

**No. 08-2455**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

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**ROLANDO HERNANDEZ,**

**Petitioner,**

**v.**

**ERIC H. HOLDER, JR., United States Attorney General,**

**Respondent.**

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**PETITION FOR REVIEW OF AN ORDER OF  
THE BOARD OF IMMIGRATION APPEALS**

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**RESPONDENT'S RESPONSE AND OPPOSITION  
TO PETITIONER'S PETITION FOR PANEL REHEARING**

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## **INTRODUCTION**

Respondent respectfully opposes Petitioner's rehearing petition, which seeks panel rehearing on the limited issue of whether the agency erred in declining to grant Petitioner a continuance. In its decision, published at 579 F.3d 864, the Court correctly determined that, pursuant to its prior precedent, judicial review of the agency's denial of a continuance is limited to reviewing constitutional claims and questions of law and that Petitioner had presented no such viable claims. The Court accordingly concluded that it lacked jurisdiction to review the agency's denial of the continuance request. As this conclusion is compelled by the case law of this Court, the decision under review contains no legal or factual errors and therefore does not merit panel rehearing. Petitioner does not seek en banc rehearing, nor would en banc consideration be warranted here. His rehearing petition should accordingly be denied.

## **BACKGROUND**

Petitioner Rolando Hernandez ("Petitioner" or "Hernandez") is a native of Guatemala who last entered the United States illegally in 1992. Administrative Record ("AR") 166, 328. In his deportation proceeding (commenced in 1993), he claimed that he faced persecution by a guerrilla group he had deserted after being forcibly conscripted. AR 1216-20. His application for asylum was granted by an immigration judge who had been detailed to the immigration court where the

proceeding occurred (Minnesota). AR 745, 941-54. The government appealed, and in 2002, after additional administrative and judicial proceedings, this Court remanded the case for further proceedings. Hernandez v. Reno, 258 F.3d 806, 815 (8th Cir. 2001).

On remand, the case was heard by a different immigration judge as the prior immigration judge no longer served details to that immigration court. AR 745. Hernandez continued to pursue his asylum application. AR 281-304, 484-86. In addition, as alternative forms of relief, Hernandez filed an application for suspension of deportation, AR 270-71, 464, 566-74, and further filed a motion for administrative closure for purposes of repapering, along with an application for cancellation of removal. AR 390-91, 463-72. “‘Repapering’ is the process by which the Attorney General may terminate prior exclusion [or deportation] proceedings and instead initiate new removal proceedings. This process allows aliens previously in exclusion [or deportation] proceedings to apply for cancellation of removal, which would have otherwise been unavailable prior to the effective date of’ the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009, 3546-724. Ming-Hui Wu v. Holder, 567 F.3d 888, 890 n.4 (7th Cir. 2009) (citation omitted). In the alternative, Hernandez requested a continuance “pending final publication of the

repapering regulation.” AR 464. DHS opposed administrative closure or a continuance. AR 380.

The new immigration judge denied Hernandez’s asylum application based on changed country conditions in Guatemala and also denied his application for suspension of deportation. AR 92-94. He further denied Hernandez’s motion for administrative closure, and ordered him removed to Guatemala. AR 91, 94. The Board adopted and affirmed the immigration judge’s denial of asylum and related relief and dismissed Hernandez’s appeal. AR 2-3. The Board also affirmed the denial of Hernandez’s motion for administrative closure for repapering, agreeing that “[a]n [i]mmigration [j]udge cannot administratively close deportation proceedings over the objection of either party.” AR 2. The Board further approved the denial of a continuance to await the promulgation of repapering regulations (expressly ruling on the continuance request where the immigration judge did not), holding that “the [i]mmigration [j]udge did not err in not granting a continuance, as the possibility of a future promulgation of regulations that might represent a favorable change to . . . one party or the other does not generally constitute good cause for a continuance.” AR 3.

The Court denied Hernandez’s ensuing petition for review in part and granted it in part. It ruled that the Board failed to consider whether Hernandez

should be granted humanitarian asylum under 8 C.F.R. § 1208.13(b)(1)(iii)(B), and granted the petition and remanded as to this issue. Hernandez, 579 F.3d at 876. With regard to the Board’s denial of Hernandez’s requests for a continuance or for administrative closure, the Court first held that the Board’s denial of Hernandez’s request for a continuance “is a discretionary determination over which [the Court] lack[s] jurisdiction.” Id. at 877. Second, the Court also held that it lacks jurisdiction over the denial of the motion for administrative closure because: (1) the decision to administratively close a case is “not distinguishable from a continuance,” and the Court lacks jurisdiction to review continuance denials, id. (quoting Garza-Moreno v. Gonzales, 489 F.3d 239, 242 (6th Cir. 2007)); and (2) “there is no sufficiently meaningful standard for evaluating the [immigration judge]’s or the [Board]’s decision not to close a case.” 579 F.3d at 877 (citing, *inter alia*, Diaz-Covarrubias v. Mukasey, 551 F.3d 1114, 1118 (9th Cir. 2009)). The Court then stated that, even if it had jurisdiction to review the denial of administrative closure, the Board correctly held that it lacked discretion to do so where DHS objected. 579 F.3d at 877-78.

**ARGUMENT**

**THE COURT’S DETERMINATION THAT IT LACKS JURISDICTION  
TO REVIEW THE AGENCY’S CONTINUANCE DENIAL DOES  
NOT MERIT PANEL REHEARING**

**A. The Court’s Jurisdictional Determination Is Compelled By  
Current Eighth Circuit Case Law**

As the Court noted in its decision herein, it has previously held that judicial review of the agency’s discretionary denial of a continuance is precluded by 8 U.S.C. § 1252(a)(2)(B)(ii) (barring review of decisions “the authority for which is specified under this subchapter to be in the discretion of the Attorney General”). See Hernandez, 579 F.3d at 876-77 (citing Castro-Pu v. Mukasey, 540 F.3d 864, 869 (8th Cir. 2008), and Grass v. Gonzales, 418 F.3d 876, 879 (8th Cir. 2005), as “controlling precedent”). Although this conclusion is contrary to the government’s position on this issue, see Resp. Br. 27 n.10, it is the binding law of this Circuit, and the panel is required to apply it. Ikenokwalu-White v. Gonzales, 495 F.3d 919, 924 & n.2 (8th Cir. 2007).

The Court also correctly summarized its case law when it stated that the foregoing jurisdictional bar is qualified by 8 U.S.C. § 1252(a)(2)(D), which preserves the Court’s jurisdiction to review “constitutional claims or questions of law.” See 579 F.3d at 877 (citing Grass, 418 F.3d at 879). Hernandez argues that

the Board's denial of a continuance here presents a legal issue because he had argued, in pressing for a continuance, that he met the legal standards for eligibility for repapering relief. Reh'g Pet. 2. He contends that the Board "was obligated to rule on this legal argument" (regarding repapering eligibility) in considering the continuance request and erred when it failed to do so. Id. He argues that he "was *entitled* to a continuance because he demonstrated his apparent eligibility for cancellation relief as a matter of regulation." Id. at 3 (emphasis supplied).

The Court correctly declined to find that the continuance denial presented a legal question. Hernandez's claims that he met the legal standards for repapering are irrelevant. Hernandez sought a continuance to await final publication of the repapering regulation; without judging whether he was or would be eligible under such a final regulation, the Board simply held that it would not continue the case to await a regulation that had been pending for years. AR 3. This decision is a classic discretionary decision, involving the discretionary weighing of various relevant factors, but no legal determinations. Nor does it suggest sufficient procedural unfairness as to implicate due process. See Grass, 418 F.3d at 878. Indeed, in his opening brief, Hernandez phrased his claim against the continuance denial in terms of an abuse of discretion, not in the labored language of a legal claim he uses herein. Petr.'s Br. 32 (arguing that "the IJ had far more than good

cause to continue the proceedings”). Accordingly, the Court correctly found it lacked jurisdiction to review the continuance denial, and panel rehearing on this issue is not warranted.

**B. Petitioner Has Not Sought En Banc Rehearing, Which Is Not Warranted In Any Event**

In his rehearing petition, Hernandez also questions whether the Court’s jurisdictional position on review of continuance denials is the correct one, and points out that the Supreme Court might overrule the Court’s underlying reasoning in the pending case of Kucana v. Mukasey, 533 F.3d 534 (7th Cir. 2008), cert. granted sub nom. Kucana v. Holder, 129 S. Ct. 2075 (Apr. 27, 2009) (No. 08-911). Reh’g Pet. 3-4. To be sure, this Court has previously observed that its view of its jurisdiction over continuance denials is at odds with that of the majority of the circuits. Ikenokwalu-White, 495 F.3d at 924 n.2. Specifically, since Grass, a majority of the circuits have determined that the courts of appeals do have jurisdiction to review the agency’s discretionary denial of a motion to continue. See Sandoval-Luna v. Mukasey, 526 F.3d 1243, 1246 (9th Cir. 2008); Alsamhour v. Gonzales, 484 F.3d 117, 122 (1st Cir. 2007); Zafar v. U.S. Att’y Gen., 461 F.3d 1357, 1360-62 (11th Cir. 2006); Khan v. Att’y Gen. of the U.S., 448 F.3d 226, 231-32 (3d Cir. 2006); Ahmed v. Gonzales, 447 F.3d 433, 436-37 (5th Cir. 2006);

Sanusi v. Gonzales, 445 F.3d 193, 198-99 (2d Cir. 2006); Abu-Khaliel v. Gonzales, 436 F.3d 627, 632-34 (6th Cir. 2006). But see Malik v. Mukasey, 546 F.3d 890, 892 (7th Cir. 2008); Subhan v. Ashcroft, 383 F.3d 591, 595 (7th Cir. 2004). In general, these circuits have determined that the jurisdictional bar of 8 U.S.C. § 1252(a)(2)(B)(ii) applies only when the grant of discretion to the Attorney General comes from the Immigration and Nationality Act itself, and does not preclude judicial review when the source of discretionary authority is not statutory, but is found only in an implementing regulation, as it is with regard to continuances (see 8 C.F.R. § 1003.29). See, e.g., Alsamhuri, 484 F.3d at 122.

Given this conflict between this Circuit's case law and the majority view, the Court has stated that "that it may be appropriate for [this] court to revisit this issue en banc." Ikenokwalu-White, 495 F.3d at 924 n.2. However, Hernandez has not sought en banc here. Nor does this case present a suitable vehicle for such consideration. Even if the Court had jurisdiction to review continuance denials, it would be hard pressed to find that the continuance denial here was an abuse of discretion. As Hernandez admitted in his opening brief, he was requesting an indefinite continuance, as there was no firm indication when the long-pending repapering regulations would be promulgated. Petr.'s Br. 18. This Court would likely find that the denial of Hernandez's request for an indefinite continuance was

not an abuse of discretion, and therefore would not overturn the Board's decision even if it had jurisdiction.<sup>1</sup> See Lendo v. Gonzales, 493 F.3d 439, 442 (4th Cir. 2007) (holding that immigration judge did not abuse his discretion in denying alien's request for indefinite continuance to await processing of wife's labor certification application); Khan, 448 F.3d at 235 (same). Accordingly, en banc consideration, and reversal on the jurisdictional issue, would not change the result here, and, therefore, such consideration is not warranted.<sup>2</sup> See Ikenokwalu-White, 495 F.3d at 924 n.2 (declining to address issue en banc in that case because "even if we were to determine that we have jurisdiction . . . , [petitioners'] claims are wholly without merit"); Dace v. ACF Industries, Inc., 728 F.2d 976, 978 (8th Cir. 1984) ("We see no purpose in convening the Court en banc to decide an issue that,

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<sup>1</sup> Rather than an indefinite continuance, a more appropriate remedy for an alien eligible for "repapering" would be administrative closure. See AR 399. However, such closure is not granted if the government objects, In re Lopez-Barrios, 20 I. & N. Dec. 203, 204 (BIA 1990); see also Garza-Moreno v. Gonzales, 489 F.3d 239, 242-43 (6th Cir. 2007), and the government did so object here. The immigration judge and the Board accordingly declined to administratively close proceedings, Hernandez, 579 F.3d at 877, and Hernandez does not seek rehearing on this issue.

<sup>2</sup> Likewise, a decision in the pending Supreme Court case, Kucana, would have no practical impact on this case. Even if the Court's reasoning regarding its jurisdiction over discretionary decisions (like the continuance denials at issue here and the reopening denial at issue in Kucana) is incorrect, the result should still be affirmed here.

even if it went in the defendant's favor, would not produce a decision affirming the directed verdict.").

**CONCLUSION**

For the foregoing reasons, the Court should deny the Petition for Panel Rehearing.

Respectfully submitted,

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Dated: November 16, 2009

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 16th day of November, 2009, I electronically filed the foregoing **Respondent's Response and Opposition To Petitioner's Petition For Panel Rehearing** with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF user:

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