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Judicial Review of Visa Petition Revocations: A "Precedential Cascade"

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JUDICIAL REVIEW OF VISA PETITION REVOCATIONS: A "PRECEDENTIAL CASCADE"

Abstract: The Secretary of Homeland Security has the power to revoke approved visa petitions pursuant to the grant of authority in 8 U.S.C. § 1155, part of the Immigration and Nationality Act (INA). The circuit courts disagree over whether the Secretary's decisions under this provision are subject to judicial review. On April 7, 2020, the United States Court of Appeals for the Fourth Circuit, in *Polfliet v. Cuccinelli*, held that the Secretary's authority under 8 U.S.C. § 1155 is discretionary. In doing so, the Fourth Circuit joined nine other circuit courts to find that visa petition revocation decisions are discretionary and, as such, 8 U.S.C. § 1252(a)(2)(B)(ii) precludes judicial review of the decisions. This Comment considers the impact of the 2010 Supreme Court decision, *Kucana v. Holder*, on the analysis of jurisdictional bars in cases like *Polfliet*. This Comment argues that the Fourth Circuit, in *Polfliet*, should have adopted the interpretive principles that the Supreme Court used in *Kucana* and resisted the precedential cascade.

INTRODUCTION

Under the Immigration and Nationality Act (INA), United States citizens and lawful permanent residents may submit visa petitions to the United States Citizenship and Immigration Services (USCIS) on behalf of certain family members, pursuant to 8 U.S.C. § 1154.[1] After receiving an approved visa peti-

[1] 8 U.S.C. § 1154(a)(1)(A)(i), (ii), (iv) (authorizing visa petitions based on family relationships including for spouses and children). Lawful permanent residents are noncitizens with authorization to reside permanently in the United States. *See id.* § 1101(a)(20) (defining "lawfully admitted for permanent residence"). United States Citizenship and Immigration Services (USCIS) is a division of the Department of Homeland Security that oversees the processing of immigration applications including visa petitions and citizenship. *See* 6 U.S.C. § 271(b)(1) (authorizing the assignment of the adjudication of visa petitions to USCIS). The "petitioner" is the U.S. citizen or lawful permanent resident submitting the application, and the "beneficiary" is the alien family member seeking to immigrate. *See* 8 U.S.C. § 1154; IRA J. KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK 1442 (17th ed. 2020) (describing the relationship between petitioner and beneficiary for family-based visa petitions). USCIS reviews the nature of the family relationship and the petitioner's immigration status to determine eligibility for a visa petition. *See* 8 C.F.R. § 204.2(d)(2) (2020) (describing the required evidence for visa petition applications for a child). Family visa petitions are not available to U.S. citizens with certain convictions for offenses related to minors, absent a discretionary determination that the petitioner poses no risk to the beneficiary, pursuant to the Adam Walsh Act (AWA). *See* 8 U.S.C. § 1154(a)(1)(A)(viii) (promulgating the AWA's visa petition eligibility bar that was intended to protect noncitizens from any risks associated with obtaining visa petitions based on relationships with citizens that have certain criminal histories).

tion, the beneficiary may apply for legal permanent residence.[2] An approved visa petition does not guarantee a subsequent grant of permanent residency.[3] USCIS considers additional admissibility grounds and retains the discretionary authority to deny admission.[4] Additionally, USCIS may revoke an approved visa petition pursuant to 8 U.S.C. § 1155.[5] Revocation of a visa petition eliminates the beneficiary's eligibility for a visa but does not automatically result in removal from the United States.[6] Petitioners may appeal revocation decisions to the Board of Immigration Appeals (BIA).[7] After exhausting administrative remedies, petitioners sometimes seek judicial review of the revocation decision in federal court, but they often encounter a jurisdictional bar.[8]

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[2] *See* 8 U.S.C. § 1202 (providing the requirements to apply for an immigrant visa); *id.* § 1255 (describing the requirements for another mechanism for obtaining permanent residence once a person has a valid immigrant visa); Matter of Ho, 19 I. & N. Dec. 582, 582 (B.I.A. 1988) (describing an approved visa petition as a preliminary step to acquiring an actual visa).

[3] *Ho*, 19 I. & N. Dec. at 582 (holding that an approved visa petition does not bestow rights nor entitle the beneficiary to an immigrant visa).

[4] *See* 8 U.S.C. § 1255 (outlining the eligibility criteria for obtaining permanent residence status such as having a valid visa petition or prolonged physical presence in the United States); *id.* § 1182 (enumerating grounds for denying admission, including health, criminal history, threats to national security, and likelihood of being a public charge); *see also* Rebecca Hayes, Comment, *Lawful Permanent Residency: What the United States Citizenship & Immigration Services Giveth, It Can Also Take Away,* 59 B.C. L. REV. ELEC. SUPP. 329, 332–36 (2018), https://lawdigitalcommons.bc.edu/bclr/vol59/iss9/19 [https://perma.cc/V6YG-4WQC] (discussing the history and evolution of eligibility requirements for obtaining lawful admission for permanent residence).

[5] 8 U.S.C. § 1155. To revoke a visa petition, USCIS must issue a notice of intent to revoke the petition and allow the petitioner the opportunity to respond with evidence to refute the revocation. *See* 8 C.F.R. § 205.2(b) (2020) (governing the process of visa petition revocation). Then, USCIS must issue a written explanation of its decision. *Id.* A previous version of § 1155 required the issuance of notice before the petitioner travelled to the United States. *See* 8 U.S.C. § 1155 (1996) (authorizing the revocation of visa petitions so long as the petitioner received notice prior to entering the United States). Congress removed that requirement in 2004. *See id.* § 1155 (2004) (authorizing the revocation of visa petitions regardless of the location of the beneficiary).

[6] *See*, *e.g.*, Polfliet v. Cuccinelli, 955 F.3d 377, 384 (4th Cir. 2020) (noting that the individual was not in removal proceedings despite the revocation of his visa petition years earlier). The government must separately initiate removal proceedings—adjudications in which noncitizens have an opportunity to present evidence, and an immigration judge determines the noncitizen's eligibility to remain in the United States. 8 U.S.C. § 1229a (2020). The Government initiates removal proceedings by issuing a notice to appear. *Id.* § 1229(a). A notice to appear is a legal document that states the immigration charges brought against a noncitizen. *Id.* § 1229(a)(1).

[7] *See* 8 C.F.R. § 205.2(d) (2020) (enumerating petitioners' procedural rights once USCIS has revoked their visa). The Board of Immigration Appeals (BIA) is the administrative body within the Department of Justice that reviews immigration decisions. *See id.* § 1003.1(d) (describing the powers and jurisdiction of the BIA as an appellate forum for immigration decisions).

[8] *See* 8 U.S.C. § 1252(a)(2) (proscribing limitations on the jurisdiction of federal courts to review immigration decisions); *see also Polfliet*, 955 F.3d at 383 (holding that the court lacked jurisdiction to review the visa petition revocation decision). Judicial review refers to courts' ability to examine and overturn the decisions of the other branches of government. *Judicial Review*, BLACK'S LAW DICTIONARY (11th ed. 2019). This Comment refers to statutes that prohibit federal courts from reviewing immigration decisions as jurisdictional bars. *See* 8 U.S.C. § 1252 (barring judicial review of certain immigration decisions).

Congress drastically restricted judicial review of certain immigration decisions further in 1996 when it enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).[9] Congress enacted IIRIRA's jurisdictional bar to expedite the removal process by precluding certain immigration decisions from judicial review in federal court.[10] Section 1252(a)(2)(B)(i) bars specific immigration decisions from judicial review.[11] Section 1252(a)(2)(B)(ii) is the catchall provision of the jurisdictional bar, and it precludes judicial review of discretionary decisions under the Immigration and Nationality Act (INA).[12] The § 1252(a)(2)(B)(ii) jurisdictional bar does not specify which immigration decisions are discretionary, but rather leaves courts do decide if the underlying immigration statute specifically grants discretionary authority such that the jurisdictional bar applies.[13]

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[9] *See* 8 U.S.C. § 1252(a)(2) (expanding the type of immigration decisions barred from judicial review to include a broad category of discretionary decisions). The Illegal Immigration Reform and Immigrant Responsibility Act's (IIRIRA) jurisdictional bar precludes judicial review of decisions regarding admissibility, denials of discretionary relief, removal orders for those with criminal convictions, as well as any other discretionary decisions. *Id.*; *see* Kucana v. Holder, 558 U.S. 233, 245–46 (2010) (discussing the scope of the § 1252(a)(2) jurisdictional bars). In 2004, Congress added an exception from the jurisdictional bar for constitutional claims or questions of law. 8 U.S.C. § 1252(a)(2)(D). Some courts narrowly interpret this preservation of judicial review to apply only to claims arising during removal proceedings. *See, e.g.*, *Polfliet*, 955 F.3d at 384 (declining to review constitutional claims made outside of removal proceedings); Green v. Napolitano, 627 F.3d 1341, 1346–47 (10th Cir. 2010) (noting that § 1252(a)(2)(D) applies only to petitions for review of removal decisions).

[10] 8 U.S.C. § 1252(a)(2); *see* S. REP. NO. 104-249, at 142 (1996) (describing the need for jurisdictional bars to streamline immigration cases by avoiding the added delay of federal court review); *see* Michael A. Keough, Kucana v. Holder *and Judicial Review of the Decision Not to Reopen Sua Sponte in Immigration Removal Proceedings*, 80 FORDHAM L. REV. 2075, 2088–90 (2012) (describing the purpose of IIRIRA to expedite immigration processes by restricting judicial review and the resulting consolidation of power within the executive branch).

[11] *See* 8 U.S.C. § 1252(a)(2)(B)(i) (listing barred decisions, including those regarding certain waivers of inadmissibility, cancellation of removal, permission for voluntary departure and adjustment of status); *Kucana*, 558 U.S. at 247 (noting that § 1252(a)(2)(B)(i) listed substantive decisions related to the ability to remain in the United States that are not subject to judicial review).

[12] 8 U.S.C. § 1252(a)(2)(B)(ii); *see* Sands v. U.S. Dep't of Homeland Sec., 308 F. App'x 418, 419 (11th Cir. 2009) (per curiam) (finding the jurisdictional bar applies to § 1155 because it is an applicable discretionary decision under the INA). Precisely which immigration decisions are discretionary is still subject to discussion more than twenty years after the enactment of IIRIRA. *See* Daniel Kanstroom, *The Better Part of Valor: The REAL ID Act, Discretion and the "Rule" of Immigration Law*, 51 N.Y.L. SCH. L. REV. 161, 163 (2007) (noting that distinguishing law from discretion is challenging because discretion is difficult to define).

[13] *See Kucana*, 558 U.S. at 246–47 (holding that § 1252(a)(2)(B)(ii) applies to specified statutory grants of discretionary authority). The INA does not define discretion but leaves courts to determine whether immigration statutes convey discretionary authority. *See generally*, Kanstroom, *supra* note 12, at 180–89 (discussing the difficulty courts face in distinguishing law from discretion and the inconsistency that results). Discretion is generally the ability to freely exercise judgement. *Discretion*, BLACK'S LAW DICTIONARY, *supra* note 8. Congress usually delegates authority to the Attorney General or the Secretary of Homeland Security, and the Secretary may then delegate its discretionary authority to the USCIS, which is located within the Department of Homeland Security. *See* 6 U.S.C. § 271(b)

Circuit courts disagree on whether § 1155 contains an objective legal standard that constrains the discretionary authority to revoke visa petitions.[14] The majority of circuit courts concluded that the jurisdictional bar applies because the language of § 1155 clearly vests unambiguous discretionary authority to USCIS to revoke visa petitions.[15] In April 2020, the Fourth Circuit, in *Polfliet v. Cuccinelli*, became the tenth circuit court to reach this conclusion.[16]

This Comment argues that the Fourth Circuit should have retained jurisdiction to review visa petition revocation decisions.[17] Part I of this Comment provides an overview of the application of jurisdictional bars to preclude review of visa petition revocation decisions.[18] Part II discusses the divergent statutory interpretations of § 1155 after the Supreme Court decision in 2010, *Kucana v. Holder*.[19] Finally, Part III argues that the approach of the majority of circuits requires reconsideration in light of the Court's narrow construction of jurisdictional bars in *Kucana*.[20]

(listing the functions that the Secretary transferred to USCIS such as adjudicating visa petitions, refugee applications, and citizenship petitions).

[14] 8 U.S.C. § 1155 (permitting the Secretary to revoke a previously approved visa petition "at any time, for what he deems to be good and sufficient cause"); *see* ANA Int'l, Inc. v. Way, 393 F.3d 886, 893 (9th Cir. 2004) (finding that "good and sufficient cause" is a legal standard). *But see* Jilin Pharm. USA, Inc. v. Chertoff, 447 F.3d 196, 202 (3d Cir. 2006) (holding that § 1155 lacks a legal standard). If the phrase "good and sufficient cause" is a legal standard, then the court retains jurisdiction to review the revocation decision. *See ANA Int'l*, 393 F.3d at 893 (interpreting § 1155 to contain a legal standard that constrains the Secretary's discretion, therefore retaining jurisdiction). If the court finds that § 1155 grants unconstrained discretionary authority to the Secretary of Homeland Security, then § 1252(a)(2)(B)(ii) precludes judicial review. *See* 8 U.S.C. § 1252(a)(2)(B)(ii) (barring discretionary decisions from judicial review); *see, e.g.*, *Polfliet*, 955 F.3d at 377, 383 (holding that § 1155 clearly conveys discretionary authority); Bernardo *ex rel.* M & K Eng'g, Inc. v. Johnson, 814 F.3d 481, 482 (1st Cir. 2016) (holding that the jurisdictional bar precluded review of discretionary § 1155 decisions); El-Khader v. Monica, 366 F.3d 562, 567 (7th Cir. 2004) (holding that the text of the statute clearly conveys discretion).

[15] *See Polfliet*, 955 F.3d at 383 (finding that § 1155's terms unambiguously convey discretion to USCIS to retract visa petitions); *Bernardo*, 814 F.3d at 485–86 (same); Mehanna v. U.S. Citizenship & Immigr. Serv., 677 F.3d 312, 315 (6th Cir. 2012) (same); Green v. Napolitano, 627 F.3d 1341, 1345 (10th Cir. 2010) (same); Abdelwahab v. Frazier, 578 F.3d 817, 821 (8th Cir. 2009) (same); Ghanem v. Upchurch, 481 F.3d 222, 225 (5th Cir. 2007) (same); *Jilin Pharm.*, 447 F.3d at 202 (same); *El-Khader*, 366 F.3d at 567 (same).

[16] *See Polfliet*, 955 F.3d at 384 (joining the First, Second, Third, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits to hold that § 1252(a)(2)(B)(ii) bars review of visa petition revocation decisions).

[17] *See infra* notes 88–103 and accompanying text.

[18] *See infra* notes 21–61 and accompanying text.

[19] *See infra* notes 62–87 and accompanying text.

[20] *See infra* notes 88–103 and accompanying text.

I. JUDICIAL REVIEW OF DECISIONS TO REVOKE VISA PETITIONS

Visa petitions are a preliminary step for recipients to obtain legal admission to the United States.[21] When the Attorney General revokes a visa petition, the recipient often seeks reversal of that decision which may lead them to pursue judicial review of the revocation decision in federal court.[22] In 2004, the Ninth Circuit, in *ANA International, Inc. v. Way,* retained jurisdiction to review visa petition revocations.[23] Nine other circuit courts, however, have held that 8 U.S.C. § 1252(a)(2)(B)(ii) bars judicial review of the revocations.[24] Section A of this Part provides an overview of the early circuit split.[25] Section B discusses the 2010 Supreme Court ruling in *Kucana v. Holder* and its impact on the 8 U.S.C. § 1252(a)(2)(B)(ii) analysis.[26] Section C discusses the contributions of the recent Fourth Circuit decision in *Polfliet v. Cuccinelli* to the dialogue surrounding the discretionary nature of visa revocation decisions under 8 U.S.C. § 1155.[27]

A. Interpreting § 1155: The Initial Circuit Split

The first two circuit courts to decide whether § 1252(a)(2)(B)(ii) applied to visa petition revocation decisions reached opposite results.[28] In 2004, the

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[21] *See* 8 U.S.C. § 1202 (enumerating the application requirements for an immigrant visa including a valid travel document, documentation of identity, and a consular interview); *id.* § 1255 (providing the process for obtaining legal permanent residency status); Matter of Ho, 19 I. & N. Dec. 582, 582 (B.I.A. 1988) (stating that an approved visa petition is an initial step in the visa process).

[22] *See* 8 C.F.R. § 205.2(d) (2020) (describing petitioners' procedural rights to appeal revocation decisions to the Board of Immigration Appeals (BIA)); Polfliet v. Cuccinelli, 955 F.3d 377, 384 (4th Cir. 2020) (discussing whether the court has jurisdiction to review the visa petition revocation decision after the petitioner and recipient have exhausted administrative remedies); Ghanem v. Upchurch, 481 F.3d 222, 223 (5th Cir. 2007) (considering judicial review of a visa petition revocation decision after the BIA affirmed the revocation decision).

[23] *See* ANA Int'l, Inc. v. Way, 393 F.3d 886, 891 (9th Cir. 2004) (holding that the court retained jurisdiction to review the decisions because the statute authorizing revocation, 8 U.S.C. § 1155, contained a legal standard).

[24] *See Polfliet*, 955 F.3d 377 (holding that the text of § 1155 specifies discretionary authority and therefore the jurisdictional bar precludes review); Bernardo *ex rel.* M & K Eng'g, Inc. v. Johnson, 814 F.3d 481, 485–86 (1st Cir. 2016) (same); Mehanna v. U.S. Citizenship & Immigr. Serv., 677 F.3d 312, 315 (6th Cir. 2012) (same); Green v. Napolitano, 627 F.3d 1341, 1346 (10th Cir. 2010) (same); Abdelwahab v. Frazier, 578 F.3d 817, 821 (8th Cir. 2009) (same); Sands v. U.S. Dep't of Homeland Sec., 308 F. App'x 418 (11th Cir. 2009) (per curiam) (same); *Ghanem*, 481 F.3d at 225 (same); Jilin Pharm. USA, Inc. v. Chertoff, 447 F.3d 196, 202 (3d Cir. 2006) (same); El-Khader v. Monica, 366 F.3d 562, 567 (7th Cir. 2004) (same); Firstland Int'l, Inc. v. I.N.S., 377 F.3d 127, 131 (2d Cir. 2004) (same); *see also* iTech U.S., Inc. v. Cuccinelli, 474 F. Supp. 3d 291, 295 (D.D.C. 2020) (rejecting the Ninth Circuit's approach in *ANA Int'l* to find that 8 U.S.C. § 1252(a)(2)(B)(ii) bars judicial review of a visa petition revocation decision), *appeal docketed*, No. 20-5235 (D.C. Cir. Aug. 6, 2020).

[25] *See infra* notes 28–35 and accompanying text.

[26] *See infra* notes 36–43 and accompanying text.

[27] *See infra* notes 44–61 and accompanying text.

[28] *See* 8 U.S.C. § 1252(a)(2)(B)(ii) (barring judicial review of certain discretionary immigration decisions); *id.* § 1155 (governing visa petition revocations); *El-Khader*, 366 F.3d at 567 (holding that the jurisdictional bar applied to visa petition revocation decisions); *ANA Int'l*, 393 F.3d at 891 (finding

Seventh Circuit, in *El-Khader v. Monica*, held that the plain language of § 1155 granted discretionary authority to revoke visa petitions.[29] The court found that determining "good and sufficient cause" was a subjective, discretionary judgement.[30] Therefore, the court held that § 1252(a)(2)(B)(ii) bars judicial review of § 1155 decisions.[31]

Also in 2004, the Ninth Circuit in *ANA International, Inc. v. Way* split from the Seventh Circuit.[32] In a split panel decision, the Ninth Circuit retained jurisdiction to review visa petition revocations by finding that the language of § 1155 included an objective legal standard.[33] The Ninth Circuit narrowly in-

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that 1252(a)(2)(B)(ii) did not preclude judicial review of a visa petition revocation decision). In both *El-Khader* and *ANA Int'l*, the government revoked the noncitizens' visa petitions after investigating their applications for lawful permanent residence. *El-Khader*, 366 F.3d at 564; *ANA Int'l*, 393 F.3d at 889.

[29] 8 U.S.C. § 1155; *see El-Khader*, 366 F.3d at 567 (finding that Congress' use of the term "may" and the phrase "at any time" indicated discretion). USCIS revoked El-Khader's visa petition after determining that his former marriage was fraudulent. *El-Khader*, 366 F.3d at 564–65.

[30] 8 U.S.C. § 1155; *El-Khader*, 366 F.3d at 568. Later in 2004, the Second Circuit, in *Firstland International, Inc. v. I.N.S.*, agreed with the Seventh Circuit's interpretation in dicta. *See* 377 F.3d 127, 131 (2d Cir. 2004) (retaining jurisdiction to review the visa revocation decision in this instance but signaling agreement with *El-Khader*'s interpretation of § 1155 as discretionary). The *Firstland* decision concerned the interpretation of the final two sentences of an earlier version of § 1155, that mandated that petitioners receive notice of a revocation before travelling to the United States. *See* 8 U.S.C. § 1155 (1996) (requiring petitioner's receipt of a revocation notice while still abroad); *Firstland Int'l*, 377 F.3d at 131–32 (holding that the notice requirement was a legal standard that was subject to judicial review). Although the court retained jurisdiction to review the procedural challenge, it noted that the decision to revoke a visa petition was likely discretionary. *See Firstland Int'l*, 377 F.3d at 132 (finding that the notice requirement constrained § 1155's otherwise discretionary authority). Shortly after the *Firstland* decision, Congress removed the statutory notice requirement. *See* 8 U.S.C. § 1155 (2004) (amending the statute to eliminate any procedural provisions). *See generally Firstland Int'l*, 377 F.3d at 127 (reviewing the application of the objective notice requirement in § 1155 in August 2004).

[31] 8 U.S.C. § 1155; *see El-Khader*, 366 F.3d at 567 (finding that the jurisdictional bar applied because the statute was discretionary). To reach this holding, the court also decided that § 1252(a)(2)(B)(ii) applied outside of removal proceedings. *See El-Khader*, 366 F.3d at 567 (finding that the jurisdictional bar applied to visa petition revocation decisions). In the 2005 amendments to § 1252(a)(2)(B), Congress codified that the jurisdictional bar applied beyond the removal context. *See* 8 U.S.C. § 1252(a)(2)(B) (2005) (adding language to specify the broad scope of the jurisdictional bar).

[32] *See ANA Int'l*, 393 F.3d at 891 (retaining jurisdiction to review § 1155 decisions). *But see El-Khader*, 366 F.3d at 567 (holding that the jurisdictional bar precludes review of § 1155 decisions). In *ANA Int'l*, USCIS revoked an I-140 employment visa petition by asserting that the beneficiary failed to meet a requirement of his visa petition by not demonstrating that he served a managerial role. 393 F.3d at 889–90. The Ninth Circuit agreed with the Seventh Circuit that the words "may" and "at any time" convey some level of discretion, yet unlike the Seventh Circuit, the Ninth Circuit's analysis did not end there. *See ANA Int'l*, 393 F.3d at 891 (finding that the presence of a legal standard constrained the statute's discretionary terms); *El-Khader*, 366 F.3d at 567 (emphasizing the plain language); *see also* 8 U.S.C. § 1155 (2020) (authorizing the revocation of visa petitions "at any time").

[33] *See* 8 U.S.C. § 1155 (granting authority to revoke visa petitions for "good and sufficient cause"); *ANA Int'l*, 393 F.3d at 893–94 (finding that BIA and Ninth Circuit precedent treated "good and sufficient cause" as a legal standard); *see also* Tongatapu Woodcraft Haw., Ltd. v. Feldman, 736 F.2d 1305, 1308 (9th Cir. 1984) (finding that § 1155 contains a legal standard); Matter of Tawfik, 20

terpreted the jurisdictional bar to apply only to grants of pure discretion.[34] Therefore, because the decision to revoke a visa petition depended, in part, on satisfying an objective legal standard, the jurisdictional bar did not apply.[35]

B. Kucana v. Holder *and the § 1252(a)(2)(B)(ii) Analysis*

In 2010, in *Kucana*, the Supreme Court reviewed whether the § 1252(a)(2)(B)(ii) jurisdictional bar precludes judicial review of administrative denials of motions to reopen removal proceedings.[36] The Court held that the jurisdictional bar applies only to statutes that explicitly grant discretionary authority.[37] Therefore, because regulations, rather than statutes, govern motions to reopen, § 1252(a)(2)(B)(ii) does not bar review of motions to reopen.[38]

I. & N. Dec. 166, 168–69 (B.I.A. 1990) (finding that "good and sufficient cause" requires a meaningful evidentiary showing).

[34] *See* 8 U.S.C. § 1252(a)(2)(B)(ii) (prohibiting judicial review of immigration decisions that are discretionary); *ANA Int'l*, 393 F.3d at 891 (finding that jurisdictional bars apply only when decisions are entirely discretionary). The court grounded its analysis in a strong presumption of jurisdiction over administrative decisions. *See ANA Int'l*, 393 F.3d at 891 (finding that the presumption of jurisdiction was well established in the immigration context).

[35] *See ANA Int'l*, 393 F.3d at 893 (retaining jurisdiction to review the application of the good and sufficient cause standard). Subsequently, the Third, Fifth, Eighth, and Eleventh Circuits have joined the Seventh Circuit in holding that § 1155 conveys discretionary authority, and, therefore, § 1252(a)(2)(B)(ii) bars judicial review of visa petition revocation decisions. *See* 8 U.S.C. § 1155 (authorizing the revocation of visa petitions); *id.* § 1252(a)(2)(B)(ii) (barring judicial review of discretionary agency decisions); Jilin Pharm. USA, Inc. v. Chertoff, 447 F.3d 196, 202 (3d Cir. 2006) (finding that no legal standard curtailed § 1155's discretionary language); Abdelwahab v. Frazier, 578 F.3d 817, 821 (8th Cir. 2009) (holding that the statutory language conveys discretionary authority); Sands v. U.S. Dep't of Homeland Sec., 308 F. App'x 418 (11th Cir. 2009) (holding that the jurisdictional bar applies to § 1155); Ghanem v. Upchurch, 481 F.3d 222, 224 (5th Cir. 2007) (finding that the language clearly grants discretionary authority); *El-Khader*, 366 F.3d at 567 (holding that the language of § 1155 is plainly discretionary).

[36] 8 U.S.C. § 1252(a)(2)(B)(ii); *see* Kucana v. Holder, 558 U.S. 233, 237 (2010). Motions to reopen allow noncitizens to request re-examination of a removal decision based on new information. *See Kucana*, 558 U.S. at 238, 242 (describing the purpose of motions to reopen). New evidence of worsening conditions in Albania justified Kucana's motion to reopen. *See id.* at 240 (describing that the change in political conditions in Albania warranted reopening Kucana's asylum claim). *Kucana* did not directly involve the interpretation of § 1155. *See generally id.* at 243–52 (lacking specific discussion of § 1155); Polfliet v. Cuccinelli, 955 F.3d 377, 382 (4th Cir. 2020) (finding that *Kucana* was not relevant to interpreting § 1155). Judge Kermit Lipez of the First Circuit, however, has noted that although *Kucana* is not directly on point, it can aid a court's interpretation of jurisdictional bars. *See* Bernardo *ex rel.* M & K Eng'g, Inc. v. Johnson, 814 F.3d 481, 508 (1st Cir. 2016) (Lipez, J., dissenting) (arguing that interpretive methods from *Kucana* inform the analysis of jurisdictional bars).

[37] *See Kucana,* 558 U.S. at 246–47 (finding that the statutory construction of § 1252(a)(2) suggests that the jurisdictional bar applies only to congressional grants of discretionary authority).

[38] 8 U.S.C. § 1252(a)(2)(B)(ii); *see Kucana*, 558 U.S. at 246–47 (holding that the regulation did not preclude judicial review under a narrow reading of § 1252(a)(2)(B)(ii) because Congress intended the jurisdictional bar to apply only to statutes). This decision also avoided the situation in which the Attorney General could craft a regulation granting himself discretionary authority, thereby insulating any administrative decisions from judicial review, which the Court held was not consistent with congressional intent. *See Kucana*, 558 U.S. at 252 (noting that barring judicial review of regulatory grants of discretion would exceed congressional intent).

The Court emphasized that statutes must explicitly specify discretionary authority for the jurisdictional bar to apply.[39] Additionally, the Court examined the structure of the jurisdictional bar to interpret its scope.[40] The Court characterized the enumerated decisions that § 1252(a)(2)(B)(i) barred as substantive because they concerned the ability to remain in the United States.[41] In contrast, the Court designated motions to reopen as adjunct, procedural decisions.[42] Moreover, the Court reasserted that a presumption of jurisdiction to review administrative decisions guides the interpretation of jurisdictional bars.[43]

C. The Factual Background of Polfliet v. Cuccinelli

In April 2020, in *Polfliet*, the Fourth Circuit joined the majority of circuit courts in interpreting § 1155 as a grant of discretionary power.[44] The appellants

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[39] *See Kucana*, 558 U.S. at 243 n.10 (emphasizing that the definition of "specify" is more precise than implied or anticipated). Since *Kucana*, those seeking judicial review of visa petition revocations have pointed to the Court's discussion of the definition of "specify" and argued that § 1155 lacks the requisite explicit indication of discretionary authority. *Id.*; *see, e.g.*, *Polfliet*, 955 F.3d at 381–82 (rejecting the appellant's contention that clearly specifying discretion requires the word "discretion").

[40] *See* 8 U.S.C. § 1252(a)(2) (barring judicial review of both specific and broad categories of decisions); *Kucana*, 558 U.S. at 246–48 (analyzing § 1252(a)(2)'s construction to deduce the scope of the statute's catchall provision). First, the Court compared § 1252(a)(2)(A), (B), and (C) to conclude that the jurisdictional bar applies to statutory, and not regulatory, grants of discretionary authority. *Kucana*, 558 U.S. at 246; *see* 8 U.S.C. § 1252(a)(2) (barring judicial review of final removal orders, decisions related to discretionary relief, and decisions concerning noncitizens with certain criminal records).

[41] *See* 8 U.S.C. § 1252(a)(2)(B)(i) (barring review of specific discretionary relief decisions including inadmissibility waivers, cancellation of removal, permission for voluntary departure and adjustment of status); *Kucana*, 558 U.S. at 247 (categorizing the nature of the provisions in § 1252(a)(2)(B)(i)).

[42] *Kucana*, 558 U.S. at 248. The Court explained that motions to reopen are a mechanism for ensuring procedural fairness and are not explicitly tied to ability to stay in the United States. *Id.*

[43] *See id.* at 251–52 (asserting that the longstanding presumption of judicial review applies to immigration decisions). The Court articulated that the interpretive principle requires clear and convincing evidence to overcome the presumption of judicial review. *Id.* at 252. Since *Kucana*, the First, Sixth, and Tenth Circuits have found that § 1155 overcomes the presumption of jurisdiction. *See* Bernardo *ex rel.* M & K Eng'g, Inc. v. Johnson, 814 F.3d 481, 485 (1st Cir. 2016) (finding that § 1155 is explicitly discretionary and overcomes the presumption of jurisdiction); Mehanna v. U.S. Citizenship & Immigr. Serv., 677 F.3d 312, 317 (6th Cir. 2012) (holding that the language of § 1155 unambiguously conveys discretion and overcomes the presumption of judicial review); Green v. Napolitano, 627 F.3d 1341, 1346 (10th Cir. 2010) (holding that § 1155 unambiguously specifies discretion). Notably, the First Circuit issued a split panel decision, in which the dissenting judge argued that the statutory construction analysis, the emphasis on the definition of "specified," and the presumption of judicial review in *Kucana* compel a different result. *Bernardo*, 814 F.3d at 496 (Lipez, J., dissenting); *see* 8 U.S.C. § 1252(a)(2)(B)(ii) (barring judicial review of decisions made pursuant to statutes that specify discretionary authority); *Kucana*, 558 U.S. at 243 n.10, 245–50 (elaborating on the meaning of "specify" as providing explicit detail).

[44] *See* 8 U.S.C. § 1155 (authorizing the revocation of visa petitions); *Polfliet*, 955 F.3d at 383 (joining the First, Third, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits). Prior to 2020, nine circuit courts had decided that § 1252(a)(2)(B)(ii) applied to visa petition revocation decisions. *See Bernardo*, 814 F.3d at 485–86 (barring judicial review of petition revocation decisions); *Mehanna*, 677 F.3d at 315 (same); *Green*, 627 F.3d at 1346 (same); Sands v. U.S. Dep't of Homeland Sec., 308

were Polfliet, a United States citizen, and Kimiki, a Japanese national and the stepson of Polfliet.[45] Kimiki lived with his mother and Polfliet in the United States.[46] USCIS granted Polfliet a I-130 family visa petition for Kimiki in June 2012.[47] In November 2013, USCIS revoked the I-130 visa petition after discovering that Polfliet had a conviction for possession of child pornography from 2000.[48] Polfliet's conviction rendered him ineligible to file family visa petitions absent a determination that he posed no risk to Kimiki, pursuant to the Adam Walsh Child Protection and Safety Act (AWA).[49] Polfliet and Kimiki appealed this decision to the BIA, but the BIA dismissed it for lack of jurisdiction.[50] The appellants then sought judicial review of the revocation decision in the United States District Court for the District of South Carolina, Orangeburg

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F. App'x 418 (11th Cir. 2009) (per curiam) (same); Abdelwahab v. Frazier, 578 F.3d 817, 821 (8th Cir. 2009) (same); Ghanem v. Upchurch, 481 F.3d 222, 225 (5th Cir. 2007) (same); Jilin Pharm. USA, Inc. v. Chertoff, 447 F.3d 196, 202 (3d Cir. 2006) (same); El-Khader v. Monica, 366 F.3d 562, 567 (7th Cir. 2004) (same); Firstland Int'l, Inc. v. I.N.S., 377 F.3d 127, 131 (2d Cir. 2004) (retaining jurisdiction to review a procedural issue but noting that § 1252(a)(2)(B)(ii) otherwise prevented review). Following the Fourth Circuit decision in *Polfliet*, the U.S. Court of Appeals for the D.C. Circuit docketed a case presenting the same question. *See* iTech U.S., Inc. v. Cuccinelli, 474 F. Supp. 3d 291, 295 (D.D.C. 2020) (holding that 8 U.S.C. § 1252(a)(2)(B)(ii) bars judicial review of a visa petition revocation decision), *appeal docketed*, No. 20-5235 (D.C. Cir. Aug. 6, 2020).

[45] *Polfliet*, 955 F.3d at 379. Polfliet served in the United States Air Force in Japan, where he met Kimiki's mother. *Id.*

[46] *Id*. Polfliet had previously successfully petitioned for an I-130 visa for his wife, Kimiki's mother, who later obtained U.S. citizenship without issue. *Id.*

[47] *Id*. I-130 visa petitions provide a pathway to permanent residency and citizenship for alien family members of U.S. citizens who live together. *Id*.; *see* 8 U.S.C. § 1255 (describing the process for adjustment of status to obtain permanent residency).

[48] *Polfliet*, 955 F.3d at 379–80. A military tribunal convicted Polfliet of violating Uniform Code of Military Justice 18 U.S.C. § 2252A in 2000. *Id.* at 379; *see* 18 U.S.C. § 2252A (prohibiting activities related to child pornography). This conviction preceded Polfliet's marriage to Kimiki's mother. *Polfliet*, 955 F.3d at 379. USCIS asserted that they only discovered the conviction upon reviewing Kimiki's eligibility for lawful permanent residence. *Id.* at 380.

[49] *Polfliet*, 955 F.3d at 380; *see* 8 U.S.C. § 1154(a)(1)(A)(viii) (2006) (granting the Secretary sole discretion to make an exemption). The AWA bars U.S. citizens with convictions for offenses against minors from applying for family visa petitions. 8 U.S.C. § 1154(a)(1)(A)(viii). Congress enacted the AWA in 2006 and it was in effect at the time Polfliet filed an I-130 visa petition for his wife and his stepson. *Id.*; *Polfliet*, 955 F.3d at 379. USCIS did not raise Polfliet's conviction until November 2013. *Polfliet*, 955 F.3d at 379.

[50] *Polfliet*, 955 F.3d at 380. The Fourth Circuit opinion conflicted with the District Court opinion, which stated that the BIA affirmed USCIS's revocation decision. *Compare id.* (asserting that the BIA dismissed the appeal), *with* Polfliet v. Rodriguez, No. 16-cv-03358, 2017 WL 4348521, at *2 (D.S.C. Sept. 28, 2017) (noting that the BIA reviewed and affirmed the decision). This distinction is relevant because petitioner's right to appeal a visa petition revocation is an enumerated procedural protection. *See* 8 C.F.R. § 205.2 (2020) (requiring notice of intent to revoke; notice of the revocation decision; and a right to an administrative appeal). Courts have held that § 1252(a)(2)(B)(ii) does not bar judicial review of procedural errors in visa petition revocations. *See* Musunuru v. Lynch, 831 F.3d 880, 888 (7th Cir. 2016) (retaining jurisdiction to review application of regulatory procedures, not discretionary factors); Mantena v. Johnson, 809 F.3d 721, 728 (2d Cir. 2015) (retaining jurisdiction to review USCIS's procedural compliance); Kurapati v. U.S. Citizenship & Immigr. Serv., 775 F.3d 1255, 1262 (11th Cir. 2014) (finding that USCIS's procedural errors were not discretionary).

Division.[51] The district court granted USCIS's motion to dismiss for lack of subject matter jurisdiction.[52] The court found that the jurisdictional bar precluded review because § 1155 conveyed discretionary authority.[53] Polfliet and Kimiki appealed the decision to the Fourth Circuit.[54]

The Fourth Circuit held that § 1252(a)(2)(B)(ii) precludes visa petition revocation decisions from judicial review.[55] The court rejected the appellants' argument that the absence of the word "discretion" in § 1155 rendered the statute ambiguous.[56] The court distinguished this case from *Kucana* by limiting *Kucana's* holding to its assertion that the jurisdictional bar does not apply to regulatory grants of discretionary authority.[57] Pointing to the plain language of § 1155, the court held that the statute was unambiguous.[58] Additionally, the court rejected the Ninth Circuit's reading of "good and sufficient cause" as an objective le-

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[51] *See Polfliet*, 2017 WL 4348521, at *2 (dismissing all statutory and constitutional counts that Polfliet and Kimiki alleged because of lack of subject matter jurisdiction); *see also Polfliet*, 955 F.3d at 380 (discussing the district court's decision).

[52] *Polfliet*, 2017 WL 4348521, at *6; *Subject-Matter Jurisdiction*, BLACK'S LAW DICTIONARY, *supra* note 8 (defining the authority to hear matters of a specific nature). The petitioners alleged that the revocation decision violated the Administrative Procedure Act, due process, and improperly applied the AWA retroactively. *Polfliet*, 955 F.3d at 380. Polfliet and Kimiki argued that the visa petition revocation constituted a deprivation of their constitutional property interest. *Id.* The court rejected this notion, however, reasoning that if USCIS has the ability to revoke visa petitions, then approved visa petitions do not constitute legitimate property interests. *See Polfliet*, 2017 WL 4348521, at *4 (finding that the petitioners had no constitutional property interest (citing Town of Castle Rock v. Gonzales, 545 U.S. 748, 756 (2005))).

[53] 8 U.S.C. § 1155; *Polfliet*, 2017 WL 4348521, at *5.

[54] *Polfliet*, 955 F.3d at 377.

[55] *See* 8 U.S.C. § 1252(a)(2)(B)(ii) (barring judicial review of a broad category of discretionary decisions); *id.* § 1155 (authorizing the revocation of visa petitions); *Polfliet*, 955 F.3d at 384 (joining nine circuit courts in splitting from the Ninth Circuit to reach this holding).

[56] *See* 8 U.S.C. § 1155 (providing the authority to revoke visa petitions at any time); *Polfliet*, 955 F.3d at 381–82 (holding that the language was unambiguous without the word discretion). Appellants invoked footnote 10 in *Kucana*, which emphasized that, by definition, specified discretion requires explicit or detailed language and cannot be anticipated or implied discretion. *See* Kucana v. Holder, 558 U.S. 233, 243 n.10 (2010) (differentiating specified discretion from implied or anticipated discretion to limit the scope of jurisdictional bars to only statutes that specify discretion); *Polfliet*, F.3d at 381 (rejecting appellant's argument that the absence of the word discretion created ambiguity).

[57] 8 U.S.C. § 1252(a)(2)(B)(ii); *see Kucana*, 558 U.S. at 246–47 (analyzing the construction of the jurisdictional bar to conclude that it only applies to statutorily authorized discretionary decisions); *Polfliet*, 955 F.3d at 382 (limiting *Kucana* to its holding that § 1252(a)(2)(B)(ii)'s jurisdictional bar is not applicable to decisions that regulations, not statutes, made discretionary).

[58] 8 U.S.C. § 1155; *see Polfliet*, 955 F.3d at 382 (holding that "may" "at any time" and "for what he deems to be" clearly convey discretion). The court referenced the other circuit courts that found the plain language unambiguously discretionary as support for its holding. *See Polfliet*, 955 F.3d at 382 (citing El-Khader v. Monica, 366 F.3d 562, 567 (7th Cir. 2004) for the notion that the plain meaning of the statutory language conveys discretion and citing the circuit courts that previously reached similar conclusions); *see also* Bernardo *ex rel.* M &K Eng'g, Inc. v. Johnson, 814 F.3d 481, 484 (1st Cir. 2016) (holding that the text of § 1155 clearly provided discretionary authority).

gal standard.[59] Instead, it asserted that § 1155 grants discretionary authority to determine what constitutes "good and sufficient cause."[60] The Fourth Circuit affirmed the district court's dismissal for lack of subject matter jurisdiction.[61]

II. Discussion of the Divergent Interpretations of 8 U.S.C. § 1155

The unbalanced circuit split concerning the interpretation of 8 U.S.C. § 1155 appears to grant significant weight to the holding of a majority of circuit courts, however, the merits of the minority approach warrant further discussion as well.[62] Section A of this Part discusses how the dissent in the First

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[59] *See Polfliet*, 955 F.3d at 383 (criticizing the Ninth Circuit's focus on "good and sufficient cause"); ANA Int'l, Inc. v. Way, 393 F.3d 886, 893 (9th Cir. 2004) (analyzing the legislative history of § 1155 to find that "good and sufficient cause" constitutes a legal standard that constrains the Secretary's discretion).

[60] *See Polfliet*, 955 F.3d at 383 (asserting that the word "deems" conveys discretion to determine "good and sufficient cause"). Interestingly, the court disclosed that in a previous unpublished decision, the Fourth Circuit retained jurisdiction to review a visa petition revocation decision to determine if "good and sufficient cause" existed. *See id.* at 383 n.7 (acknowledging that the court previously exercised judicial review of a visa petition revocation (citing Oddo v. Reno, 175 F.3d 1015 (4th Cir. 1999) (per curiam)). Appellants argued that the Fourth Circuit's 1999 case, *Oddo v. Reno*, demonstrated that the court previously treated the language of § 1155 as a reviewable legal standard. *See* 8 U.S.C. § 1155 (authorizing the revocation of visa petitions "at any time" for "good and sufficient cause"); *Polfliet*, 955 F.3d at 383 n.7 (addressing the appellants' invocation of *Oddo*); *Oddo*, 175 F.3d 1015, at *3 (reviewing USCIS's decision to revoke a visa petition pursuant to § 1155). The court dismissed this argument by asserting that *Oddo* was not precedential and did not discuss the jurisdictional bar. *Polfliet*, 955 F.3d at 383; *see Oddo*, 175 F.3d 1015, at *3 (reviewing and affirming the administrative decision to revoke Oddo's visa petition in an unpublished, per curiam opinion).

[61] *Polfliet*, 955 F.3d at 384. Additionally, the Fourth Circuit held that the jurisdictional bar precluded review of petitioner's constitutional claims. *See id.* (rejecting petitioner's argument that their constitutional claims were excluded from the jurisdictional bar). Although 8 U.S.C. § 1252(a)(2)(D) carves out a limited exception to the jurisdictional bar for constitutional questions, the Fourth Circuit interpreted the exemption to apply only during a noncitizen's removal proceedings. *See* 8 U.S.C. § 1252(a)(2)(D) (providing that § 1252(a)(2)(B) does not preclude review of constitutional claims that are "filed with an appropriate court of appeals"); *Polfliet*, 955 F.3d at 382 (citing Lee v. U.S. Citizenship & Immigr. Serv., 592 F.3d 612, 620 (4th Cir. 2010) (holding that Congress intended to preserve judicial review of constitutional issues under § 1252(a)(2)(D) only when brought during removal proceedings)). Therefore, because Kimiki was not actively in removal proceedings, the court did not have jurisdiction to review his constitutional claims. *See Polfliet*, 955 F.3d at 382 (dismissing the constitutional claims because Polfliet and Kimiki asserted them outside of the context of removal proceedings).

[62] *See* Karakenyan v. U.S. Citizenship & Immigr. Serv., 468 F. Supp. 3d 50, 55 (D.D.C. 2020) (noting that the unbalanced nature of the circuit split could "almost tip over the scale"). Critics characterized the breadth of support for the majority approach as a "precedential cascade," because many circuits joined the majority without contributing significant independent analysis. *See* Bernardo *ex rel.* M & K Eng'g v. Johnson, 814 F.3d 481, 508 (1st Cir. 2016) (Lipez, J., dissenting) (finding the numerical imbalance in the circuit split unpersuasive because many of the decisions came in quick succession without additional analysis). The rapid succession of circuit courts joining the majority of the split with minimal analysis is indicative of a precedential cascade. *See* Eric Talley, *Precedential Cascades: An Appraisal*, 73 S. Cal. L. Rev. 87, 89–92 (1999) (discussing the phenomena of cascading judicial decisions, including the efficiency benefits and opportunities for bias and undermining credibility of legal doctrines). Many of the circuit court decisions preceded the 2010 Supreme Court decision *Kucana v. Holder* and were not subject to *Kucana*'s analytical approach to jurisdictional bars. *See* 558 U.S. 233,

Circuit decision, in 2016, *Bernardo* ex rel. *M & K Engineering v. Johnson,* applied the Supreme Court's analysis from the 2010 decision, *Kucana v. Holder*.[63] Section B discusses the Fourth Circuit's contributions to the circuit split and its response to *Kucana* in its 2020 decision, *Polfliet v. Cuccinelli*.[64]

A. The Impact of Kucana *on the Analysis of Judicial Review of § 1155*

The First Circuit dissent in 2016, in *Bernardo ex rel. M&K Engineering*, used the interpretive guidance from *Kucana* to argue that the jurisdictional bar, 8 U.S.C. § 1252(a)(2)(B)(2), does not preclude review of visa petition revocations.[65] Namely, the *Bernardo* dissent asserted that the strong presumption of jurisdiction over administrative decisions requires a narrow interpretation of the jurisdictional bar.[66] The *Bernardo* dissent recognized that § 1155 contains discretionary language but argued that the phrase "good and sufficient cause" is an objective legal standard that constrains the discretion that the statute otherwise grants.[67] The dissent further argued that the presence of objective legal

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243–52 (2010) (prescribing a narrow interpretation of jurisdictional bars based on statutory construction and legislative intent analysis); *see, e.g.*, Abdelwahab v. Frazer, 578 F.3d 817, 821 (8th Cir. 2009) (holding that the statute conveyed discretionary authority); Ghanem v. Upchurch, 481 F.3d 222, 223–25 (5th Cir. 2007) (neglecting to apply a presumption of review); Jilin Pharm. USA, Inc. v. Chertoff, 447 F.3d 196, 200–05 (3d Cir. 2006) (analyzing the jurisdictional bar's application to § 1155 without discussion of the presumption of jurisdiction). Although the cases following *Kucana* continued to join the majority's holding, the analysis differed from the pre-*Kucana* cases. *See Kucana*, 558 U.S. 243–52 (asserting that courts should construe jurisdictional bars narrowly); *see, e.g.*, *Bernardo*, 814 F.3d at 485 (holding that § 1155's specific language overcomes the presumption of jurisdiction articulated in *Kucana*); Green v. Napolitano, 627 F.3d 1341, 1346 (10th Cir. 2010) (finding the language of § 1155 is sufficiently specific, as defined in *Kucana*).

[63] *See infra* notes 65–77 and accompanying text.

[64] *See infra* notes 78–87 and accompanying text.

[65] 8 U.S.C. § 1251(a)(2)(B)(ii); *see Kucana*, 558 U.S. at 243–52 (analyzing the scope of the jurisdictional bar by interpreting the statutory construction and legislative history and applying a presumption of jurisdiction); *Bernardo*, 814 F.3d at 495–508 (Lipez, J., dissenting) (arguing that the interpretive principles from *Kucana* compel retention of jurisdiction to review visa petition revocations). The dissent applied *Kucana* to expand on the Ninth Circuit's reasoning in 2004, in *ANA Int'l Inc. v. Way*. *See Kucana*, 558 U.S. at 243–52 (holding that the presumption of jurisdiction combined with statutory construction and legislative history analysis required a narrow interpretation of the catchall jurisdictional bar); *Bernardo*, 814 F.3d at 495–508 (Lipez, J., dissenting) (adopting the statutory construction analysis from *Kucana* and the analysis regarding the existence of a legal standard in 8 U.S.C. § 1155 from *ANA International*); ANA Int'l, Inc. v. Way, 393 F.3d 886, 891–94 (9th Cir. 2004) (splitting from the Seventh Circuit to retain jurisdiction to review visa revocation decisions by interpreting 8 U.S.C. § 1155 to contain a legal standard).

[66] 8 U.S.C. § 1251(a)(2)(B)(ii); *Bernardo*, 814 F.3d at 495 (Lipez, J. dissenting); *see Kucana*, 558 U.S. at 251–52 (asserting that the presumption of jurisdiction is a longstanding principle in immigration law); *ANA Int'l*, 393 F.3d at 891 (holding that the presumption of jurisdiction mandates a narrow construction of the jurisdictional bar, such that it only bars matters of pure discretion from judicial review).

[67] 8 U.S.C. § 1155; *see Bernardo*, 814 F.3d at 504 (Lipez, J., dissenting) (rejecting the majority's emphasis on the quantity of discretionary terms because "good and sufficient cause" constrains each); *ANA Int'l*, 393 F.3d at 893 (holding that "good and sufficient cause" is a legal standard subject to judicial

criteria creates uncertainty surrounding whether § 1155 is a specific grant of discretionary authority.[68] Therefore, it contended that the statute fails to meet the requirement of "specified" discretion, as articulated in *Kucana*.[69]

Additionally, the *Bernardo* dissent examined § 1155's legislative ratification history.[70] It argued that the statute's reenactments in 1996 and 2004 indicated congressional acceptance of the interpretation of "good and sufficient cause" as a legal standard.[71] Further, the dissent asserted that Congress was aware of language that unambiguously conveys discretionary authority, but

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review). The *Bernardo* dissent synthesized various BIA opinions and visa petition requirements to assert that "good and sufficient cause" exists when the evidentiary record would not support approval of such a petition. *See* 814 F.3d at 496–97 (Lipez, J., dissenting) (providing examples of objective documentation that would inform determinations of "good and sufficient cause"). The *Bernardo* dissent asserted that the BIA's consistent treatment of "good and sufficient cause" as an objective standard indicates that the phrase has a specific, well known meaning in the immigration context. *See id*. at 496 (analyzing the BIA's treatment of "good and sufficient cause" as an objective evidentiary standard); *ANA Int'l*, 393 F.3d at 894 (adopting the BIA interpretation of § 1155 to retain jurisdiction to review the objective legal standard); Matter of R.I. Ortega, 28 I. & N. Dec. 9, 15 (B.I.A. 2020) (finding that "good and sufficient" cause existed where substantial evidence demonstrated that USCIS would deny the visa petition); Matter of Tawfik, 20 I. & N. Dec. 166, 170 (B.I.A. 1990) (reversing revocation decision because the evidence did not arise to "good and sufficient cause" to revoke); Matter of Estime, 19 I. & N. Dec. 450, 450 (B.I.A. 1987) (explaining that "good and sufficient cause" is met when the existing evidence would bar approval of a visa petition).

[68] 8 U.S.C. § 1155; *see Bernardo*, 814 F.3d at 496 (Lipez, J., dissenting) (suggesting that the divergent interpretations of § 1155 demonstrate that Congress did not specify discretion); *Kucana*, 558 U.S. at 243 n.10 (explaining that the jurisdictional bar applies to statutes that explicitly detail discretionary authority).

[69] 8 U.S.C. § 1252(a)(2)(B)(ii); *see Kucana*, 558 U.S. at 243 n.10 (defining "specify" as providing explicit detail); *Bernardo*, 814 F.3d at 496 (Lipez, J., dissenting) (noting the definition of "specify" the Court provided in *Kucana*). The *Bernardo* majority refuted the dissent's reliance on *Kucana* by citing another footnote where the Court referred to the word "may" as an indication of discretionary authority. *See Bernardo*, 814 F.3d at 486–87 (opinion of Lynch, J.) (explaining that *Kucana* did not change the analysis of § 1155 because the Supreme Court offered a statute containing the same conditional phrase as § 1155 as an example of discretionary language (citing *Kucana*, 558 U.S. at 247 n.13)).

[70] *See Kucana*, 558 U.S. at 249 (analyzing legislative history to infer congressional intent from the historic treatment of motions to reopen); *Bernardo*, 814 F.3d at 499–500 (Lipez, J., dissenting) (arguing that § 1155's ratification history informs the analysis of congressional intent). *Compare* 8 U.S.C. § 1155 (1996) (authorizing the revocation of visa petitions so long as the petitioner received notice prior to entering the United States), *with id.* § 1155 (2004) (granting authority to revoke visa petitions without a statutory notice requirement).

[71] *See Bernardo*, 814 F.3d at 499–500 (Lipez, J., dissenting) (asserting that Congress was aware of the consistent BIA interpretation of "good and sufficient cause"). *Compare* 8 U.S.C. § 1155 (1996) (authorizing the revocation of visa petitions when petitioners were given notice before their arrival), *with id.* § 1155 (2004) (removing the notice requirement with no change to the rest of the statute). In 1996, Congress reenacted § 1155 as part of IIRIRA, without alteration. *See id.* § 1155 (1996) (including visa petition revocation under the umbrella immigration bill, IIRIRA). In 2004, Congress amended § 1155 to remove two sentences but left the rest of the statute unchanged. *See id.* § 1155 (2004) (removing an ambiguous notice requirement). Conversely, some courts found that the 2004 amendment to § 1155 reflected congressional intent to further restrict judicial review of immigration decisions. *Id.* § 1155; *see, e.g.*, Jilin Pharm. USA, Inc. v. Chertoff, 447 F.3d 196, 203 (3d Cir. 2006) (finding that § 1155's amendment suggested an intent to clearly convey discretionary authority).

declined to use it in § 1155.[72] For these reasons, the dissent argued that Congress intended to preserve the objective legal criteria in § 1155 and to constrain the Secretary's discretionary authority.[73]

Moreover, the *Bernardo* dissent applied *Kucana* to examine the structure of the jurisdictional bar.[74] The dissent argued that the nature of visa petition revocations significantly differs from the discretionary relief decisions that § 1252(a)(2)(B)(i) enumerates.[75] Unlike the decisions in § 1252(a)(2)(B)(i), revocation of a visa petition does not automatically result in removal from the United States.[76] Therefore, the dissent asserted that the jurisdictional bar should not preclude review of visa petition revocation decisions.[77]

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[72] 8 U.S.C. § 1155; *see Bernardo*, 814 F.3d at 501 (Lipez, J., dissenting) (noting that Congress unequivocally conveyed discretion in other statutes of the INA); *see also ANA Int'l.*, 393 F.3d at 893–94 (arguing that Congress could have chosen different language, so retention of "good and sufficient cause" signaled recognition of the agency meaning). The dissent noted that the phrase "good and sufficient cause" does not appear in any other INA provision. *Bernardo*, 814 F.3d at 499 (Lipez, J., dissenting).

[73] 8 U.S.C. § 1155 (2020); *see Bernardo*, 814 F.3d at 499–501 (Lipez, J., dissenting) (arguing that the consistent reenactment of § 1155 is a sufficient indication of congressional approval of the BIA's interpretation). Conversely, the *Bernardo* majority asserted that inconsistent judicial interpretation and lack of affirmative recognition by Congress undermine the legislative ratification argument. 814 F.3d at 489–90 (opinion of Lynch, J.). The dissent argued that it does not. *See id.* at 502 n.31 (Lipez, J., dissenting) (asserting that the legislative ratification canon does not require Congress's affirmative recognition).

[74] 8 U.S.C. § 1252(a)(2)(B)(ii); *see Kucana*, 558 U.S. at 245–48 (analyzing the statutory construction to deduce the scope of § 1252(a)(2)(B)(ii)); *Bernardo*, 814 F.3d at 505–07 (Lipez, J., dissenting) (using *Kucana*'s approach to differentiate visa petition revocations from the decisions subject to the jurisdictional bar).

[75] 8 U.S.C. § 1252(a)(2)(B)(ii); *id.* § 1155; *see Bernardo*, 814 F.3d at 506 (Lipez, J., dissenting) (comparing § 1155 to the enumerated decisions in § 1252(a)(2)(B)(i)). The *Bernardo* majority declined to decide this point because appellants waived it. 814 F.3d at 492 n.17 (opinion of Lynch, J.). Nonetheless, the court ruminated that the emphasis on decision type in *Kucana* served to contrast procedural devices from discretionary decisions. *Id.* at 493.

[76] *See Bernardo*, 814 F.3d at 506–07 (Lipez, J., dissenting) (distinguishing potential eligibility for a visa from substantive forms of relief such as cancellation of removal, and voluntary departure). *Compare* 8 U.S.C. § 1252(a)(2)(B)(i) (barring judicial review of decisions relating to the ability to remain in the country including, eligibility for admission and cancellation of removal), *with id.* § 1155 (authorizing the revocation of visa petitions). Although the revocation of the visa petition renders the beneficiary ineligible for a visa, actually instigating removal proceedings requires additional action. *See id.* § 1202 (listing the requirements to apply for an immigrant visa); *id.* § 1229(a) (describing the process to initiate removal proceedings).

[77] 8 U.S.C. § 1252(a)(2)(B)(ii); *id.* § 1155; *see Kucana*, 558 U.S. at 248 (asserting that the jurisdictional bar applies to substantive decisions similar to the enumerated actions in § 1252(a)(2)(B)(i)); *Bernardo*, 814 F.3d at 506 (Lipez J., dissenting) (arguing that visa petition revocation is not categorically substantive but, rather, is an adjunct decision).

B. The Contributions of Polfliet v. Cuccinelli*: Rejecting* Kucana

The Fourth Circuit in *Polfliet* echoed the majority of circuit courts and rested its analysis of § 1155 on the plain meaning of the statute.[78] The court emphasized the quantity of discretionary terms in the statute and found that the consecutive application of discretionary language specified discretion.[79] The Fourth Circuit narrowly construed the precedential value of *Kucana*.[80] Unlike other post-*Kucana* decisions, the Fourth Circuit did not acknowledge the presumption of judicial review for administrative decisions.[81] Instead, the court dismissed the appellants' argument that the presumption should apply to the analysis.[82] The Fourth Circuit rejected the argument that *Kucana* required the inclusion of "discretion" to clearly specify discretionary authority.[83] The court asserted that even absent the exact word, the statute unambiguously specified discretion.[84]

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[78] 8 U.S.C. § 1155; *see* Polfliet v. Cuccinelli, 955 F.3d 377, 381–82 (4th Cir. 2020) (noting that the majority of circuit courts support the court's conclusion); *see, e.g.*, Mehanna v. U.S. Citizenship & Immigr. Serv., 677 F.3d 312, 315 (6th Cir. 2012) (holding that the text of the statute specified discretion); Jilin Pharm. USA, Inc. v. Chertoff, 447 F.3d 196, 203 (3d Cir. 2006) (examining the discretionary terms in § 1155); El-Khader v. Monica, 366 F.3d 562, 567 (7th Cir. 2004) (finding that the language of the statute conveys discretionary authority).

[79] 8 U.S.C. § 1155; *see Polfliet*, 955 F.3d at 382 (finding the successive use of "may," "at any time," and "for what he deems to be" unambiguously conveys discretion). *But see* ANA Int'l, Inc. v. Way, 393 F.3d 886, 893–94 (9th Cir. 2004) (arguing that a holistic reading reveals that "good and sufficient cause" constrains the discretion). The Fourth Circuit criticized the Ninth Circuit's emphasis on "good and sufficient cause" for failing to acknowledge the role of "deems" as a modifier on the phrase. *See Polfliet*, 955 F.3d at 383 (classifying the Ninth Circuit approach as operating in a vacuum); *ANA Int'l*, 393 F.3d at 893 (finding that legislative history demonstrated that "good and sufficient cause" was a legal standard).

[80] *Polfliet*, 955 F.3d at 382; *see Kucana*, 558 U.S. at 243–52 (prescribing an analytical approach to construing § 1252(a)(2)(B)(ii)). Similarly, the Tenth Circuit asserted that *Kucana* did not change its interpretation of § 1155. *See* Green v. Napolitano, 627 F.3d 1341, 1345 (10th Cir. 2010) (finding that applying the analysis from *Kucana* reached the same result).

[81] *See Polfliet*, 955 F.3d 380–84 (declining to discuss the presumption of jurisdiction). Other circuit courts recognized the presumption of review governing the application of jurisdictional bars, and continued to hold that § 1155 overcomes it. 8 U.S.C. § 1155; *see, e.g.*, *Mehanna*, 677 F.3d at 317 (noting that *Kucana* instructs a narrow interpretation of jurisdictional bars but still finding that the language overcomes the presumption of jurisdiction); *Bernardo*, 814 F.3d at 485 (finding that the language of § 1155 overcomes the presumption of jurisdiction).

[82] 8 U.S.C. § 1252(a)(2)(B)(ii); *id.* § 1155; *see Polfliet*, 955 F.3d at 381 (finding that the presumption of jurisdiction did not apply because § 1155 was unambiguous). This contradicts the Ninth Circuit's use of the presumption of jurisdiction as a core interpretive principle. *See ANA Int'l*, 393 F.3d at 891 (analyzing the jurisdictional bar with a presumption of jurisdiction).

[83] *See Polfliet*, 955 F.3d at 381 (finding that *Kucana* primarily compared statutes and regulations and did not mandate that the only means of unambiguously conveying discretion was reciting the exact word); *Kucana*, 558 U.S. at 243 n.10 (defining specify as to convey explicitly).

[84] 8 U.S.C. § 1155; *see Polfliet*, 955 F.3d at 382 (holding that § 1155's consecutive discretionary terms clearly indicated discretion). Section 1155 consecutively includes the words "may," which is permissive rather than mandatory, "at any time," which provides temporal flexibility, and "for what he deems to be," which places the decision in the purview of the authorized decisionmaker. 8 U.S.C.

The Fourth Circuit acknowledged that despite the loss of Kimiki's visa eligibility, the government had not pursued his removal from the United States.[85] Although the court recognized that the revocation decision did not directly result in Kimiki's removal, the court did not discuss *Kucana's* distinction between categorically substantive decisions, to which § 1252(a)(2)(B)(ii) applies, and adjunct decisions, which avoid the jurisdictional bar.[86] Instead, the court found that § 1252(a)(2)(B)(ii) precluded review of the visa petition revocation decision.[87]

III. *KUCANA* ENDORSES RESISTING THE "PRECEDENTIAL CASCADE"

In 2020, the Fourth Circuit, in *Polfliet v. Cuccinelli*, erred by joining the "precedential cascade" of circuit courts in narrowly interpreting the INA's jurisdictional bar without considering the Supreme Court's direction in the 2010 decision, *Kucana v. Holder*.[88] The Fourth Circuit failed to consider the presumption of jurisdiction to review administrative decisions.[89] Instead, the Fourth Circuit required a less stringent showing of discretion to apply the jurisdictional

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§ 1155; *see Bernardo*, 814 F.3d at 485–86 (discussing how the language in § 1155 conveys discretion and holding that the language signals that Congress intended to preclude judicial review).

[85] *See Polfliet*, 955 F.3d at 384 (noting that Kimiki had not faced removal proceedings despite the revocation of his visa petition years earlier).

[86] 8 U.S.C. § 1252(a)(2)(B)(ii); *see Kucana*, 558 U.S. at 248 (distinguishing unreviewable substantive decisions, which determine the ability to remain in the United States, from procedural decisions); *Polfliet*, 955 F.3d at 377 (discussing the procedural posture in reference to preclusion of the petitioners' constitutional claims only). *But see Mehanna*, 677 F.3d at 317 (classifying visa petition revocation decisions as substantive).

[87] 8 U.S.C. § 1252(a)(2)(B)(ii); *id.* § 1155; *see Polfliet*, 955 F.3d at 384 (dismissing appellants' claim for lack of subject matter jurisdiction).

[88] *See* 8 U.S.C. § 1252(a)(2)(B)(ii) (acting as a catchall provision barring discretionary decisions from judicial review); s*ee* Kucana v. Holder, 558 U.S. 233, 251–52 (2010) (applying a strong presumption of judicial review to narrowly construe the jurisdictional bar); Polfliet v. Cuccinelli, 955 F.3d 377, 382 (4th Cir. 2020) (dismissing *Kucana* as irrelevant to the analysis of 8 U.S.C. § 1155); Bernardo *ex rel.* M & K Eng'g, Inc. v. Johnson, 814 F.3d 481, 508 (1st Cir. 2016) (Lipez, J., dissenting) (characterizing the circuit split as a "precedential cascade" and critiquing the holdings of the circuit split majority). The precedential cascade demonstrates the expediency of the majority's position more than it does the merits. *See, e.g.*, Sands v. U.S. Dep't of Homeland Sec., 308 F. App'x 418 (11th Cir. 2009) (per curiam) (dismissing review of § 1155 decision for lack of jurisdiction without substantial analysis); Abdelwahab v. Frazier, 578 F.3d 817, 821 (8th Cir. 2009) (noting the weight of authority supporting the application of the jurisdictional bar); Ghanem v. Upchurch, 481 F.3d 222, 223–24 (5th Cir. 2007) (adopting the reasoning of previous circuit court decisions to find that the jurisdictional bar precluded review of the visa petition). Although courts do not often admit it, precluding review of visa petition revocation decisions effectively serves judicial efficiency goals. *See* ANA Int'l Inc. v. Way, 393 F.3d 886, 895 (9th Cir. 2004) (Tallman, J., dissenting) (expressing frustration that the court retained jurisdiction to review visa decisions because of the foreseeable burden on the court).

[89] *See Polfliet*, 955 F.3d at 380–81 (resting its analysis on the statute's plain language). *But see Kucana*, 558 U.S. at 252 (asserting that the presumption of jurisdiction to review immigration decisions is a longstanding interpretive principle); *ANA Int'l*, 393 F.3d at 891 (noting that the presumption of jurisdiction governed the interpretation of jurisdictional bars).

bar.[90] In *Kucana*, the Court explained that 8 U.S.C. § 1252(a)(2)(B)(ii) applies only to statutes that "specify" discretionary authority.[91] The Court provided that implied or anticipated discretion is distinct from specified discretion.[92] Although the language of 8 U.S.C. § 1155 contains terms that signal discretion, circuit courts disagree on whether "good and sufficient cause" constrains that discretion.[93] The Fourth Circuit failed to recognize that the existence of a circuit split indicates that § 1155 is susceptible to multiple reasonable interpretations.[94]

The Fourth Circuit erred by failing to look beyond the statutory language to examine the legislative history of § 1155 and the statutory construction of the jurisdictional bar.[95] During the enactment of IIRIRA in 1996, Congress reenacted § 1155 without alteration, despite explicitly granting discretionary

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[90] 8 U.S.C. § 1252(a)(2)(B)(ii). *Compare Polfliet*, 955 F.3d at 379 (asserting that the statute is subject to the jurisdictional bar because it is sufficiently discretionary), *with ANA Int'l*, 393 F.3d at 891 (limiting the scope of the jurisdictional bar to purely discretionary matters). This difference is indicative of a larger challenge: determining the meaning of discretion in the immigration context. *See* Kanstroom, *supra* note 12, at 163 (discussing the ambiguity of distinguishing law from discretion in immigration statutes).

[91] 8 U.S.C. § 1252(a)(2)(B)(ii); *see Kucana*, 558 U.S. at 243 n.10 (describing the requirements for a statute to be subject to the jurisdictional bar).

[92] *See Kucana*, 558 U.S. at 243 n.10 (articulating that "specified" means stated explicitly, which contrasts with the ambiguity inherent in implied or anticipated discretion).

[93] 8 U.S.C. § 1155; *see Bernardo*, 814 F.3d at 496 (Lipez, J., dissenting) (noting that the BIA consistently treats "good and sufficient cause" as a legal standard, suggesting that the statute does not clearly specify discretion); *ANA Int'l*, 393 F.3d at 893 (conceding that the statute conveys some level of discretion but holding that a legal standard constrains the discretion); *see also, e.g.*, Matter of Tawfik, 20 I. & N. Dec. 166, 170 (B.I.A. 1990) (reversing a revocation decision for failure to satisfy the "good and sufficient cause" standard). The Fourth Circuit criticized the Ninth Circuit for concentrating on the phrase "good and sufficient cause" without considering the meaning within the context of the sentence. *See Polfliet*, 955 F.3d at 383 (finding that the word "deems" makes "good and sufficient cause" discretionary). Still, the Fourth Circuit committed a similar error by limiting its analysis to the words "may," "at any time," and "deem." *See id.* at 382–83 (discussing the meaning of each discretionary term); *ANA Int'l*, 393 F.3d at 893 (insisting that statutory interpretation required examination of the entire statute, including the meaning of "good and sufficient cause").

[94] 8 U.S.C. § 1155; *see* Josh Adams, *Federal Court Jurisdiction Over Visa Revocations*, 32 VT. L. REV. 291, 306 (2007) (noting that § 1155 was marginally ambiguous if it could result in divergent interpretations). *Compare Polfliet*, 955 F.3d at 381 (asserting that the statutory language was clear), *and* El-Khader v. Monica, 366 F.3d 562, 567 (7th Cir. 2004) (noting that discerning "good and sufficient cause" is a highly subjective endeavor), *with ANA Int'l*, 393 F.3d at 894 (holding that "good and sufficient cause" presents an objective standard that curbs discretion). Additionally, the Fourth Circuit's previous review of visa petition revocations demonstrates that the same court can construe § 1155 differently. *Compare* Oddo v. Reno, 175 F.3d 1015, at *3 (4th Cir. 1999) (reviewing a visa revocation decision for legal error), *with Polfliet*, 955 F.3d at 377 (dismissing review of a visa petition revocation for lack of jurisdiction).

[95] 8 U.S.C. § 1155; *id.* § 1252(a)(2)(B)(ii); *see Polfliet*, 955 F.3d at 381–83 (finding that the text of the statute sufficiently conveyed discretionary authority). *But see Kucana*, 558 U.S. at 245–48 (analyzing the construction of the jurisdictional bar to determine whether motions to reopen were comparable to the expressly barred substantive decisions); *Bernardo*, 814 F.3d at 498 (Lipez, J., dissenting) (analyzing § 1155's legislative ratification history to determine congressional intent).

authority in other parts of the Act.[96] In 2004, Congress amended § 1155 to remove an ambiguous notice requirement but left the rest of the statute unchanged.[97] Congress' continued omission of explicit language and retention of the phrase "good and sufficient cause" through two re-enactments suggests that Congress anticipated that § 1155 was a discretionary grant of authority but neglected to specify it.[98]

The guidance for statutory construction that *Kucana* provided instructs courts to compare the nature of the particular statute and the discretionary relief decisions subject to the jurisdictional bar.[99] Visa petition revocation decisions are not substantially similar to the enumerated decisions that § 1252(a)(2)(B)(i) bars because retracting eligibility for an immigrant visa is procedurally distinct from denying someone relief from deportation.[100] Revocation does not automatically trigger removal proceedings, as the continual

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[96] 8 U.S.C. § 1155 (1996); *see, e.g.*, *id.* § 1154(a)(1)(A)(viii) (specifying that the Secretary alone has discretion to waive the AWA bar for petitioners with a conviction of an offense against a minor).

[97] 8 U.S.C. § 1155 (2004). The 2004 amendments removed a notice requirement that created uncertainty regarding the permissibility of revocations of visa petitions for people already in the United States. *See* Firstland Int'l Inc. v. I.N.S., 377 F.3d 127, 130 (2d Cir. 2004) (holding that § 1155's notice requirement was not unambiguously discretionary, therefore reserving jurisdiction to review whether USCIS satisfied the procedural requirements despite noting that the rest of § 1155 would not be subject to judicial review).

[98] 8 U.S.C. § 1155 (2020); *see* Kucana v. Holder, 558 U.S. 233, 243 n.10 (2010) (noting that Congress must specify discretion for the jurisdictional bar to apply and the definition of "specify" is distinct from anticipate or imply). The Fourth Circuit rejected the argument that a statute must include the word discretion to specify discretionary authority. *Polfliet*, 955 F.3d at 381–82. Still, Congress's frequent use of more explicit language to convey discretion is notable. *See Bernardo*, 814 F.3d at 499 (Lipez, J. dissenting) (noting that "good and sufficient cause" exclusively appears in § 1155). The *Bernardo* dissent used § 1155's legislative ratification history to argue that Congress intended to retain the agency interpretation of § 1155. 8 U.S.C. § 1155; *Bernardo*, 814 F.3d at 499 (Lipez, J. dissenting). The longstanding, consistent BIA interpretation of "good and sufficient cause" implies congressional awareness of the phrase's meaning as a term of art. *See Bernardo*, 814 F.3d at 498 (Lipez, J. dissenting) (citing BIA decisions that apply a legal standard to review § 1155 decisions); *see, e.g.*, Matter of R.I. Ortega, 28 I. & N. Dec. 9, 15 (B.I.A. 2020) (treating "good and sufficient cause" as an objective standard).

[99] 8 U.S.C. § 1252(a)(2)(B); *see Kucana*, 558 U.S. at 247–49 (analyzing the character of the decisions that § 1252(a)(2)(B)(i) barred to assess the applicability of § 1252(a)(2)(B)(ii)).

[100] 8 U.S.C. § 1252(a)(2)(B)(i); *id.* § 1155; *see Bernardo*, 814 F.3d at 247–48 (asserting that the jurisdictional bar applies to similar discretionary relief decisions). Approved visa petitions do not convey the same right to remain in the United States as actual visas. *See* Matter of Ho, 19 I. & N. Dec. 582, 589 (B.I.A. 1988) (explaining that visa petition approval is merely a step in the visa process); *Bernardo*, 814 F.3d at 506 (Lipez, J., dissenting) (noting that visa issuance is a discretionary decision in which USCIS considers factors beyond visa petition approval). In 2012, the Sixth Circuit, in *Mehanna v. U.S. Citizenship & Immigration Service*, found that § 1155 decisions were substantive. *See* 677 F.3d 312, 317 (6th Cir. 2012) (characterizing the visa petition revocation as a substantive decision that governs a petitioner's ability to remain in the United States). Approved visa petitions are only one factor in determining eligibility for visas, and they do not alone grant any right to legal status. *See Bernardo*, 814 F.3d at 508 n.40 (Lipez, J., dissenting) (identifying this mistake in *Mehanna* and noting that visa petition approval alone does not determine whether someone can remain in the United States).

presence of the petitioner, Kimiki, in *Polfliet v. Cuccinelli* demonstrated.[101] Therefore, revocation of an approved visa petition is not categorically similar to the substantive decisions under § 1251(a)(2)(B)(i), and should not be subject to the catchall provision of the jurisdictional bar, § 1252(a)(2)(B)(ii).[102] After *Kucana* provided these analytical principles and reasserted the presumption of judicial review, the Fourth Circuit should have narrowly construed the jurisdictional bar, resisted the precedential cascade, and joined the Ninth Circuit.[103]

Conclusion

In 2020, the Fourth Circuit in *Polfliet v. Cuccinelli* held that 8 U.S.C. § 1252(a)(2)(B)(ii) bars judicial review of visa petition revocation decisions by interpreting the plain language of 8 U.S.C. § 1155 as an unambiguous grant of discretionary authority. The language of § 1155 is subject to different interpretations, and where such ambiguity exists, courts should construe statutes in favor of the retention of judicial review. Retaining the phrase "good and sufficient cause" through two amendments to § 1155 implies that Congress was aware of the established agency interpretation as a legal standard. Visa petition revocation decisions also notably differ from the substantive decisions that § 1252(a)(2)(B)(i) expressly bars. Therefore, § 1155 does not overcome the strong presumption in favor of jurisdiction to review administrative decisions. For these reasons, the Fourth Circuit should have adopted the principles that the Supreme Court employed in 2010, in *Kucana v. Holder*, to retain jurisdiction to review visa petition revocation decisions.

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[101] *See Polfliet*, 955 F.3d at 384 (recognizing that the government had not initiated removal proceedings against Kimiki following the revocation of his visa petition).

[102] 8 U.S.C. § 1155; *see id.* § 1252(a)(2)(B)(i) (precluding judicial review of specific immigration decisions that directly impact the noncitizen's ability to remain in the country, such as cancellation of removal); *id.* § 1252(a)(2)(B)(ii) (prohibiting judicial review of a broad category of discretionary decisions); *Kucana*, 558 U.S. at 248 (distinguishing substantive decisions from adjunct procedures); *Bernardo*, 814 F.3d at 506 (Lipez, J., dissenting) (differentiating the authority under § 1155 from the substantive decisions § 1252(a)(2)(B)(i) bars).

[103] 8 U.S.C. § 1252(a)(2)(B)(ii); *see Kucana*, 558 U.S. at 252 (specifying that surmounting the presumption of jurisdiction requires clear and convincing evidence); ANA Int'l, Inc. v. Way, 393 F.3d 886, 891–94 (9th Cir. 2004) (retaining jurisdiction to review § 1155 decisions by applying the presumption of jurisdiction and finding that the statute contained a legal standard).