No. 06-1181

IN THE
Supreme Court of the United States

SAMSON TAIWO DADA,
Petitioner,
v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL,
Respondent.

**On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit**

BRIEF OF ADIL CHEDAD AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

MICHAEL F. STURLEY
LYNN E. BLAIS
727 East Dean Keeton Street
Austin, TX 78705
(512) 232-1350

SAHER JOSEPH MACARIUS
21 Walsh Street
Framingham, MA 01701
(508) 879-4443

DAVID C. FREDERICK
Counsel of Record
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

Counsel for Amicus Adil Chedad

November 13, 2007

QUESTION PRESENTED

Whether the filing of a motion to reopen removal proceedings automatically tolls the period within which an alien must depart the United States under an order granting voluntary departure.

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INTEREST OF *AMICUS CURIAE*[1]

Naturalization and visa applications have historically been subject to lengthy delays because of the large backlog of applications at United States Citizenship and Immigration Services ("USCIS"). *See*, *e.g.*, USCIS, U.S. Dep't of Homeland Security, *Backlog Elimination Plan* at iii (Dec. 11, 2006) (noting backlog high of 3.85 million cases in 2004 and 1.16 million backlogged cases in June 2006); Office of Immigration Statistics, U.S. Dep't of Homeland Security, *2003 Yearbook of Immigration Statistics* 133 (Sept. 2004) (noting that some 625,000 applicants were awaiting naturalization decisions at the end of fiscal years 2002 and 2003). The resolution of such applications is often the difference between relief for an alien and removal. Petitioner's case illustrates the dilemma that aliens face when forced either to elect the benefits of voluntary departure or to exercise their statutory right to file a motion to reopen a final administrative order of removal in hopes of benefiting from a decision on a naturalization or visa application.

Amicus Adil Chedad urges this Court to hold that a timely motion to reopen tolls the voluntary departure period. *See* 8 U.S.C. §§ 1229a(c)(7), 1229c(d). Mr. Chedad has a similar case pending in the First Circuit, and a decision for petitioner in this case will benefit *amicus*. In contrast to petitioner's case,

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[1] Pursuant to Rule 37.6, counsel for *amicus* declares that counsel for a party did not author this brief in whole or in part and that none of the parties or their counsel, nor any other person other than *amicus* or his counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief, and letters reflecting their consent are on file with the Clerk.

however, the Board of Immigration Appeals ("BIA") *granted* Mr. Chedad's motion to reopen. Even if this Court concludes that filing a motion to reopen is insufficient to toll the voluntary departure period, therefore, it should leave open the question whether a *granted* motion to reopen will toll the voluntary departure period.

Mr. Chedad, a Moroccan citizen, came to the United States in 1994 on a non-immigrant visa. In November 1997, he married Joanne Francisco, who was then a legal permanent resident and is now a naturalized U.S. citizen. In September 1997, the government instituted removal proceedings against Mr. Chedad because he had overstayed his visa. When those proceedings concluded on June 11, 1999, Mr. Chedad's request for voluntary departure was granted, and he was given sixty days to leave the country. Mr. Chedad promptly exercised his statutory right to appeal the decision of the Immigration Judge ("IJ").[2] While his appeal was still pending, Mr. Chedad's wife was naturalized, which entitled him to an adjustment of his immigration status. Because his appeal had been filed before his wife's naturalization, and thus could not have included that information, the BIA dismissed his appeal and granted Mr. Chedad an additional thirty days for voluntary departure. Before the expiration of that thirty-day period, Mr. Chedad filed a motion to reopen, which included the new evidence of his wife's naturalization. Based on his "prima facie eligibility" for an adjustment of status, the BIA granted Mr.

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[2] Although the IJ granted Mr. Chedad only a sixty-day voluntary departure period, the execution of that judgment was stayed pending resolution of the appeal. *See* 8 C.F.R. § 1003.6(a).

Chedad's timely motion to reopen; that grant of Mr. Chedad's motion occurred *after* the voluntary departure period had expired. On remand, however, the IJ denied relief because Mr. Chedad had remained in the United States beyond the voluntary departure period while waiting for the final resolution of his case. Mr. Chedad appealed to the First Circuit, which denied relief based on its erroneous belief that Congress intended to confer the benefits of voluntary departure only on those aliens who agree "to give up the fight and leave the country willingly." *Chedad v. Gonzales*, 497 F.3d 57, 63 (1st Cir. 2007).

The First Circuit has stayed its decision on Mr. Chedad's pending rehearing petition until this Court renders judgment in this case. Accordingly, because this Court's decision may directly affect his pending case in the First Circuit, Mr. Chedad has a strong interest in the favorable resolution of petitioner's claims so that he may remain in the United States with his wife and daughter.

SUMMARY OF ARGUMENT

This case falls within the interstices of two statutory provisions intended to benefit aliens — the section granting the right to file a motion to reopen and the section creating the opportunity to depart voluntarily. The Fifth Circuit has misconstrued those provisions to work at cross purposes, leaving aliens who try to comply with both provisions at risk of receiving the benefit of neither. On the one hand, aliens have a statutory right to file a motion to reopen proceedings within ninety days of a final order of removal. *See* 8 U.S.C. § 1229a(c)(7)(A), (C)(i). On the other, aliens also have a statutory right to seek voluntary departure if they meet certain conditions. *See id.*

§ 1229c(b)(1). If granted, the voluntary departure period for an alien extends for up to sixty days. *See id.* § 1229c(b)(2). An alien who fails to depart within that period may be ineligible for immigration relief for ten years. *See id.* § 1229c(d)(1)(B). An alien who in fact does depart within the voluntary departure period, however, is treated by the government as having withdrawn any pending motion to reopen. *See* 8 C.F.R. § 1003.2(d).

As the Fifth Circuit has interpreted the statutory timing provisions, an alien must navigate the potentially conflicting timing allowances permitted by the motion to reopen provision and the voluntary departure provision with the almost-certain possibility that one or the other benefit will be pretermitted. In this case, the Fifth Circuit adopted a draconian interpretation of those provisions, which ensures that an alien will be denied any form of relief once the voluntary departure period has expired. *See* Pet. App. 2.[3] That interpretation conflicts with congressional intent to provide aliens with a ninety-day period to file a motion to reopen and functionally denies aliens their statutory right to file such a motion because the BIA rarely acts on such motions within the sixty-day window provided for voluntary departure. The Fifth Circuit's interpretation creates a cruel

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[3] It should be noted that the Fifth Circuit's decision was based on *Banda-Ortiz v. Gonzales*, 445 F.3d 387 (5th Cir. 2006), *cert. denied*, 127 S. Ct. 1874 (2007) — a case decided against an alien, proceeding *pro se*, in which Judge Smith filed a strong dissent. *See id.* at 391 (Smith, J., dissenting). When rehearing en banc was denied, Judge Smith's dissent from that decision attracted support from four other circuit judges. *See Banda-Ortiz v. Gonzales*, 458 F.3d 367, 368 (5th Cir. 2006) (Smith, J., dissenting, on denial of rehearing).

irony that Congress could not have intended: motions filed by aliens who qualify and elect voluntary departure will *not* be adjudicated on the merits, whereas aliens ordered to be deported or removed in the first instance are able to have their motions adjudicated without sustaining any diminution or abridgment of statutorily created benefits.

Four federal circuits have interpreted the Immigration and Nationality Act ("INA") to allow tolling of the voluntary departure period upon the timely filing of a motion to reopen. *See Ugokwe v. United States Att'y Gen.*, 453 F.3d 1325, 1331 (11th Cir. 2006); *Kanivets v. Gonzales*, 424 F.3d 330, 335 (3d Cir. 2005); *Sidikhouya v. Gonzales*, 407 F.3d 950, 952 (8th Cir. 2005); *Azarte v. Ashcroft*, 394 F.3d 1278, 1289 (9th Cir. 2005); *see also Chedad*, 497 F.3d at 66 (Lipez, J., dissenting); *Banda-Ortiz*, 445 F.3d at 391 (Smith, J., dissenting). That interpretation best serves congressional intent and enables aliens to fully exercise their statutory right to file a motion to reopen. This Court should sustain the majority position and hold that a timely motion to reopen tolls the voluntary departure period.

If this Court should decide *not* to adopt that approach, Mr. Chedad falls into a smaller class of aliens that this Court should protect. However the Court chooses to resolve the situation presented in Mr. Dada's case when an alien simply files a motion to reopen, it should protect aliens in situations such as Mr. Chedad's, because a timely motion to reopen that the BIA *grants* should toll the voluntary departure period. *Cf. Orichitch v. Gonzales*, 421 F.3d 595, 597-98 (7th Cir. 2005) (holding that the BIA's grant of a motion to reopen vacates a previous voluntary departure order). The BIA's recognition of prima facie

merit in the alien's status, evidenced by its grant of a motion to reopen, should suffice to toll the period in which voluntary departure is available. Such an interpretation accords with Congress's intent in conferring such benefits on aliens, while also respecting the agency's judgment that the alien has presented the requisite prima facie showing of eligibility for immigrant status.

ARGUMENT

I. TIMELY MOTIONS TO REOPEN TOLL THE VOLUNTARY DEPARTURE PERIOD

At the conclusion of removal proceedings, the INA provides that "[a]n alien may file one motion to reopen proceedings." 8 U.S.C. § 1229a(c)(7)(A). An alien's motion to reopen "shall be filed within 90 days of the date of entry of a final administrative order of removal." *Id.* § 1229a(c)(7)(C)(i). The BIA, however, considers a motion to reopen to be withdrawn upon "[a]ny departure from the United States." 8 C.F.R. § 1003.2(d). Additionally, an alien who complies with an order of removal may not file a motion to reopen after having departed the United States. *See id.*

The INA also provides that "[t]he Attorney General may permit an alien voluntarily to depart the United States" if the alien meets certain criteria. 8 U.S.C. § 1229c(b)(1). The period for voluntary departure cannot exceed sixty days. *See id.* § 1229c(b)(2). Aliens who fail to depart within the period permitted "shall be ineligible, for a period of 10 years, to receive any further relief under this section and sections 1229b, 1255, 1258, and 1259 of this title." *Id.* § 1229c(d)(1)(B).

When these two provisions are read as they were by the Fifth Circuit in *Dada*, they put an alien in the

untenable position of having to choose between two equally bad alternatives: either the alien can remain in the United States, only to have his motion to reopen denied if the agency does not act on his motion within the voluntary departure period, or the alien can comply with the voluntary departure period at the expense of forfeiting his statutory right to file a motion to reopen. Congress did not intend for aliens to be put to such a dilemma.

A. The Motion To Reopen Provision Gives Aliens A Single, But Ample, Opportunity To Show A Change In Immigration Status

Congress purposefully provided aliens with a statutory right to file a motion to reopen proceedings within ninety days of a final order of removal. *See* 8 U.S.C. § 1229a(c)(7)(C)(i). The statute provides that "[a]n alien *may* file one motion to reopen proceedings." *Id.* § 1229a(c)(7)(A) (emphasis added). Here, the word "may" is used with its ordinary meaning, as "an auxiliary verb, qualifying the meaning of another verb, by expressing ability." *United States v. Lexington Mill & Elevator Co.*, 232 U.S. 399, 411 (1914) (internal quotation marks omitted). "The word 'may' clearly connotes discretion." *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 533 (1994). By using "may" in this statute, Congress has conferred a substantive right upon aliens by giving them the ability, and discretion, to file one motion to reopen proceedings.

Congress afforded aliens an opportunity to file a motion to reopen in recognition of the possibility that an alien's status might change during the immigration hearing process. *See* 8 U.S.C. § 1229a(c)(7)(B) ("[t]he motion to reopen shall state the *new* facts") (emphasis added). Congress did not intend for that

process to be subject to repeated and interminable proceedings, however, which is why it limited the alien to *one* opportunity to file a motion to reopen. *See id.* § 1229a(c)(7)(A). Having conferred that right on aliens, it is clear from the statutory text that Congress intended for the alien also to have the right to have that motion adjudicated on its merits. *See id.* § 1229a(c)(7)(B) ("[t]he motion to reopen shall state the new facts *that will be proven at a hearing to be held if the motion is granted*") (emphasis added). Indeed, it would be not only meaningless but absurd for Congress to grant the right to move to reopen the proceedings if the agency were precluded, in the ordinary course of events, from deciding the motion on its merits.

B. The Voluntary Departure Provision Is Intended To Afford Aliens A Special Benefit To Leave The Country With Respect And Dignity, Not To Undermine The Substantive Right To Rehearing If The Alien's Circumstances Change

The voluntary departure provision is a separate benefit afforded to certain aliens of good standing at the conclusion of removal proceedings. *See* 8 U.S.C. § 1229c(b)(1). To receive voluntary departure, an alien must (1) have the means and intent to depart the United States; (2) have been physically present in the United States for at least one year prior to the institution of removal proceedings; and (3) be a person of good moral character. *See id.* Only a relatively small number of aliens placed in removal proceedings qualify for voluntary departure.[4] Aliens

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[4] Of the 220,057 removal proceedings conducted in fiscal year 2006, only some 22,214 — 10.1 percent — were resolved by

granted voluntary departure must depart the United States within sixty days of the conclusion of removal proceedings. *See id.* § 1229c(b)(2).

Congress enacted the voluntary departure provision to show special respect for aliens who, although they did not meet the requisites for immigrant status, nonetheless had comported themselves in a manner warranting respectful treatment. Thus, the findings of length of duration and good moral character are fundamental to the alien's qualification for voluntary departure, and such departures provide aliens an opportunity to get their affairs in order and to leave the country in a respected and respectable manner. Nothing in the plain text of the statute indicates an intent for the voluntary departure provision to undermine the alien's right to obtain rehearing if a change in circumstances affects his or her status.

C. The Fifth Circuit's Approach Creates An Illogically Punitive Anomaly That Is Contrary To Congressional Intent

The Fifth Circuit's interpretation should be rejected, because it renders an important provision of the INA virtually ineffectual and is therefore inconsistent with the well-settled principle that a provision's force and effect must be interpreted in light of the entire statute. *See*, *e.g.*, *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988). When a statutory provision is susceptible to two reasonable interpretations, its meaning can often be "clarified by the remainder of

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granting voluntary departure. *See* Executive Office for Immigration Review, U.S. Dep't of Justice, *FY 2006 Statistical Year Book* at Q1 (Feb. 2007) ("*2006 Statistical Year Book*").

the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *Id.* By holding that the sixty-day voluntary departure period cuts off the ability of the BIA to act on a pending motion to reopen, the Fifth Circuit's reading of the statute renders the motion to reopen provision functionally meaningless.

In practice, the BIA rarely rules on motions to reopen prior to the expiration of an alien's voluntary departure period.[5] *See Banda-Ortiz*, 445 F.3d at 393 n.5; *Sidikhouya*, 407 F.3d at 952; *Azarte*, 394 F.3d at 1282. Because motions to reopen are rarely adjudicated within sixty days, individuals granted voluntary departure are functionally deprived of the right to file a motion to reopen. The irony, however, is that those aliens who do *not* qualify for voluntary departure may obtain a decision on the merits of their motions to reopen. Thus, an alien who is *not* a person in good standing with the United States (and therefore ineligible for voluntary departure under § 1229c(b)[6]) may ultimately receive relief, because the only limitation on the adjudication of those motions to reopen is the alien's physical presence in the United States. *See* 8 C.F.R. § 1003.2(d). That result is fundamentally unfair as it transforms the privilege of voluntary departure into a punishment.

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[5] Of the 27,918 cases pending before the BIA as of September 30, 2006, 6,154 had been pending from September 30, 2005, or earlier. *See 2006 Statistical Year Book* at U1.

[6] Our focus is on voluntary departure at the close of proceedings, and not the voluntary provision that may be invoked before the conclusion of proceedings, which does not contain a requirement of good moral standing. *See* 8 U.S.C. § 1229c(a).

Statutory interpretations that compel absurd results must be avoided. *See*, *e.g.*, *United States v. Wilson*, 503 U.S. 329, 334 (1992). Even were this statute merely ambiguous, this Court should adopt petitioner's position as it has long "constru[ed] any lingering ambiguities in deportation statutes in favor of the alien." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987). Accordingly, the filing of a motion to reopen must toll the voluntary departure period to effectuate congressional intent.

D. An Interpretation That Permits Tolling On Timely Motions To Reopen Serves The Statute's Policy Purposes

A rule that permits tolling serves the policies behind the INA and accomplishes congressional intent. Congress was concerned with the potential for abuse in the filing of motions to reopen. *See* Immigration Act of 1990, Pub. L. No. 101-649, § 545, 104 Stat. 4978, 5066 (directing the Attorney General to research the use of motions to reopen and instructing him to limit the number of motions allowed and the time period allotted for filing such motions). Congress revised the INA to prevent the filing of frivolous motions to reopen. The 1996 amendments corrected potential abuse by imposing strict limitations on motions to reopen. *See* 8 U.S.C. § 1229a(c)(7)(A)-(C). Congress did not express an intent to impose additional restrictions on filing motions to reopen that would force the most law-abiding aliens to face a choice of which rights they could exercise. In that respect, the Fifth Circuit's interpretation goes far beyond what Congress intended.

Tolling the voluntary departure period preserves the status quo and maintains the reasonable limits

on voluntary departure that Congress intended. Congress imposed a reasonable limitation on aliens by allowing them to file *only one* motion to reopen. *See id.* § 1229a(c)(7)(A). Congress further limited their availability by requiring that the motion be filed within ninety days of a final order of removal and that it be supported by evidence of newly discovered facts. *See id.* § 1229a(c)(7)(B), (C)(i). Those restrictions were considered adequate to prevent abusive filings. Congress's inclusion of a new-evidence requirement further evinces its intent to have these motions adjudicated on their merits, rather than on judicially created procedural bars. Given that most aliens' circumstances will not change significantly within the ninety-day filing period or the period in which their case is considered on appeal, there is little incentive for them to file frivolous motions. Additionally, waiting for the motion to be adjudicated on its merits puts the government in no worse a position than it was at the conclusion of the initial appeal. If a motion to reopen is denied, the tolling stops and the alien must depart within the remaining time period.

Thus, tolling alleviates the draconian consequences imposed by the Fifth Circuit's interpretation of the INA and enables Congress's intent to be effectuated by allowing the resolution on the merits of aliens' motions to reopen.

II. A TIMELY MOTION TO REOPEN, *WHEN GRANTED* BY THE BIA, TOLLS THE VOLUNTARY DEPARTURE PERIOD

Even if this Court were to conclude — contrary to petitioner's and his *amici*'s submissions — that the filing of a motion to reopen does not toll the

voluntary departure period, this Court should recognize that other appropriate and related circumstances *may* toll the voluntary departure period. Mr. Chedad's case presents just such a circumstance.

If this Court chooses not to accept petitioner's claim, it should leave open for future resolution whether the BIA's *grant* of a motion to reopen tolls the period within which an alien must depart the United States under a voluntary departure order. Important policy considerations justify that position: when the BIA *grants* a motion to reopen, it does so based on some critical change necessitating reconsideration, such as evidence that was unavailable at the initial immigration hearing.

A. Not Only Was Mr. Chedad's Motion To Reopen Timely, But The BIA Also Granted It

At the conclusion of his first appeal to the BIA, Mr. Chedad was given thirty days voluntarily to depart from the United States. *See Chedad*, 497 F.3d at 60 n.5. Before the expiration of the voluntary departure period and within the ninety-day period permitted for filing motions to reopen, Mr. Chedad filed his *one* statutorily permitted motion to reopen. *See id.*; *see* 8 U.S.C. §§ 1229a(c)(7)(A) (allowing only *one* motion to reopen), 1229a(c)(7)(C)(i) (requiring that the motion to reopen be filed within ninety days of the final administrative order of removal).

Mr. Chedad timely filed his motion to reopen based on new evidence that had been unavailable to him at the time of his immigration hearing. *See Chedad*, 497 F.3d at 57; *see* 8 U.S.C. § 1229a(c)(7)(B). During the pendency of his BIA appeal, Mr. Chedad's wife became a naturalized citizen. *See Chedad*, 497 F.3d at 59. Because his I-130 petition had already been

approved, *see id.*, Mr. Chedad was immediately eligible for an adjustment of status. *See* 8 U.S.C. §§ 1151(b)(2)(A)(i), 1255(a). Based on his wife's citizenship and his approved I-130 application, the BIA *granted* Mr. Chedad's motion to reopen, noting that he had established prima facie eligibility for an adjustment of status. *See Chedad*, 497 F.3d at 60.

On remand, however, the IJ denied Mr. Chedad relief on the ground that he had overstayed the voluntary departure period, something the BIA did not note in its opinion even though it rendered its decision outside the voluntary departure period set for Mr. Chedad. *See id.* Furthermore, the IJ's decision contravenes the clear language of the statute, which states that an alien will be able to prove those new facts "at a hearing to be held *if the motion is granted*." 8 U.S.C. § 1229a(c)(7)(B).

When it *grants* a timely motion to reopen, the BIA's decision should suffice to toll the voluntary departure period even if the *filing* of such a motion is insufficient. Indeed, the Seventh Circuit has gone even further and held that the BIA's grant of a motion to reopen vacates its previous voluntary departure order and thus does not present the alien with a bar to relief. *See Orichitch*, 421 F.3d at 597-98.

B. The New Evidence Presented In Mr. Chedad's Motion To Reopen Established A Prima Facie Case For His Eligibility To Adjust Status

The most compelling rationale for allowing the voluntary departure period to be tolled is when the underlying claims supporting the motion to reopen are likely meritorious. When it *grants* a motion to reopen, the BIA has determined that the alien has

satisfied the burden of demonstrating a prima facie change in status warranting admission into the United States. A rule that does not allow for tolling of the voluntary departure period when a motion to reopen is either timely or timely and granted eviscerates the purpose of the motion to reopen provision. Because the circumstances of Mr. Chedad's case are unlikely to affect many aliens, the INA should be construed to effectuate its purpose by giving aliens the opportunity to have their claims adjudicated on the merits.

Because motions to reopen must be accompanied by new evidence relevant to the immigration status of the alien, abusive motions can be readily identified and rejected. A decision to grant a motion to reopen is highly probative of the alien's likelihood of success on the merits. Mr. Chedad, for example, had no basis for filing a motion to reopen until his wife's naturalization application had been approved. Similarly, an alien whose spouse's naturalization application is denied, or is not yet resolved before the voluntary departure period expires, would have no such incentive to file a motion to reopen, and, were he to do so, the motion would be summarily denied. But, when aliens file motions to reopen that convince the BIA that their claims for readjustment of status are likely to be meritorious, the voluntary departure period should be tolled so as not functionally to deprive them "of their statutory right to file a motion to reopen." *Azarte*, 394 F.3d at 1282.

Had his wife's naturalization application been approved soon enough to have been available at Mr. Chedad's immigration hearing, he would have succeeded in adjusting his status. *See* 8 U.S.C. §§ 1151(b)(2)(A)(i), 1255(a). On February 21, 2003 —

nearly three months after the "expiration" of the voluntary departure period — the BIA granted Mr. Chedad's motion to reopen based on the change in his wife's status, noting that he had demonstrated to the BIA that "he [was] prima facie eligible for an adjustment of status." *Chedad*, 497 F.3d at 60 (internal quotation marks omitted). But Mr. Chedad's claim was never judged on its merits.

Many other aliens are presented with evidence that would entitle them to immigration relief and a small window in which to present it to the BIA. When such relief is not speculative, as in Mr. Chedad's case, there is no reason to deny tolling.

A reading of the INA that does not recognize tolling puts aliens in the "'untenable position of having to choose between two equally undesirable alternatives.'" *Banda-Ortiz*, 445 F.3d at 393 (Smith, J., dissenting) (quoting *In re Wilson*, 442 F.3d 872, 878 (5th Cir. 2006)). This is a particularly harsh result "when one considers that it operates to disadvantage those aliens whose good behavior has entitled them to the solicitude of the law of voluntary departure." *Id.*

Navigating the byzantine immigration system, often in a language other than their own and without the aid of counsel,[7] already presents aliens with a daunting task. The INA should not be construed to compel absurd results by making an already difficult task nearly impossible.

CONCLUSION

The court of appeals' judgment should be reversed.

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[7] *See Barroso v. Gonzales*, 429 F.3d 1195, 1196-97 & n.2 (9th Cir. 2005) (discussing the vulnerability and victimization of aliens by persons falsely representing that they are licensed attorneys).

Respectfully submitted,

MICHAEL F. STURLEY
LYNN E. BLAIS
727 East Dean Keeton Street
Austin, TX 78705
(512) 232-1350

SAHER JOSEPH MACARIUS
21 Walsh Street
Framingham, MA 01701
(508) 879-4443

DAVID C. FREDERICK
Counsel of Record
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

Counsel for Amicus Adil Chedad

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