No. 14-213

In the Supreme Court of the United States

MARIA ALEKSANDROVNA ANTROPOVA, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a court of appeals has jurisdiction to review "[t]he determination of what evidence is credible and the weight to be given that evidence" by the Department of Homeland Security when an alien spouse seeks a waiver under 8 U.S.C. 1186a(c)(4), notwithstanding that such a decision rests in the "sole discretion" of the Secretary of Homeland Security, and 8 U.S.C. 1252(a)(2)(B) expressly deprives federal courts of jurisdiction to review decisions or actions assigned to the Secretary's discretion.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-7a) is not published in the *Federal Reporter* but is reprinted in 553 Fed. Appx. 49. The decisions of the Board of Immigration Appeals (Pet. App. 8a-15a) and the Immigration Judge (Pet. App. 16a-25a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 2014. Pet. App. 3a. A petition for rehearing was denied on May 23, 2014. Pet. App. 1a. This petition for a writ of certiorari was filed on August 20, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3537, an alien who marries a U.S. citizen or lawful permanent resident is generally entitled to adjust her status to that of a permanent resident, albeit on a "conditional basis." 8 U.S.C. 1186a(a)(1) and (h)(1). Within two years of such an adjustment, the couple must file a joint petition to remove the alien spouse's conditional status and submit to a personal interview. 8 U.S.C. 1186a(c)(1) and (d)(3). Immigration officials in turn determine, among other things, whether the marriage was "entered into for the purpose of procuring an alien's admission as an immigrant." 8 U.S.C. 1186a(d)(1)(A)(III).

An alien spouse can also apply to the Secretary of Homeland Security to remove the conditional status, "in the Secretary's discretion," without such a joint petition. 8 U.S.C. 1186a(c)(4).[1] The Secretary may choose to exercise his discretion in favor of such a waiver "if the alien demonstrates," among other things, that "the qualifying marriage was entered into in good faith by the alien spouse, but the qualifying marriage has been terminated * * * and the alien was not at fault" in failing to file a joint petition. 8 U.S.C. 1186a(c)(4)(B). The statute further specifies that "the Secretary of Homeland Security shall con-

[1] Responsibility for the removal of aliens has been transferred from the Attorney General to the Secretary of Homeland Security, see 6 U.S.C. 251(2), although the Attorney General retains responsibility for the administrative adjudication of removal cases by immigration judges and the Board. See 68 Fed. Reg. 9830-9846 (Feb. 28, 2003). The regulations governing the adjudication procedures are at 8 C.F.R. 1001 *et seq*.

sider any credible evidence relevant to the application," but "[t]he determination of what evidence is credible and the weight to be given that evidence shall be within the *sole discretion* of the Secretary of Homeland Security." 8 U.S.C. 1186a(c)(4) (emphasis added).

The rule that credibility and weight determinations under 8 U.S.C. 1186a(c)(4) rest in the "sole discretion" of the Secretary is codified in the same subchapter as 8 U.S.C. 1252(a)(2)(B), which precludes judicial review of any "decision or action * * * the authority for which is specified under this subchapter to be in the discretion of the * * * Secretary of Homeland Security." 8 U.S.C. 1252(a)(2)(B). This withdrawal of jurisdiction does not, however, "preclude[e] review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals." 8 U.S.C. 1252(a)(2)(D).

2. Petitioner is a native of Russia who entered the United States in June 2002 on a four-month cultural and student exchange visitor (J-1) visa. A.R. 125, 218, 293. Shortly before her visa status expired, petitioner married a United States citizen she met during her visit. Pet. App. 20a. In November 2003, pursuant to Section 1186a(a), petitioner adjusted her status to that of a conditional permanent resident. *Id.* at 22a. But petitioner and her then-husband never filed a joint petition to remove that conditional status, as Section 1186a(c) generally requires. In 2008, petitioner instead applied for a waiver of the joint-petition requirement on the ground that she had entered into the marriage in good faith but the two had since divorced. Pet. 1; see 8 U.S.C. 1186a(c)(4).

The United States Citizenship and Immigration Services (USCIS) denied petitioner's application for a waiver, finding that petitioner "did not provide sufficient evidence to confirm that the marriage was not entered into for the purpose of evading the immigration laws of the U.S." A.R. 166. Petitioner testified that she had lived with her ex-husband "for approximately eight months," but "[v]ery few, if any documents, indicated that [petitioner] and [her ex-husband] had a shared life together or conducted * * * personal or financial affairs from a common address." *Ibid.* Petitioner submitted only a single tax return showing the couple as married filing jointly; a joint car loan for $4000; a utility bill; an affidavit from a friend; and six pictures of herself and her ex-husband. A.R. 165-166. USCIS observed that the only substantial joint asset was the $4000 car loan—but no payments were ever made on the loan. A.R. 166. By contrast, petitioner had purchased a home and lived with another man, described as her "ex-boyfriend." *Ibid.* The affidavit and utility bill added little, USCIS concluded, as the affidavit was "self-serving" and "[a] utility company is not concerned with the validity of [a person's] marriage." *Ibid.* The agency found that "[t]he lack of documentation * * * leads USCIS to believe that this marriage was solely for the purpose of you obtaining your permanent residence status." *Ibid.* Accordingly, USCIS found petitioner ineligible for relief under Section 1186a(c)(4).

An immigration judge (IJ) agreed with USCIS's determination. Pet. App. 19a-25a. The IJ agreed that "there is insufficient evidence for [petitioner] to meet the burden of proof." *Id.* at 24a-25a. Indeed, the IJ

observed that "there is really very little documenttation regarding the marriage." *Id.* at 24a. "[Petitioner] acknowledges that they really did not have any joint accounts"; it was "not quite clear to the Court how long she and her ex-husband lived together"; and apart from the car loan and the utility bill, petitioner presented no other objective evidence to show a shared life together. *Ibid.* The IJ also noted that no witnesses testified in support of her cause. *Ibid.*

The Board of Immigration Appeals (BIA) dismissed petitioner's appeal, agreeing that petitioner "did not present sufficient evidence to establish that she entered into her marriage in good faith" and therefore that she was ineligible for discretionary relief under Section 1186a(c)(4). Pet. App. 13a. "[I]t is [petitioner's] burden to demonstrate that she entered her marriage in good faith," the BIA reasoned, but she "acknowledge[d] the lack of documents in support of her claim" and "acknowledged that she did not ask others to testify on her behalf." *Id.* at 12a. The BIA also rejected petitioner's argument that the IJ erred in stating that "there was not enough evidence to show that the parties 'had a shared life together.'" *Id.* at 13a. The BIA agreed that the correct inquiry was "to examine the parties' intent *at the time of the marriage*," but it found any error harmless, as the IJ had stated the correct standard earlier in his opinion and "the parties' conduct following the marriage can also be relevant in determining their original intent." *Ibid.*

The BIA denied a motion to reopen. Pet. App. 8a-9a.

3. On January 30, 2014, in an unpublished summary order, the court of appeals dismissed petition-

er's petition for review in part and denied it in part. Pet. App. 3a-7a. First, pursuant to 8 U.S.C. 1252(a)(2)(D), the court exercised jurisdiction over questions of law to reject on the merits petitioner's argument that the IJ applied the wrong legal standard. The court noted that the IJ stated the correct legal standard earlier in his opinion and examined evidence that was relevant under that standard. Pet. App. 5a-6a (citing *Boluk* v. *Holder*, 642 F.3d 297, 303 (2d Cir. 2011)). The court of appeals thus agreed with the BIA that, to the extent there was such an error, it "did not infect the immigration judge's fact finding" and "was 'harmless.'" *Ibid.*

Second, the court rejected on the merits petitioner's argument, relying on *Kataria* v. *INS*, 232 F.3d 1107 (9th Cir. 2000), that her testimony had to be taken as true because the IJ did not make an adverse credibility determination. Pet. App. 6a; see *Kataria*, 232 F.3d at 1114 ("In the absence of an explicit adverse credibility finding, we must assume that [an applicant's] factual contentions are true."). The panel observed that petitioner had "failed to disclose to the court" that *Kataria* was "no longer good law." Pet. App. 6a. The court explained that, in the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302, "'Congress abrogated' *Kataria*'s holding that 'we must accept an applicant's testimony as true in the absence of an explicit adverse credibility finding.'" Pet. App. 6a (quoting *Aden* v. *Holder*, 589 F.3d 1040, 1044 (9th Cir. 2009)). Congress instead provided that "if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal." 8 U.S.C. 1229a(c)(4)(C).

Third, the court of appeals dismissed for lack of jurisdiction petitioner's arguments that the IJ's decision was not supported by substantial evidence. "Because her challenge essentially relates to the credibility of the evidence and the weight accorded to it, she fails to raise a reviewable claim." Pet. App. 6a. (citing *Contreras-Salinas* v. *Holder*, 585 F.3d 710, 714 (2d Cir. 2009) (per curiam)).

A petition for rehearing was denied on May 23, 2014. Pet. App. 1a.

ARGUMENT

Petitioner seeks review of the general question whether "eligibility determinations under 8 U.S.C. §1186a(c)(4) [are] subject to judicial review." Pet. i. That general question is not presented here, because the court of appeals exercised jurisdiction over the portion of petitioner's claims that raised questions of law while also holding that it lacked jurisdiction over petitioner's arguments to the extent that they "essentially relate[d] to the credibility of the evidence and the weight accorded to it." Pet. App. 6a. This nuanced jurisdictional ruling is consistent with the plain language of Sections 1186a(c)(4) and 1252(a)(2)(B) and the overwhelming weight of circuit authority; the lone outlier decision may be corrected without this Court's intervention; and even if the court of appeals had exercised jurisdiction to reconsider credibility determinations or the weight of the evidence, it would not alter the outcome here because petitioner plainly failed to carry her burden of proof.

Although petitioner does not identify it as a question presented, she also appears to seek review of whether an alien's testimony should be presumed credible on appeal in the absence of an adverse

credibility finding. Pet. 12-14. This question was not passed upon below and does not warrant this Court's review.

1. a. The court of appeals correctly concluded that it lacks jurisdiction to second-guess credibility determinations or re-weigh the limited evidence petitioner submitted to USCIS in her application for a waiver of the requirement of a joint petition to remove her conditional status. Congress has deprived courts of jurisdiction to consider any "decision or action" that is "specified under this subchapter to be in the discretion of * * * the Secretary of Homeland Security." 8 U.S.C. 1252(a)(2)(B)(ii). In that same subchapter, Congress specified that "[t]he determination of what evidence is credible and the weight to be given that evidence" in such a waiver application "shall be within the *sole discretion* of the Secretary of Homeland Security." 8 U.S.C. 1186a(c)(4) (emphasis added). Petitioner does not dispute that her arguments about the lack of substantial evidence "essentially relat[e] to the credibility of the evidence and the weight accorded to it." Pet. App. 6a. Accordingly, the court of appeals correctly held that it lacked jurisdiction over petitioner's sufficiency challenge. *Ibid.*; see also *Contreras-Salinas* v. *Holder*, 585 F.3d 710, 714 (2d Cir. 2009) (per curiam) ("we lack jurisdiction" over "claims challeng[ing] only credibility determinations and the weight given to evidence by the IJ and BIA").

At the same time, the court of appeals also exercised jurisdiction to consider (and reject on the merits) petitioner's argument that the IJ applied the wrong legal standard to her claim. Pet. App. 5a-6a. In 2005, Congress amended Section 1252(a)(2) to be clear that the courts of appeals have jurisdiction to

review "constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section." 8 U.S.C. 1252(a)(2)(D). It is a question of law whether the agency applied the correct legal standard. *E.g.*, *Alvarado de Rodriguez* v. *Holder*, 585 F.3d 227, 233-234 (5th Cir. 2009). The court of appeals thus correctly assessed the metes and bounds of its jurisdiction.

b. Petitioner contends that the court of appeals' unpublished summary order puts the Second Circuit on the minority side of a 5-3 split regarding "whether judicial review is available with respect to a determination of eligibility for a waiver under 8 U.S.C. § 1186a(c)(4) based upon a good faith marriage." Pet. 2-3. Petitioner correctly notes that "the Second Circuit itself had acknowledged this conflict but declined to take a position." Pet. 3; see *Contreras-Salinas*, 585 F.3d at 713-715.[2] This split is no longer live, however, and in any event this case does not present the question.

Before 2005, the Third and Fifth Circuits issued opinions that can be read as holding that courts lack jurisdiction over eligibility determinations in good-faith-marriage waiver cases because Congress granted the Secretary discretion to make the ultimate decision of whether to grant or deny such a waiver. 8 U.S.C. 1186a(c)(4); see *Urena-Tavarez* v. *Ashcroft*, 367 F.3d 154, 159-161 (3d Cir. 2004); *Assaad* v.

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[2] The Second Circuit declined to "choose a side in this debate" in *Contreras-Salinas* because, as here, the alien there "challenge[d] only credibility determinations and the weight given to evidence," and Sections 1186a(c)(4) and 1252(a)(2)(B)(ii) bar judicial review of such determinations. 585 F.3d at 713-715.

Ashcroft, 378 F.3d 471, 475 (5th Cir. 2004) (per curiam). In 2005, however, Congress enacted the REAL ID Act, which altered the legal landscape by clarifying that courts have jurisdiction to review "constitutional claims or questions of law." 8 U.S.C. 1252(a)(2)(D).

Since enactment of the REAL ID Act, no circuit has held that courts wholly lack jurisdiction over eligibility determinations in good-faith-marriage waiver cases. Indeed, recognizing that the REAL ID Act changed the law, the Fifth Circuit has narrowed its position, holding that the REAL ID Act "clearly permits appellate jurisdiction" over claims that the BIA applied the incorrect legal standard in determining that an alien spouse was ineligible for discretionary relief under Section 1186a(c). *Alvarado de Rodriguez*, 585 F.3d at 233-234. As for the Third Circuit, its pre-REAL ID Act decision in *Urena-Tavarez* also "do[es] not unequivocally hold that 8 U.S.C. § 1252(a)(2)(B)(ii) bars *all* court challenges to determinations by the Attorney General that an alien has failed to prove that she married in good faith and thus is ineligible for discretionary relief under 8 U.S.C. § 1186a(c)(4)(B)." *Cho* v. *Gonzales*, 404 F.3d 96, 101-102 (1st Cir. 2005). Rather, *Urena-Tavarez* can be read as holding only that courts lack jurisdiction "to review precisely the issue presented [there], that is, the relative weight of the evidence." *Urena-Tavarez,* 367 F.3d at 161. And since the REAL ID Act, the Third Circuit has exercised jurisdiction over a constitutional claim arising in a marriage-waiver case, albeit in an unpublished order. *Roldan* v. *Attorney Gen.*, 381 Fed. Appx. 195, 197 (2010) (per curiam).

Thus, there is no longer a live circuit split over the question petitioner raises.

The question petitioner identifies is also not presented here. The court of appeals did not decline to exercise jurisdiction over any and all questions "with respect to a determination of eligibility for a waiver * * * based upon a good faith marriage." Pet. 2. Rather, consistent with Congress's tailored provisions governing judicial review, the court's holding was narrower. The court correctly determined that it lacked jurisdiction to reconsider credibility or reweigh the evidence petitioner presented to USCIS in her application because Congress assigned the Secretary "sole discretion" to assess credibility and weigh the evidence. 8 U.S.C. 1186a(c)(4). But the court also correctly determined that it had jurisdiction to review the legal standard the IJ applied below in determining that petitioner was ineligible for discretionary relief under Section 1186a(c)(4), because that is a question of law over which courts have jurisdiction pursuant to 8 U.S.C. 1252(a)(2)(D). See Pet. App. 5a-6a.

c. To the extent petitioner challenges the narrower question actually at issue—whether a court of appeals has jurisdiction to review credibility determinations and the weight to be given to credible evidence in an eligibility determination under Section 1186a(c)(4)—the circuits overwhelmingly agree that Congress meant what it said and that there is no such jurisdiction. This is the position of the First, Second, Third, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits. *Cho* v. *Gonzales*, 404 F.3d 96, 101-102 (1st Cir. 2005); *Contreras-Salinas* v. *Holder*, 585 F.3d 710, 714 (2d Cir. 2009) (per curiam); *Urena-Traverz* v. *Ashcroft*, 367 F.3d 154, 157-159 (3d Cir.

2004); *Roldan* v. *Attorney Gen.*, 381 Fed. Appx. 195, 197 (3d Cir. 2010) (unpublished); *Alvarado de Rodriguez* v. *Holder*, 585 F.3d 227, 233-234 (5th Cir. 2009); *Johns* v. *Holder*, 678 F.3d 404, 405-407 (6th Cir. 2012); *Boadi* v. *Holder*, 706 F.3d 854, 857-861 (7th Cir. 2013); *Ibrahimi* v. *Holder*, 566 F.3d 758, 763-764 (8th Cir. 2009); *Nguyen* v. *Mukasey*, 522 F.3d 853, 854-855 (8th Cir. 2008) (per curiam); *Iliev* v. *Holder*, 613 F.3d 1019, 1023-1024 (10th Cir. 2010); *Fynn* v. *United States Atty. Gen.*, 752 F.3d 1250, 1252 (11th Cir. 2014) (per curiam).[3]

The lone outlier is the Ninth Circuit. In *Oropeza-Wong* v. *Gonzales*, 406 F.3d 1135, 1141-1147 (2005), the Ninth Circuit declined to follow Congress's unambiguous textual command in Section 1186a(c)(4) that determining credibility and weighing evidence in marriage-waiver applications rest in the "sole discretion" of the Secretary and thus are unreviewable under 8 U.S.C. 1252(a)(2)(B)(ii). Rather, relying on the legislative history of Section 1186a(c)(4), the Ninth Circuit concluded that Congress enacted the "sole discretion" language to prevent immigration officials from employing overly-strict evidentiary rules when

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[3] Petitioner suggests that, "even if credibility and weight are discretionary matters," some circuits would review "whether the credited evidence meets the good-faith standard," while the Third and Fifth Circuits would not because they do not review any eligibility determinations in good-faith-marriage waiver cases. Pet. 11 (quotation marks omitted). But as discussed above, see pp. 9-11, *supra*, the Third and Fifth Circuits do not appear to have applied their categorical rule since enactment of the REAL ID Act. In any event, this question is not presented here because petitioner does not dispute that the arguments she raised below "essentially relat[e] to the credibility of the evidence and the weight accorded to it." Pet. App. 6a.

determining the credibility of battered women. *Oropeza-Wong*, 406 F.3d at 1143.

Oropeza-Wong is clearly wrong and has been heavily criticized. First, the Ninth Circuit's holding is directly contrary to the unambiguous textual command. See, *e.g.*, *Iliev*, 613 F.3d at 1024 ("Like other of our sister circuits before us, we reject *Oropeza-Wong*'s suggestion that credibility determinations or the weight given to competing evidence are within our jurisdictional ken; Congress has specifically and clearly denied us authority to review those questions."); *Contreras-Salinas*, 585 F.3d at 714 n.4 (the text "demonstrates an unambiguous intent to limit judicial review of those determinations"). Second, *Oropeza-Wong* erred in relying on legislative history to trump clear statutory text. *E.g.*, *Iliev*, 613 F.3d at 1024 ("*Oropeza-Wong* errs by elevating legislative history above express textual direction."); *Contreras-Salinas*, 585 F.3d at 714 n.4 (disagreeing with *Oropeza-Wong*, including for "resort[ing] to the legislative history * * * in the face of unambiguous statutory language"). Third, whatever the legislative history of Section 1186a(c)(4), the Ninth Circuit failed to recognize that Congress subsequently enacted the preclusion-of-jurisdiction provision in Section 1252(a)(2)(B) as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546, a primary "theme" of which was "protecting the Executive's discretion from the courts." *Contreras-Salinas*, 585 F.3d at 714 n.4 (quoting *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 486 (1999)).

Further review is unwarranted on the narrow question whether courts have jurisdiction to review

weight and credibility determinations under Section 1186a(c)(4). First, petitioner does not even seek review of this question; she seeks certiorari only on the broader question of whether there is jurisdiction at all to review eligibility determinations in good-faith-marriage waiver cases. That question is not presented here and there is no live split on it. See pp. 9-10, *supra*. Second, the Ninth Circuit may resolve the lopsided 9-1 split as to judicial review of credibility and weight determinations without this Court's intervention. The Ninth Circuit was one of the first circuits to address this issue; its position is now clearly an outlier; and several Ninth Circuit decisions suggest that *Oropeza-Wong* may warrant reconsideration by that court. For example, in *Hammad* v. *Holder*, 603 F.3d 536 (2010), the panel stated that a "reasonable question can be raised as to whether we have jurisdiction to review adverse credibility determinations under section 1186a," recognizing that a majority of the other circuits had held to the contrary and the Ninth Circuit's position on the issue has been criticized by other circuits. *Id.* at 544 n.9. In *Singh* v. *Holder*, 591 F.3d 1190 (2010), the Ninth Circuit similarly noted that *Oropeza-Wong*'s broad holding "has received some criticism." *Id.* at 1195 n.3. Accordingly, the Ninth Circuit may reconsider *Oropeza-Wong* in a future case or en banc petition.

Third, if this Court is ever going to decide this question, it should do so in a case where a court's exercise of jurisdiction would alter the substantive outcome. (In *Oropeza-Wong*, it did not. The Ninth Circuit denied the petition for review on the merits because substantial evidence supported the agency's

denial of relief. 406 F.3d at 1147-1149.) The court of appeals' decision here, however, is clearly correct, consistent with the overwhelming majority of circuit authority, and even if there were an error, it would be harmless. If the court of appeals had exercised jurisdiction to review credibility and weight determinations, it would have denied petitioner relief because substantial evidence supports the BIA's determination that petitioner failed to carry her burden of demonstrating that she entered into her marriage in good faith. See 8 U.S.C. 1186a(c)(4)(B), 1252(b)(4)(B).

Petitioner married a U.S. citizen under suspicious circumstances: they married shortly after meeting each other and shortly before petitioner's visa status was set to expire. Pet. App. 20a. The couple quickly separated before ultimately divorcing. *Id.* at 20a-21a. And in an effort to carry her burden of proving that her brief marriage was nonetheless entered into in good faith, petitioner submitted "really very little documentation." *Id.* at 24a. Petitioner acknowledged "the lack of documents in support of her claim"; that "she and her husband did not have any joint accounts together"; and that she failed to present any other live-witness testimony in support of her cause. *Ibid.* The failure of evidence of a shared life with her ex-husband is also notable because the evidence showed that petitioner purchased a home and lived with another man, described as an "ex-boyfriend." A.R. 166. Indeed, it was not even clear "how long [petitioner] actually lived with her ex-husband." Pet. App. 12a. Thus, petitioner provided almost nothing to support her application beyond her own say-so. Judicial review thus would not disturb the BIA's deter-

mination that the IJ correctly determined that petitioner had failed to carry her burden.

2. In the text of her certiorari petition, petitioner contends that the court of appeals' unpublished order opened an inter- and intra-circuit split over whether, under 8 U.S.C. 1229a(c)(4)(C), an alien's testimony is entitled to a rebuttable presumption of credibility in the absence of an adverse-credibility finding. See Pet. 12-14. This question is not fairly included within the question presented in the petition (see Pet. i), which is sufficient reason to deny it. See *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 510 U.S. 27, 31 n.5 (1993) (per curiam) ("[T]he fact that [petitioner] discussed this issue in the text of [his] petition for certiorari does not bring it before us. Rule 14.1(a) requires that a subsidiary question be fairly included in the *question presented* for our review.").

Even if petitioner had properly presented the question, it would not warrant review. First, the court of appeals did not even address whether the BIA erred by failing to provide a rebuttable presumption of credibility under Section 1229a(c)(4)(C)—or under Section 1186a(c)(4), the specific provision petitioner invoked in seeking a waiver—because petitioner made a sweeping demand, relying on *Kataria* v. *INS*, 232 F.3d 1107, 1114 (9th Cir. 2000), that, "absent an explicit adverse credibility finding, [her] testimony *must* be accepted as true." Pet. App. 6a (emphasis added); see Pet. C.A. Br. 12-15; Pet. C.A. Reply Br. 6-7. The court of appeals correctly rejected that argument because petitioner "failed to disclose to the court that the legal principle in [*Kataria*] on which she relied is no longer good law." *Ibid.* "Congress abro-

gated" *Kataria* by enacting Section 1229a(c)(4)(C), replacing *Kataria*'s absolute presumption with a rebuttable presumption. *Aden* v. *Holder*, 589 F.3d 1040, 1044 (9th Cir. 2009).[4]

Every court of appeals to address the issue recognizes that, as Section 1229a(c)(4)(C) expressly provides, there is a rebuttable presumption of credibility in the absence of a credibility determination. *E.g.*, *Guta-Tolossa* v. *Holder*, 674 F.3d 57, 61 (1st Cir. 2012). Nothing in the decision below or any decision of the Second Circuit is to the contrary. Regardless, the unpublished summary order below could not have opened an inter- or intra-circuit split of the sort that might warrant this Court's review, because "[r]ulings by summary order do not have precedential effect." 2d Cir. Local R. 32.1.1(a). Finally, any error would be harmless because the outcome of this case does not depend on whether a presumption of credibility applies to petitioner's testimony or has been rebutted. Rather, looking at the evidence as a whole, the BIA concluded that petitioner failed to carry her burden of proof because she presented insufficient documentation to support her claim and no live testimony whatsoever from supporting witnesses. Pet. App. 12a, 24a. As set forth above, that determination is fact-

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[4] After oral argument, petitioner filed a letter pursuant to Federal Rule of Appellate Procedure 28(j) arguing that the BIA "fail[ed] to accord [petitioner] the presumption of credibility required by" Section 1229a(c)(4)(C). See Doc. 134, at 2 (Jan. 23, 2014). Even if this post-argument letter were sufficient to preserve the issue, petitioner did not disclose that Congress had abrogated *Kataria*, disavow her argument that her testimony must be taken as true, or present an argument why application of the rebuttable presumption would have altered the BIA's decision. See *ibid.*

bound and correct. And, petitioner cannot in any event challenge the BIA's assessment of the weight of the testimony and evidence (or the lack thereof), because courts lack jurisdiction to reconsider "the weight to be given [the] evidence" in this context. 8 U.S.C. 1186a(c)(4).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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