure to seek repeated extensions of the voluntary departure period from the district director, in order to preserve the award of voluntary departure until our final determination . . . ." 852 F.2d at 1092. Thus, the court concluded that the right of voluntary departure should remain in effect throughout the period of appellate review and for whatever additional time the BIA afforded the petitioner in its decision. *Id.* In adopting this rule, the court rejected an alternative rule which would have preserved voluntary departure only where the alien petitions for review within the period specified for voluntary departure. Such a rule was unacceptable because, in the court's view, it would "shorten the statutory six month period" provided for under "old law" for filing a petition for review. *Id.* at 1096 (citing 8 U.S.C. 1252(c) (repealed 1996)).

Petitioners here, however, are subject to the rule of IIRIRA, as amended by the REAL ID Act of 2005, because a final deportation order was entered after October 30, 1996. Pub.L. No. 104-208, § 309(c)(4), 110 Stat. 3009, 3009-546, 3009-625; REAL ID Act of 2005, Pub.L. 109-13, § 106(d), 119 Stat. 231, 311. Two changes made applicable by IIRIRA are relevant here. First, automatic stays are no longer granted; an alien must petition the court for a stay of deportation. *Id.* § 309(c)(4)(F). Second, petitions for review must be filed within 30 days of the final order of deportation. *Id.* § 309(c)(4)(C).

These changes have so undercut the rationale of *Contreras-Aragon* that Petitioners reliance on that decision is misplaced. Indeed, these very same changes prompted the Ninth Circuit several years later in *Zazueta-Carrillo v. Ashcroft,* 322 F.3d 1166 (9th Cir.2003), to reconsider

Contreras-Aragon and hold that the period for voluntary departure begins to run from the time the BIA enters its order.[7] *Id.* at 1170-72; *see also Rife v. Ashcroft*, 374 F.3d 606, 614-15 (8th Cir.2004). Petitioners' period for voluntary departure, therefore, began to run upon issuance of the BIA's order denying their application for asylum and withholding of return. They are therefore barred from adjusting their status unless the period for voluntary departure was stayed, tolled, or otherwise extended by their having filed for a stay of deportation. We now turn to that issue.

ii. Whether the period for voluntary departure may be stayed, tolled, or otherwise extended

In *Thapa*, 460 F.3d 323, following the position adopted by the majority of the Circuits, *compare Bocova*, 412 F.3d at 265-67 (holding that IIRIRA does not limit a court's authority to issue a stay of departure suspending the running of a voluntary departure period); *and El Himri v. Ashcroft*, 344 F.3d 1261, 1262 (9th Cir.2003) ("the District Director's authority to extend voluntary departure time periods does not limit this court's equitable authority to grant a stay of the voluntary departure period"); *and Rife*, 374 F.3d at 616 (holding that since IIRIRA permits stays of removal, voluntary departure can also be stayed); *and Lopez-Chavez*, 383 F.3d at 654 (concluding that under the permanent IIRIRA rules, a stay tolling the time for voluntary departure may be

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[7] In *Elian v. Ashcroft*, 370 F.3d 897, 901 (9th Cir.2004), however, the court held that *Contreras-Aragon* still applied to cases governed by then-applicable transitional rules under IIRIRA due to the fact that under those rules the court loses jurisdiction to hear a petition for review if the alien leaves the United States. That we are deprived of jurisdiction under these circumstances may very well be a reason why voluntary departure might appropriately be stayed, tolled, or otherwise extended. It does not, however, provide a reason for *automatically* imposing such a stay until such time as we decide the merits of the underlying petition for review.

entered); *and Nwakanma v. Ashcroft*, 352 F.3d 325, 327 (6th Cir.2003); *with Ngarurih v. Ashcroft*, 371 F.3d 182, 194 (4th Cir.2004) (holding that voluntary departure may not be stayed), we recently held that "we have the authority . . . to stay an agency order [of voluntary departure] pending . . . consideration of a petition for review on the merits." *Thapa*, 460 F.3d at 324-25. We did not address, however, our power to issue such a stay where, as here, the petitioners (1) moved only for a stay of removal and failed to make a motion expressly requesting a stay of voluntary departure, and (2) have now sought such relief well after the time for voluntary departure has expired.

iii. Whether Petitioners must have expressly requested a stay of the voluntary departure order

In *Thapa*, and most cases where other courts have held the period for voluntary departure may be stayed, the petitioner expressly moved for a stay of voluntary departure. *See id.* at 326-27; *see, e.g., Nwakanma*, 352 F.3d at 327; *Lopez-Chavez*, 383 F.3d at 651. In contrast, Petitioners here sought a stay of *deportation*, but not a stay of *voluntary departure*. That said, two circuits-the Ninth Circuit in *Desta v. Ashcroft*, 365 F.3d 741, 743 (9th Cir.2004), and the Eighth Circuit in *Rife*, 374 F.3d at 616-have held that where an alien files a motion to stay removal before the period for voluntary departure expires, such a motion should be construed as including a motion to stay the voluntary departure period. According to both courts, this is so because, a motion seeking a stay of voluntary departure is "ancillary," *Desta*, 365 F.3d at 748, or "complementary," *Rife*, 374 F.3d at 616, to a stay of deportation. We disagree. For the reasons that follow, we join the First and Seventh Circuits, both of which have held that an alien who wishes to stay the period for voluntary departure must explicitly ask for such a stay. *Bocova*, 412 F.3d at 268; *Alimi v. Ashcroft*, 391 F.3d 888, 892-93 (7th Cir.2004)

When an alien is ordered deported, a warrant by the INS District Director is issued authorizing the officer to take the alien into custody and deport him or her. Gordon, Mailman & Yale-Loehr, *Immigration Law and Procedure* § 72.08[1][a] (rev. ed.2005). When this Court grants a stay of deportation, we are preventing the forced removal of an alien from the country. Such stays are particularly important in cases governed by IIRIRA's transitional rules because removal of an alien strips this Court of jurisdiction to hear their petition for review. *See Elian*, 370 F.3d at 900. Thus, if we deny a stay of deportation, we deprive ourselves of the opportunity to review a claim, and as a result, we may end up returning an alien to the very persecution he or she was fleeing in the first place.

Voluntary departure, in contrast, is a privilege granted an alien in lieu of deportation. *See Ballenilla-Gonzalez v. INS*, 546 F.2d 515, 521 (2d Cir.1976). Although it carries with it significant restrictions barring an alien's readmission to the United States, *see Thapa*, 460 F.3d at 328, voluntary departure affords an alien certain benefits: "[I]t allows [him] to choose [his] own destination points, to put [his] affairs in order without fear of being taken into custody at any time, to avoid the stigma and various penalties associated with forced removals (including extended detention while the government procures the necessary travel documents and ineligibility for readmission for a period of five or ten years, *see* 8 U.S.C. § 1182(a)(9)(A)), and it facilitates the possibility of return to the United States, for example, by adjustment of status." *Id.* An "immigration judge's order granting voluntary departure usually withholds the entry of a deportation order, permitting the respondent to depart within a specified period, and directs that the deportation order shall become effective automatically if respondent does not depart." Gordon, Mailman and Yale-Loehr, supra, at § 74.02 [4][c]. Where an alien departs within the specified time period, the alien is not re-

garded as having been deported and thus obtains the benefits of departure without deportation. *Id.*

In contrast to a stay of deportation, which stops the physical removal of an alien from the country, a stay of voluntary departure stops the clock on the period within which an alien is required to depart and, if granted, effectively extends the time during which an alien is allowed to leave voluntarily. An alien "'does not *lose* something when offered the additional opportunity to depart voluntarily. On the contrary, he retains precisely the same right to judicial review he would otherwise have had; it is only that his alternative to continued litigation has been made more attractive.'" *Harchenko v. INS,* 379 F.3d 405, 412-413 (6th Cir.2004) (quoting *Castaneda v. INS,* 23 F.3d 1576, 1582 (10th Cir.1994)). In other words, an alien granted voluntary departure has a choice-leave within the specified time period and retain the benefits afforded, or remain, litigate the claim to the very end, but bear the consequences of having decided not to depart. *See Ngarurih,* 371 F.3d at 194 ("[A]n alien considering voluntary departure must decide whether an exemption from the ordinary bars on subsequent relief is worth the cost of returning to the home country within the period specified. Having made his election, however, the alien takes all the benefits and all the burdens of the statute together.").

The relief sought by a stay of deportation, therefore, is different from that sought by a stay of voluntary departure.[8]

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[8] Under IIRIRA's transitional rules, the relief sought by stays of deportation was particularly significant because removal of an alien under those rules stripped this Court of jurisdiction to hear their petition for review. *See Elian,* 370 F.3d at 900. During the course of this appeal, Congress repealed the IIRIRA transitional rules, reestablishing our jurisdiction to hear the appeals of aliens in spite of their departure. *See Obale v. Att'y Gen.,* 453 F.3d 151, 160 n. 9 (3d Cir.2006) ("Congress enacted 8 U.S.C. § 1252(b)(3)(B) in order to permit judicial review of a removal order even if the alien

Whereas a stay of deportation is aimed at preventing forcible removal, a stay of the voluntary departure period is a way for the alien to extend the benefits of the privilege of voluntary departure beyond the date the alien was initially afforded. In addition, the equities involved in the two types of stays may also differ. *See Rife,* 374 F.3d at 616 ("[W]e do not hold that every alien who warrants a stay of removal also warrants a stay of voluntary departure . . . because there may be cases where the equities relevant to the two types of stay will balance differently."). Accordingly, we will not construe a stay of deportation automatically to include a stay of the period

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has departed the United States."). This enactment did not, however, render a stay of deportation and a stay of voluntary departure functionally the same. Notwithstanding the repeal of the IIRIRA transitional rules, these two forms of relief continue to differ in both their practical and equitable respects. Consequently, the Government deserves prompt notice of precisely what relief a petitioner seeks. Indeed, it is a petitioner's responsibility. Under Federal Rule of Appellate Procedure 18, which governs stays pending review of an agency decision, a motion for a stay must include "the reasons for granting the relief requested and the facts relied on." Fed. R.App. P. 18(a)(2)(B)(i). In this case, Petitioners styled their motion as a "stay of deportation" and, in support, noted that because stays are no longer automatically issued they are "subject to being *physically deported* from the United States at any time" and that a "denial of a Stay of Deportation will allow the INS to act to *deport them* and render [the] Petition for Review moot." It is clear, then, that the reasons offered by Petitioners for granting their stay were aimed at deportation rather than their period for voluntary departure. Petitioners thus failed to give appropriate notice that they sought relief in the form of a stay of voluntary departure. As a result, they are now not entitled to that relief. *See Thapa*, 460 F.3d at 336-37 (stating that the equities relevant to a stay of a voluntary departure order and a stay of an order of removal may balance differently and concluding that granting Thapa's motion for a stay of the voluntary departure order did not necessitate granting his motion for a stay of the order of removal).

for voluntary departure. *See Bocova,* 412 F.3d at 268-69 (noting that while the same test for granting a stay of removal applies to a stay of voluntary departure, "that test may play out differently as to each type of relief" so that the alien should be required to "be precise about the relief requested"); *Alimi,* 391 F.3d at 893 (noting that the differences between a stay of removal and a stay tolling the period for voluntary departure "require[ ] attention by both the parties and the court, attention that is possible only if a stay of removal and extra time for voluntary departure are treated as distinct subjects that must be separately addressed").

iv. Whether Petitioners are entitled to nunc pro tunc relief

Petitioners would have us now adjudicate their request for a stay of voluntary departure *nunc pro tunc. Nunc pro tunc,* Latin for "now for then," refers to a court's inherent power to enter an order having retroactive effect. *Black's Law Dictionary* 1100 (8th ed.2004). "When a matter is adjudicated *nunc pro tunc,* it is as if it were done as of the time that it should have been done." *Edwards v. INS,* 393 F.3d 299, 308 (2d Cir.2004). It is a "far-reaching equitable remedy" applied in "certain exceptional cases," *Iavorski v. INS,* 232 F.3d 124, 130 n. 4 (2d Cir.2000), typically aimed at "rectify[ing] any injustice [to the parties] suffered by them on account of judicial delay." *Weil v. Markowitz,* 829 F.2d 166, 175 (D.C.Cir.1987). In the context of agency action, we have held that an award of " *nunc pro tunc* relief [should] be available where agency error would otherwise result in an alien being deprived of the opportunity to seek a particular form of . . . relief." *Edwards,* 393 F.3d at 310-11. *See also Ethyl Corp. v. Browner,* 67 F.3d 941, 945 (D.C.Cir.1995) (noting that *nunc pro tunc* relief has been applied to embrace agency action "where necessary to put the victim of agency error in the economic position it would have occupied but for the error" (internal quotation marks and citation omitted)).

While we are sympathetic to the position Petitioners find themselves in, this is simply not a case in which *nunc pro tunc* relief is warranted. As of November 25, 2002, Petitioners' immediate relative petitions were approved. Two days later, the BIA issued its decision in the underlying asylum case, affirming the IJ's order. The BIA, however, granted Petitioners an additional 30 days within which to depart. Petitioners then had several options. First, they could have filed a motion to reopen to adjust their status sooner. Indeed, the record discloses that Petitioners did not move to reopen until January 2003, well after their period for voluntary departure had expired. Second, they could have sought an extension of their period for voluntary departure from the INS District Director. Finally, they could have moved in this Court for a stay of voluntary departure. By exercising any of these options, Petitioners might have preserved their privilege to depart voluntarily. In other words, this is not a case in which error on the part of the court or the INS put Petitioners in a worse position. An order, *nunc pro tunc*, granting a stay of voluntary departure is therefore inappropriate. *Cf. Edwards*, 393 F.3d at 312 (granting *nunc pro tunc* relief to aliens who were erroneously denied the opportunity to apply for INA § 212(c) relief); *Batanic v. INS*, 12 F.3d 662, 667-68 (7th Cir.1993) (ordering BIA to allow petitioner to apply for asylum *nunc pro tunc* to remedy IJ's error in proceeding with hearing without petitioner's attorney present); *see also Weil v. Markowitz*, 898 F.2d 198, 201 (D.C.Cir.1990) ("The paradigm case [for *nunc pro tunc* relief] involves a party who has died after his case has been submitted to the court, but before the court has entered judgment. Cases in which a party would otherwise be prejudiced by the clerk's delay in entering judgment stand upon the same footing." (citations omitted)).

Finally, we note one other factor that distinguishes *Desta* and *Rife* from this case. In each of those cases, our sister circuits were concerned that their prior case law had given petitioners reason to believe that they need not file a motion for a

stay of voluntary departure. *Desta*, 365 F.3d at 749 ("Based on the prior state of the law, [petitioner] (and his counsel) would have been justified in thinking that the period of voluntary departure would be automatically stayed, just as it had been prior to IIRIRA."); *Rife*, 374 F.3d at 616 ("[O]ur past practice gave [petitioners] reason to believe that the stay of removal included a stay of their voluntary departure period as well."). This concern is notably absent here.

This Court has never held that aliens who file a petition for review are automatically entitled to a stay of voluntary departure. To the contrary, in *Ballenilla-Gonzalez*, we highlighted the fact that the petitioner there had not filed for a petition of review within the thirty days fixed by the period for voluntary departure nor had she requested a stay of the voluntary departure period pending appeal. 546 F.2d at 521. We noted that "[t]hese procedures enable the [BIA] or this court, in cases where a prima facie meritorious basis for appeal is shown, to permit its being pursued without prejudice to voluntary departure." *Id.* Thus, in contrast to the Eighth and Ninth Circuits, both of which had expressly criticized then existing law, in *Ballenilla-Gonzalez* we expressed approval for procedures already in place prior to the passage of IIRIRA. For that reason, we are not concerned, as the courts were in *Rife* and *Desta*, that Petitioners here may have been misled that they did not have to file a motion specifically seeking a stay of voluntary departure. If anything, our decision in *Ballenilla-Gonzalez* should have put them and their counsel on notice that a motion seeking such relief was necessary.

Although we decide that the stay of deportation should not be read so as to encompass a stay of voluntary departure, Petitioners may not be without a remedy. Under pre-IIRIRA regulatory authority, the INS District Director (now the appropriate Field Office Director, U.S. Immigration Customs Enforcement, Department of Homeland Security) may grant a *nunc pro tunc* extension of voluntary departure. *See* 8

C.F.R. § 1240.57 ("Authority to reinstate or extend the time within which to depart voluntarily specified initially by an immigration judge or the Board is within the sole jurisdiction of the district director."); *see also* 6 Gordon, Mailman & Yale-Loehr, *Immigration Law and Procedure* § 74.02[4][f] (rev. ed. 2005) ("Even after the expiration of the time for voluntary departure fixed by the immigration judge or the Board, a *nunc pro tunc* extension of the voluntary departure time may be granted by the district director if the [alien] presents a valid travel document and a confirmed reservation. In such cases the district director may cancel the warrant of deportation and may place in the [alien's] file an explanatory memorandum and a copy of the letter authorizing the extension of voluntary departure time.").

Petitioners are both in their mid-to-late 60's and have been in the United States for more than a decade, without event. Their only child is a United States citizen, and the "immediate relative" petitions she submitted on her parents' behalf have already been approved. Furthermore, it appears that any delay on Petitioners' part may be attributable to counsel's failure to recommend that they seek to extend their voluntary departure period before overstaying that period, an omission that thereby made them ineligible for adjustment of their status based on approved "immediate relative" petitions. In this case, the INS District Director might well consider exercising his or her discretion to grant an extension so that Petitioners may adjust their status to lawful permanent residents. The law does not, however, support this Court granting the relief sought in the pending petitions.

The petitions for review are **DENIED**.

APPENDIX B

United States Court of Appeals,
Second Circuit.

Vladimir IOURI and Vera Yuriy,
Petitioners,
v.
John ASHCROFT, Attorney General of the United States,
Respondent.

Docket Nos. 02-4992(L), 02-4998 (CON),
03-40132 (CON), 03-40134 (CON).

Argued: March 22, 2005.
Decided: Sept. 11, 2006.
Amended: Sept. 13, 2006.

HALL, Circuit Judge.

Vladimir Iouri and Vera Yuriy ("Petitioners"), natives of the former Soviet Union and citizens of the now independent Ukraine, petition for review from a November 27, 2002 decision of the Board of Immigration Appeals ("BIA") summarily affirming an Immigration Judge's ("IJ") order finding Petitioners incredible and denying their application for asylum, withholding of return, and relief under the Convention Against Torture ("CAT"). Petitioners also seek review of a May 29, 2003 order of the BIA denying their motion to reopen immigration proceedings. The purpose of the motion to reopen was to adjust their status to that of lawful permanent residents on the basis of approved "immediate relative" petitions filed on Petitioners' behalf by their daughter, a United States citizen. The BIA denied the motion because by the time it was filed, Petitioners had remained in the United

States beyond the period granted for voluntary departure and were, therefore, statutorily barred from seeking adjustment of status.

On petition for review, Petitioners raise two issues. First, whether the BIA erred by failing to take into account their advanced age in assessing their credibility. Second, whether their voluntary departure period should be deemed stayed, tolled, or otherwise extended by their having timely filed for a petition for review and moved for a stay of deportation in their underlying asylum case.

I. Background

Petitioners-husband and wife-are natives of the former Soviet Union and citizens of the now independent Ukraine. Iouri entered the United States on or about April 4, 1993 as a non-immigrant visitor. Yuriy followed on or about August 3, 1993, also as a non-immigrant visitor. Soon after his wife's arrival, Iouri sought asylum claiming that as a member of the Ukraine Orthodox Church, he was persecuted and has a well-founded fear of future persecution due to his religious beliefs and affiliation.[1]

In his asylum application, Iouri claims that he has long been mistreated due to his religious beliefs. In particular, he asserts that under Communist rule, his family was unable to practice their religion openly, and as a child, he was punished in school for attending Easter services. His application also recounts alleged mistreatment while he served in the army. In Hungary, for example, Iouri asserts he refused to shoot protestors due to his moral and religious convictions, and as a result, he was mistreated and threatened with punishment. Iouri claims his commanding officer arrested him while he was praying.[2] Beyond that, Iouri contends he was generally

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[1] Yuriy is claimed as a dependent.

[2] After leaving the army, Iouri claims he studied to be a merchant mariner but was unable to get a job because he refused to fight in Hungary. He states that he eventually found a job in a toy factory

mocked, threatened, and forced to serve in an "atmosphere of general hostility."

According to Petitioners, conditions did not improve with *perestroika* and independence. They report receiving threatening letters and phone calls; letters they sent were opened and inspected; and the Russian Orthodox and Ukranian Catholic churches, backed by the government, did "their best to declare [Petitioner's] religion out-of-law."

Iouri's asylum application, however, made no mention of any specific incidents of abuse or violence against him or his wife. Indeed, Iouri mentioned specific incidents for the first time during an asylum interview and in an addendum to his application submitted to the IJ in June 1999. In the addendum, Iouri claimed that (1) he was attacked in December of 1991 and threatened with death if he did not stop attending religious services; (2) his apartment was vandalized in March of 1992; and (3) in February of 1993, his apartment was again broken into and vandalized, and he was beaten and admitted to the hospital with a ruptured kidney.

A hearing was held on July 6, 2000 at which both Petitioners testified. With regard to the 1991 incident, Iouri claimed for the first time that he was knocked unconscious, suffered injuries to his head and chest, and was hospitalized for seven days. As to the 1992 vandalism incident, he testified that graffiti with death threats was painted on the wall, and when he attempted to report the incident, police informed him the case was closed and advised him to stop practicing his religion. When Yuriy testified, she could not remember the date of the third incident, stating that it occurred either in December of 1992 or February of 1993. She also testified that her husband was attacked on the street, not in the apartment. When brought to her attention that submitted documents indicated the attack occurred in her home, she changed

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where he met his wife. He alleges that the KGB warned his managers about his and his wife's "political unreliability."

her testimony and stated that a fourth incident in which her husband was beaten occurred sometime in December of 1992. Her husband, however, did not testify to that effect, and there is no mention in any of the documents of a December 1992 attack.

The IJ denied Petitioners' application finding that Iouri's testimony was not credible. Specifically, the IJ found his testimony to be "generally halting and vague with regards to some significant events." As to the 1991 incident, the IJ noted that this had not been mentioned anywhere else and there were no documents corroborating that he had been hospitalized. The IJ also noted inconsistencies in the testimony between Iouri and his wife-i.e., she claimed he was attacked in 1993 on the street, not in the apartment, and she testified to a fourth incident never once mentioned by Iouri. Finally, the IJ explained that Iouri was vague in describing the tenets of his faith.[3]

Although the IJ denied Petitioners' application for asylum, he granted their request to voluntarily depart pursuant to former Immigration and Nationality Act ("INA") § 244(e)(1), 8 U.S.C. § 1254(e) (repealed 1996). Petitioners were warned that if they failed to depart voluntarily, the order granting voluntary departure would be withdrawn and they would be ordered deported to the Ukraine. They were also warned, by written order, of the statutory consequences of failing to depart; specifically, they would be ineligible for certain immigration relief, including adjustment of status, for a term of five years. *Id.* §§ 1252b(e)(2) & (5). Petitioners filed a timely appeal which tolled the first thirty days of their voluntary departure period. On November 27, 2002, the BIA summarily

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[3] In this regard, the IJ noted that Petitioners submitted a letter in support of their asylum application from a rector at a Russian Orthodox Church that Petitioners attend in the United States which, according to other materials is, in fact, the church that caused them problems in the Ukraine.

affirmed the IJ's decision and granted Petitioners a new period of voluntary departure lasting until December 27, 2002.

Petitioners filed their petitions for review with this court on December 26, 2002 and December 27, 2002. Along with the petitions for review, Petitioners also requested that we grant them a stay of deportation. They did not, however, specifically request a stay of their voluntary departure period or seek an extension of the departure period from the Immigration and Naturalization Service's ("INS") District Director. Nor did they depart. Instead, they filed a motion before the BIA to reopen proceedings in order to apply for adjustment of status on the basis of approved "immediate relative" petitions filed on their behalf by their daughter, now a United States citizen. The BIA denied their motion because they had overstayed their departure period and were, therefore, statutorily barred from applying for adjustment of status. This appeal followed.

II. Discussion

A. Asylum Application

Because the BIA summarily affirmed the IJ's decision to deny Petitioner's application for asylum, we review the IJ's decision directly. *Twum v. INS*, 411 F.3d 54, 58 (2d Cir.2005). In turn, our scope of review is "exceedingly narrow." *Wu Biao Chen v. INS*, 344 F.3d 272, 275 (2d Cir.2003) (internal quotation marks omitted). In reviewing a denial of an application for asylum, we "defer to the immigration court's factual findings as long as they are supported by 'substantial evidence,' " and "we will not disturb a factual finding if it is supported by 'reasonable, substantial and probative' evidence in the record when considered as a whole." *Id.* (quoting *Diallo v. INS*, 232 F.3d 279, 287 (2d Cir.2000)). Factual findings "are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B).

When it comes to credibility determinations, we afford "particular deference" to the IJ in applying the substantial evidence test. *Zhou Yun Zhang v. INS*, 386 F.3d 66, 73 (2d Cir.2004) (internal quotation marks omitted). Thus, we look to see whether the IJ has provided "specific, cogent" reasons for her finding and whether those findings bear a "legitimate nexus" to the credibility determinations. *Id.* at 74 (internal quotation marks omitted). Where a credibility determination is based on specific examples of "inconsistent statements" or "contradictory evidence," a "reviewing court will generally not be able to conclude that a reasonable adjudicator was compelled to find otherwise." *Id.* (internal quotation marks omitted).

Here, the IJ clearly set forth specific and cogent reasons for his adverse credibility finding, stating:

> Again, for all the reasons: the internal discrepancies, the external inconsistencies with information on documents and the addendum to the I-589 request for asylum, the general vagueness of the testimony, the lack of key details and specifics with regard to the most critical portions of the claim, and the significant discrepancies between the testimony of the two respondents; for all these reasons, I find that the testimony does not rise to the level of believability and consistency in detail to provide us with a plausible and coherent account of the basis for the fear, and for that reason a negative credibility finding is made for each respondent.

Tr. 14-15.

These findings are supported by substantial evidence. As noted above, there were significant discrepancies between Iouri's initial asylum application, the addendum, and his testimony. For example, the addendum did not note his hospitalization following the first incident and nowhere in the initial asylum application did he mention any of these incidents.

More telling are the discrepancies between the testimony of the two Petitioners. Not only did Yuriy testify that the February 1993 incident occurred while her husband was on the street, whereas he testified that it occurred in the couple's home, a fact his spouse would be unlikely to mistake, but she also testified to a fourth incident occurring in December of 1992 which is mentioned nowhere in her husband's testimony, the supporting asylum application, or even the addendum. These inconsistencies are sufficient to support the IJ's adverse credibility finding. *See Gao v. U.S. Atty. Gen.*, 400 F.3d 963, 964 (2d Cir.2005) (holding adverse credibility supported by substantial evidence where "numerous discrepancies as to dates and surrounding details [and petitioner's] testimony at his asylum hearing differed substantially from his initial written asylum application and first asylum interview . . . ").

Nevertheless, Petitioners argue that the IJ and BIA should have considered the passage of time and their advanced age in assessing their credibility. As the government correctly points out and as Petitioners acknowledge, however, this particular argument was not raised before the BIA and Petitioners therefore failed to exhaust their administrative remedies. Accordingly, this argument has been waived. *See Foster v. INS*, 376 F.3d 75, 78 (2d Cir.2004) ("To preserve a claim, we require '[p]etitioner to raise *issues* to the BIA in order to preserve them for judicial review.' ") (quoting *Cervantes-Ascencio v. INS*, 326 F.3d 83, 87 (2d Cir.2003)).[4] We there-

[4] Even if we did consider Petitioners' argument, it is without merit. Neither the passage of time nor Petitioners' advanced age adequately explains the inconsistencies here. With the passage of time and age, one expects memory to fade. Details such as dates may be forgotten or inaccurately recalled, but here Iouri totally failed to mention in his initial asylum application-an application filed shortly after his arrival in the United States-several grave incidents which go to the heart of his claim. It was more than five years later that he mentioned them, first in the addendum and then

fore deny the petitions for review of the underlying asylum application and petition for withholding of return.[5]

B. Voluntary Departure

As noted, Petitioners were granted-both by the IJ and the BIA-discretionary relief of voluntary departure in lieu of deportation pursuant to former INA § 244(e)(1).[6] "If adhered to, voluntary departure produces a win-win situation." *Bocova v. Gonzales*, 412 F.3d 257, 265 (1st Cir.2005). "For aliens, voluntary departure is desirable because it allows them to choose their own destination points, to put their affairs in order without fear of being taken into custody at any time, to avoid stigma and various penalties associated with forced removals . . . and it facilitates the possibility of return to the United States . . . ." *Lopez-Chavez v. Ashcroft*, 383 F.3d 650, 651 (7th Cir.2004). For the government, it expedites departures and reduces the costs that are typically associated with deporting individuals from the United States. *See Thapa v. Gonzales*, No. 06-1973, 2006 WL 2361248, at *4 (2d Cir. Aug.16, 2006) *Azarte v. Ashcroft*, 394 F.3d 1278, 1284 (9th Cir.2005).

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while testifying before the IJ. Similarly, his wife testified to an incident never before mentioned. The severity of these incidents, coupled with the fact that they were not mentioned until sometime later, suggests this is more than a case of mere forgetfulness due to either age or passage of time. Accordingly, the IJ cannot be faulted for failing to excuse the inconsistencies or improved recollections on these grounds.

[5] Petitioners have not sought review of their CAT claim.

[6] Section 244(e)(1) provides that "the Attorney General may, in his discretion, permit any alien under deportation proceedings . . . to depart voluntarily from the United States at his own expense in lieu of deportation if such alien shall establish . . . that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure . . . ." 8 U.S.C. § 1254(e)(1).

Following the BIA's decision to affirm the IJ, Petitioners were required to depart the United States by December 27, 2002. They did not. Instead, on January 23, 2003, they moved before the BIA to have their proceedings reopened in order to adjust their status based on "immediate relative" petitions filed on Petitioners' behalf by their daughter and approved by the INS on November 25, 2002. Because they had overstayed their time for voluntary departure, however, the BIA denied the motion. *See* 8 U.S.C. § 1252b(e)(2)(A) (repealed 1996) (aliens who fail to depart within the period for voluntary departure, "other than because of exceptional circumstances, shall not be eligible for [adjustment or change of status under section 245] for a period of 5 years after the scheduled date of departure . . . .").

The BIA's conclusions of law are reviewed *de novo* but where the BIA has applied the correct law, we review its decision to deny reopening for abuse of discretion. *Guan v. BIA*, 345 F.3d 47, 48 (2d Cir.2003). To get around the otherwise clear statutory bar to their seeking adjustment of status, Petitioners contend that either (1) their period for voluntary departure does not commence until this Court issues the mandate in the underlying asylum case or (2) because they sought a stay of deportation, we should enter a *nunc pro tunc* order staying their voluntary departure period. Either way, Petitioners argue the BIA erred in not granting their motion to reopen.

i. When does Petitioners' time to depart voluntarily begin to run?

Citing the Ninth Circuit's decision in *Contreras-Aragon v. INS*, 852 F.2d 1088, 1092 (9th Cir.1988), Petitioners first argue that their period for voluntary departure does not begin to run until we issue a mandate denying their petition for review in their underlying asylum case. *Contreras-Aragon*, however, is an "old law" case. At the time of *Contreras-Aragon*, the INA provided for automatic stays of deportation upon the filing of a petition for review. 8 U.S.C. §

1105a(a)(3) (repealed 1996). The *Contreras-Aragon* court reasoned that it was inconceivable "that Congress made such provision but intended to require aliens granted voluntary departure to seek repeated extensions of the voluntary departure period from the district director, in order to preserve the award of voluntary departure until our final determination . . . ." 852 F.2d at 1092. Thus, the court concluded that the right of voluntary departure should remain in effect throughout the period of appellate review and for whatever additional time the BIA afforded the petitioner in its decision. *Id.* In adopting this rule, the court rejected an alternative rule which would have preserved voluntary departure only where the alien petitions for review within the period specified for voluntary departure. Such a rule was unacceptable because, in the court's view, it would "shorten the statutory six month period" provided for under "old law" for filing a petition for review. *Id.* at 1096 (citing 8 U.S.C. 1252(c) (repealed 1996)).

Petitioners here, however, are subject to the transitional rule of IIRIRA because deportation proceedings against them commenced prior to April 1, 1997, and a final deportation order was entered after October 30, 1996. Pub.L. No. 104-208, § 309(c)(4), 110 Stat. 3009, 3009-546, 3009-625. Two changes made applicable by the transitional rules are relevant here. First, automatic stays are no longer granted; an alien must petition the court for a stay of deportation. *Id.* § 309(c)(4)(F). Second, petitions for review must be filed within 30 days of the final order of deportation. *Id.* § 309(c)(4)(C).

These changes have so undercut the rationale of *Contreras-Aragon* that Petitioners reliance on that decision is misplaced. Indeed, these very same changes prompted the Ninth Circuit several years later in *Zazueta-Carrillo v. Ashcroft*, 322 F.3d 1166 (9th Cir.2003)-a permanent rules case-to reconsider *Contreras-Aragon* and hold that the period for voluntary departure begins to run from the time the BIA

enters its order.[7] *Id.* at 1170-72. *See also Rife v. Ashcroft*, 374 F.3d 606, 614-15 (8th Cir.2004). Petitioners' period for voluntary departure, therefore, began to run upon issuance of the BIA's order denying their application for asylum and withholding of return. They are therefore barred from adjusting their status unless the period for voluntary departure was stayed, tolled, or otherwise extended by their having filed for a stay of deportation. We now turn to that issue.

ii. Whether the period for voluntary departure may be stayed, tolled, or otherwise extended

In *Thapa*, 2006 WL 2361248, following the position adopted by the majority of the Circuits, *compare Bocova*, 412 F.3d at 265-67 (holding that IIRIRA does not limit a court's authority to issue a stay of departure suspending the running of a voluntary departure period); *and El Himri v. Ashcroft*, 344 F.3d 1261, 1262 (9th Cir.2003) ("the District Director's authority to extend voluntary departure time periods does not limit this court's equitable authority to grant a stay of the voluntary departure period"); *and Rife*, 374 F.3d at 616 (holding that since IIRIRA permits stays of removal, voluntary departure can also be stayed); *and Lopez-Chavez*, 383 F.3d at 654 (concluding that under the permanent IIRIRA rules, a stay tolling the time for voluntary departure may be entered); *and Nwakanma v. Ashcroft*, 352 F.3d 325, 327 (6th Cir.2003); *with Ngarurih v. Ashcroft*, 371 F.3d 182,

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[7] In *Elian v. Ashcroft*, 370 F.3d 897, 901 (9th Cir.2004), however, the court held that *Contreras-Aragon* still applied to cases governed by then-applicable transitional rules under IIRIRA due to the fact that under those rules the court loses jurisdiction to hear a petition for review if the alien leaves the United States. That we are deprived of jurisdiction under these circumstances may very well be a reason why voluntary departure might appropriately be stayed, tolled, or otherwise extended. It does not, however, provide a reason for *automatically* imposing such a stay until such time as we decide the merits of the underlying petition for review.

194 (4th Cir.2004) (holding that voluntary departure may not be stayed), we recently held that "we have the authority . . . to stay an agency order [of voluntary departure] pending . . . consideration of a petition for review on the merits." *Thapa*, 2006 WL 2361248, at *1. We did not address, however, our power to issue such a stay where, as here, the petitioners (1) moved only for a stay of removal and failed to make a motion expressly requesting a stay of voluntary departure, and (2) have now sought such relief well after the time for voluntary departure has expired.

iii. Whether Petitioners must have expressly requested a stay of the voluntary departure order

In *Thapa*, and most cases where other courts have held the period for voluntary departure may be stayed, the petitioner expressly moved for a stay of voluntary departure. *See Id.* at *3; *see, e.g.*, *Nwakanma*, 352 F.3d at 327; *Lopez-Chavez*, 383 F.3d at 651. In contrast, Petitioners here sought a stay of *deportation*, but not a stay of *voluntary departure.* That said, two circuits-the Ninth Circuit in *Desta v. Ashcroft*, 365 F.3d 741, 743 (9th Cir.2004), and the Eighth Circuit in *Rife*, 374 F.3d at 616-have held that where an alien files a motion to stay removal before the period for voluntary departure expires, such a motion should be construed as including a motion to stay the voluntary departure period. According to both courts, this is so because, a motion seeking a stay of voluntary departure is "ancillary," *Desta*, 365 F.3d at 748, or "complementary," *Rife*, 374 F.3d at 616, to a stay of deportation. We disagree. For the reasons that follow, we join the First and Seventh Circuits, both of which have held that an alien who wishes to stay the period for voluntary departure must explicitly ask for such a stay. *Bocova*, 412 F.3d at 268; *Alimi v. Ashcroft*, 391 F.3d 888, 892-93 (7th Cir.2004)

When an alien is ordered deported, a warrant by the INS District Director is issued authorizing the officer to take the alien into custody and deport him or her. Gordon, Mailman &

Yale-Loehr, *Immigration Law and Procedure* § 72.08[1] [a] (rev. ed.2005). When this Court grants a stay of deportation, we are preventing the forced removal of an alien from the country. Such stays are particularly important in cases governed by IIRIRA's transitional rules because removal of an alien strips this Court of jurisdiction to hear their petition for review. *See Elian*, 370 F.3d at 900. Thus, if we deny a stay of deportation, we deprive ourselves of the opportunity to review a claim, and as a result, we may end up returning an alien to the very persecution he or she was fleeing in the first place.

Voluntary departure, in contrast, is a privilege granted an alien in lieu of deportation. *See Ballenilla-Gonzalez v. INS*, 546 F.2d 515, 521 (2d Cir.1976). Although it carries with it significant restrictions barring an alien's readmission to the United States, *see Thapa*, 460 F.3d at 325, voluntary departure affords an alien certain benefits: "[I]t allows [him] to choose [his] own destination points, to put [his] affairs in order without fear of being taken into custody at any time, to avoid the stigma and various penalties associated with forced removals (including extended detention while the government procures the necessary travel documents and ineligibility for readmission for a period of five or ten years, *see* 8 U.S.C. § 1182(a)(9)(A)), and it facilitates the possibility of return to the United States, for example, by adjustment of status." *Id.* An "immigration judge's order granting voluntary departure usually withholds the entry of a deportation order, permitting the respondent to depart within a specified period, and directs that the deportation order shall become effective automatically if respondent does not depart." Gordon, Mailman and Yale-Loehr, supra, at § 74.02 [4][c]. Where an alien departs within the specified time period, the alien is not regarded as having been deported and thus obtains the benefits of departure without deportation. *Id.*

In contrast to a stay of deportation, which stops the physical removal of an alien from the country, a stay of vol-

untary departure stops the clock on the period within which an alien is required to depart and, if granted, effectively extends the time during which an alien is allowed to leave voluntarily. An alien "'does not *lose* something when offered the additional opportunity to depart voluntarily. On the contrary, he retains precisely the same right to judicial review he would otherwise have had; it is only that his alternative to continued litigation has been made more attractive.'" *Harchenko v. INS*, 379 F.3d 405, 412-413 (6th Cir.2004) (quoting *Castaneda v. INS*, 23 F.3d 1576, 1582 (10th Cir.1994)). In other words, an alien granted voluntary departure has a choice-leave within the specified time period and retain the benefits afforded, or remain, litigate the claim to the very end, but bear the consequences of having decided not to depart. *See Ngarurih*, 371 F.3d at 194 ("[A]n alien considering voluntary departure must decide whether an exemption from the ordinary bars on subsequent relief is worth the cost of returning to the home country within the period specified. Having made his election, however, the alien takes all the benefits and all the burdens of the statute together.").

The relief sought by a stay of deportation, therefore, is different from that sought by a stay of voluntary departure.[8] Whereas a stay of deportation is aimed at preserving the court's jurisdiction, a stay of the voluntary departure period is a way for the alien to extend the benefits of the privilege of voluntary departure beyond the date the alien was initially afforded. In addition, the equities involved in the two types of stays may also differ. *See Rife*, 374 F.3d at 616 ("[W]e do not hold that every alien who warrants a stay of removal also

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[8] In *Thapa*, we agreed with the observation in *Rife*, 374 F.3d at 616, that the equities relevant to a stay of a voluntary departure order and a stay of an order of removal may balance differently and concluded that granting Thapa's motion for a stay of the voluntary departure order did not necessitate granting his motion for a stay of the order of removal. *Thapa*, 460 F.3d at 326.

warrants a stay of voluntary departure . . . because there may be cases where the equities relevant to the two types of stay will balance differently."). Accordingly, we will not construe a stay of deportation automatically to include a stay of the period for voluntary departure. *See Bocova*, 412 F.3d at 268-69 (noting that while the same test for granting a stay of removal applies to a stay of voluntary departure, "that test may play out differently as to each type of relief" so that the alien should be required to "be precise about the relief requested"); *Alimi*, 391 F.3d at 893 (noting that the differences between a stay of removal and a stay tolling the period for voluntary departure "require[ ] attention by both the parties and the court, attention that is possible only if a stay of removal and extra time for voluntary departure are treated as distinct subjects that must be separately addressed").[9]

iv. Whether Petitioners are entitled to nunc pro tunc relief

Petitioners would have us now adjudicate their request for a stay of voluntary departure *nunc pro tunc*.[10] *Nunc pro*

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[9] This is also consistent with Federal Rule of Appellate Procedure 18 pursuant to which stays pending review of an agency decision are issued. In pertinent part, Rule 18 provides that a motion for a stay must include "the reasons for granting the relief requested and the facts relied on." Fed. R.App. P. 18(a)(2)(B)(i). Here, Petitioners styled their motion as a "stay of deportation" and, in support, noted that because stays are no longer automatically issued they are "subject to being *physically deported* from the United States at any time" and that a "denial of a Stay of Deportation will allow the INS to act to *deport them* and render [the] Petition for Review moot." It is clear, then, that the reasons offered by Petitioners for granting their stay were aimed at deportation rather than their period for voluntary departure.

[10] Although Petitioners' request for nunc pro tunc relief distinguishes this case from *Thapa*, because the petitioner moved for a stay of the voluntary departure period before the period expired, *see Thapa*, 2006 WL 2361248, at *9, we stated in that case that our authority to stay an order of voluntary departure when the peti-

tunc, Latin for "now for then," refers to a court's inherent power to enter an order having retroactive effect. *Black's Law Dictionary* 1100 (8th ed.2004). "When a matter is adjudicated *nunc pro tunc,* it is as if it were done as of the time that it should have been done." *Edwards v. INS,* 393 F.3d 299, 308 (2d Cir.2004). It is a "far-reaching equitable remedy" applied in "certain exceptional cases," *Iavorski v. INS,* 232 F.3d 124, 130 n. 4 (2d Cir.2000), typically aimed at "rectify[ing] any injustice [to the parties] suffered by them on account of judicial delay." *Weil v. Markowitz,* 829 F.2d 166, 175 (D.C.Cir.1987). In the context of agency action, we have held that an award of " *nunc pro tunc* relief [should] be available where agency error would otherwise result in an alien being deprived of the opportunity to seek a particular form of . . . relief." *Edwards,* 393 F.3d at 310-11. *See also Ethyl Corp. v. Browner,* 67 F.3d 941, 945 (D.C.Cir.1995) (noting that *nunc pro tunc* relief has been applied to embrace agency action "where necessary to put the victim of agency error in the economic position it would have occupied but for the error" (internal quotation marks and citation omitted)).

While we are sympathetic to the position Petitioners find themselves in, this is simply not a case in which *nunc pro tunc* relief is warranted. As of November 25, 2002, Petitioners' immediate relative petitions were approved. Two days later, the BIA issued its decision in the underlying asylum case, affirming the IJ's order. The BIA, however, granted Petitioners an additional 30 days within which to depart. Petitioners then had several options. First, they could have filed a motion to reopen to adjust their status sooner. Indeed, the record discloses that Petitioners did not move to reopen until January 2003, well after their period for voluntary departure had expired. Second, they could have sought an extension of

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tioner moves for relief after the departure period expires is "more questionable" than our authority to stay the order when the petitioner moves for relief prior to the period's expiration. *See Id.*

their period for voluntary departure from the INS District Director. Finally, they could have moved in this Court for a stay of voluntary departure. By exercising any of these options, Petitioners might have preserved their privilege to depart voluntarily. In other words, this is not a case in which error on the part of the court or the INS put Petitioners in a worse position. An order, *nunc pro tunc*, granting a stay of voluntary departure is therefore inappropriate. *Cf. Edwards*, 393 F.3d at 312 (granting *nunc pro tunc* relief to aliens who were erroneously denied the opportunity to apply for INA § 212(c) relief); *Batanic v. INS*, 12 F.3d 662, 667-68 (7th Cir.1993) (ordering BIA to allow petitioner to apply for asylum *nunc pro tunc* to remedy IJ's error in proceeding with hearing without petitioner's attorney present); *see also Weil v. Markowitz*, 898 F.2d 198, 201 (D.C.Cir.1990) ("The paradigm case [for *nunc pro tunc* relief] involves a party who has died after his case has been submitted to the court, but before the court has entered judgment. Cases in which a party would otherwise be prejudiced by the clerk's delay in entering judgment stand upon the same footing." (citations omitted)).

Finally, we note one other factor that distinguishes *Desta* and *Rife* from this case. In each of those cases, our sister circuits were concerned that their prior case law had given petitioners reason to believe that they need not file a motion for a stay of voluntary departure. *Desta*, 365 F.3d at 749 ("Based on the prior state of the law, [petitioner] (and his counsel) would have been justified in thinking that the period of voluntary departure would be automatically stayed, just as it had been prior to IIRIRA."); *Rife*, 374 F.3d at 616 ("[O]ur past practice gave [petitioners] reason to believe that the stay of removal included a stay of their voluntary departure period as well."). This concern is notably absent here.

This Court has never held that aliens who file a petition for review are automatically entitled to a stay of voluntary departure. To the contrary, in *Ballenilla-Gonzalez*, we highlighted the fact that the petitioner there had not filed for a pe-

tition of review within the thirty days fixed by the period for voluntary departure nor had she requested a stay of the voluntary departure period pending appeal. 546 F.2d at 521. We noted that "[t]hese procedures enable the [BIA] or this court, in cases where a prima facie meritorious basis for appeal is shown, to permit its being pursued without prejudice to voluntary departure." *Id.* Thus, in contrast to the Eighth and Ninth Circuits, both of which had expressly criticized then existing law, in *Ballenilla-Gonzalez* we expressed approval for procedures already in place prior to the passage of IIRIRA. For that reason, we are not concerned, as the courts were in *Rife* and *Desta*, that Petitioners here may have been misled that they did not have to file a motion specifically seeking a stay of voluntary departure. If anything, our decision in *Ballenilla-Gonzalez* should have put them and their counsel on notice that a motion seeking such relief was necessary.

Although we decide that the stay of deportation should not be read so as to encompass a stay of voluntary departure, Petitioners may not be without a remedy. Under pre-IIRIRA regulatory authority, the INS District Director (now the appropriate Field Office Director, U.S. Immigration Customs Enforcement, Department of Homeland Security) may grant a *nunc pro tunc* extension of voluntary departure. *See* 8 C.F.R. § 1240.57 ("Authority to reinstate or extend the time within which to depart voluntarily specified initially by an immigration judge or the Board is within the sole jurisdiction of the district director."); *see also* 6 Gordon, Mailman & Yale-Loehr, *Immigration Law and Procedure* § 74.02[4][f] (rev. ed. 2005) ("Even after the expiration of the time for voluntary departure fixed by the immigration judge or the Board, a *nunc pro tunc* extension of the voluntary departure time may be granted by the district director if the [alien] presents a valid travel document and a confirmed reservation. In such cases the district director may cancel the warrant of deportation and may place in the [alien's] file an explanatory

memorandum and a copy of the letter authorizing the extension of voluntary departure time.").

Petitioners are both in their mid-to-late 60's and have been in the United States for more than a decade, without event. Their only child is a United States citizen, and the "immediate relative" petitions she submitted on her parents' behalf have already been approved. Furthermore, it appears that any delay on Petitioners' part may be attributable to counsel's failure to recommend that they seek to extend their voluntary departure period before overstaying that period, an omission that thereby made them ineligible for adjustment of their status based on approved "immediate relative" petitions. In this case, the INS District Director might well consider exercising his or her discretion to grant an extension so that Petitioners may adjust their status to lawful permanent residents. The law does not, however, support this Court granting the relief sought in the pending petitions.

The petitions for review are **DENIED**.