District Judge Marsha J. Pechman

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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| FELIX RUBIO HERNANDEZ,<br><br>Plaintiff,<br>v.<br><br>U.S. CITIZENSHIP AND IMMIGRATION SERVICES; ALEJANDRO MAYORKAS, Secretary of Homeland Security; UR M. JADDOU, Director, U.S. Citizenship and Immigration Services,<br><br>Defendants. | Case No. 2:22-cv-00904-MJP<br><br>REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS<br><br>Noted For Consideration:<br>September 30, 2022 |

Plaintiff Felix Rubio Hernandez raises issues that are of no moment here. For example, he forcefully argues that the Court can review any USCIS decision for constitutional violations. Dkt. 8 (Opp.), p. 1. No such issues were pled here or even raised in Rubio's opposition, so this is irrelevant. Dkt. 7 (MTD), p. 8. While Rubio agrees with the government that the Court does not have jurisdiction to reweigh the equities, he frames his opposition as seeking review of a pure legal issue. But Rubio's complaint only challenges USCIS's discretionary decision. Any issue about whether legal challenges are allowed pursuant 8 U.S.C. § 1252(a)(2)(B) are irrelevant and would invite an inappropriate advisory opinion. By trying to frame his opposition thus, Rubio



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seeks to limit *Patel*'s[1] reasoning—and ignore Ninth Circuit precedent—by arguing that § 1252(a)(2)(B)(i) does not apply beyond removal proceedings. The government demonstrated in its motion why that position in untenable. And Rubio admits that, at the very least, the Ninth Circuit has favored finding 1252(a)(2) is not limited to removal proceedings. Rubio's complaint is plain. He challenges USCIS's discretionary judgment as to how to weigh certain evidence when it denied his status under 8 U.S.C. § 1255(m). Following *Patel's* reasoning, as well as Ninth Circuit opinions, this is beyond this Court's jurisdiction and Rubio's complaint must be dismissed.

Further, the government raised two distinct reasons why the Court lacks subject-matter jurisdiction. While Rubio takes up the first in detail, he never opposes the second—that the APA does not allow review of decisions committed to an agency's discretion, which this is. The Court should therefore grant the government's motion to dismiss for this independent reason.

## ARGUMENT

### A. Rubio appears to agree that USCIS's decision was committed to the agency's discretion.

The APA does not allow review of a matter "committed to agency discretion by law." 5 U.S.C. § 702(a); *see* MTD, pp. 9-12. As the government explained in its motion, this is a separate reason why the Court lacks subject matter jurisdiction. Rubio never directly addresses this issue and provides only one glancing reference to the APA. Opp., p 22. As is evidence from his reluctance to address this issue, as well as the case law from the government's brief, the Court lacks jurisdiction because USCIS's decision to adjust status under § 1255(m) is committed entirely to agency discretion and is therefore not susceptible to attack under the APA. The relevant regulation is clear: "The decision to approve or deny a Form I-485 filed under section 245(m) of the Act is a discretionary determination that lies solely within USCIS's jurisdiction.

[1] *Patel v. Garland*, __ U.S. __, 142 S. Ct. 1614 (2022).



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After completing its review of the application and evidence, USCIS will issue a written decision approving or denying Form I-485 and notify the applicant of this decision." 8 C.F.R. § 245.24(f).

Thus, the Court should dismiss the complaint for the reasons articulated by the government in its motion, which are unrebutted by Rubio.

**B. Rubio did not raise a legal challenge to USCIS's decision.**

Rubio repeatedly suggests he is raising a legal challenge to USCIS's decision. Any agency decision can ultimately be described as a legal one—USCIS denied the application pursuant to 8 U.S.C. § 1255(m)(1) and the attendant regulations. But the reasons for why USCIS denied that application are mired in the factual record and USCIS's ability to weigh these issues and decide questions pursuant to 8 U.S.C. § 1255(m) is discretionary. Rubio's own complaint bears this out. His cause of action only addresses the weight USCIS afforded the evidence or lack of evidence. He alleges that the government's decision was "arbitrary, capricious, and not in accordance with the law" by

- "[basing the decision] in part on Mr. Rubio Hernandez's failure to submit documentary evidence" Compl., ¶ 48;
- "according weight to Mr. Rubio Hernandez's 2004 arrest for fourth degree assault, for which he was found not guilty" *id.* at ¶ 49;
- "weighing Mr. Rubio Hernandez's 2001 simple assault arrest against him, even though that charge was dismissed, and even though he supplied an explanation of events for that arrest, available court documents, and proof that a full police report was not available" *id.* at ¶ 50;
- "relying on events that the agency had already considered when granting Mr. Rubio Hernandez's U visa status…." *id.* at ¶ 51.[2]

[2] The final agency action is the Administrative Appeal Office's (AAO) decision. Thus, any of Rubio's arguments concerning the USCIS denial are inappropriately raised as an APA claim, which concerns only final agency actions. *Herrera v. USCIS*, 571 F.3d 881, 885 (9th Cir. 2009).



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These allegations all take issue with the type and weight of evidence that USCIS considered in its discretion. As the government pointed out, the relevant statutory language gives wide berth to USCIS exercising its discretion in adjudicating I-485 petitions: USCIS "*may* adjust the status of [a noncitizen if] *in the opinion of the [agency]*, the [noncitizen's] continued presence in the United States is justified on humanitarian grounds, to ensure family unity, or is otherwise in the public interest." 8 U.S.C. § 1255(m)(1) (emphasis added).

Not only is there is no statute, regulation, or controlling case law that defines "humanitarian grounds," "family unity," or "the public interest," there is no statute or regulation restricting the type of evidence that USCIS may consider. While Rubio tries to couch his argument as legal in nature, that would mean that USCIS violated some controlling authority when it considered this evidence. If there is some authority, at best Rubio should refile his complaint and state an APA claim that explains that USCIS violated the law by considering this evidence. While such a claim may still fail for lack of subject matter jurisdiction (for much the same reason as USCIS articulated in its brief), at least Rubio would not be calling for an advisory opinion.

As it stands, Rubio merely disagrees with USCIS's decision to consider certain evidence and the weight USCIS afforded that evidence. There is no plausible legal issue. USCIS did not proceed illegally in considering police reports and indictments—nor is there any allegation that those considerations, by themselves, were conclusive. Rather, Rubio bears the burden of establishing his eligibility by a preponderance of the evidence (8 U.S.C. § 1361) and here he was required to show he merited a favorable exercise of discretion on humanitarian grounds, to ensure family unity, or as otherwise in the public interest. 8 C.F.R. § 245.45(d)(11). There is no dispute Rubio has a criminal history, including convictions for several crimes. Compl., ¶ 27. And USCIS may take into account all relevant factors in making its discretionary determination. The procedures for USCIS's decision are laid out in 8 C.F.R. § 245.24. Nothing there restricts the type of evidence on which USCIS may rely. In fact, the regulation states the opposite:



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"USCIS may take into account ***all factors***…in making its discretionary decision on the application." 8 C.F.R. § 245.24(d)(11) (emphasis added).[3] In its decision, the agency cited a Board of Immigration Appeals (BIA) opinion that allows the agency to consider criminal conduct that does not result in a conviction. *Matter of Thomas*, 21 I&N Dec. 20, 23-24 (BIA 1995) (holding that evidence of criminal conduct that has not culminated in a final conviction may nonetheless be considered in discretionary determinations). Additionally, the USCIS Policy Manual states: "The courts and administrative appellate bodies have deemed an arrest record, as well as police reports and other corroborating information, as appropriate for consideration for purposes of applications for discretionary relief, provided that the evidentiary weight of the arrest and police reports is properly assessed and considered." *See* USCIS Policy Manual, Volume 3, Part C, Chapter 6, (available at https://www.uscis.gov/policy-manual/volume-3-part-c-chapter-6#footnote-9). In making that assertion, USCIS cites to multiple cases for support: *Paredes-Urrestarazu v. INS*, 36 F.3d 801, 810 (9th Cir. 1994) (holding that an arrest can be relevant to a discretionary determination); *Matter of Teixeira*, 21 I&N Dec. 316, 321 (BIA 1996) (police reports that are not part of the "record of conviction" may be appropriately considered for purposes of an application for discretionary relief, where the focus is on conduct rather than conviction); *Avila-Ramirez v. Holder*, 764 F.3d 717, 725 (7th Cir. 2014) (consideration of arrest reports in the weighing of discretionary factors is not prohibited but must be given appropriate evidentiary weight); *Arias-Minaya v. Holder*, 779 F.3d 49, 54 (1st Cir. 2015) (noting "it is settled beyond hope of contradiction that in reviewing requests for discretionary relief, immigration courts may consider police reports" and that this holds true even where there is no conviction). This firmly establishes that USCIS was legally allowed to consider this evidence.

The cases that Rubio cites do not suggest otherwise. They either discuss the weight such evidence should be given or regard distinct factual scenarios such as non-discretionary decisions

[3] The form Rubio filled out contained this same language: "When making a discretionary decision on your application, USCIS may take into account all factors, including those acts that would otherwise make you inadmissible." *See* USCIS Form I-485, p. 31 available at https://www.uscis.gov/sites/default/files/document/forms/i-485instr.pdf.



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or ones entirely based on uncorroborated evidence. For example, in *Zamorano v. Garland* the Ninth Circuit reversed an immigration judge's (IJ) decision denying voluntary departure because the IJ did not consider any favorable facts. "Because there generally must be some indication that the IJ evaluated the favorable factors when considering whether to grant or deny voluntary departure, we grant Zamorano's petition for review and remand for further proceedings." *Zamorano v. Garland*, 2 F.4th 1213, 1221–22 (9th Cir. 2021). Here, Rubio acknowledges that USCIS did consider his favorable factors: "While the [Administrative Appeals Office] briefly acknowledged Mr. Rubio Hernandez's positive equities, it went on to conclude that they did not outweigh his criminal history." Compl., ¶ 40. Moreover, the Ninth Circuit never said it was inappropriate for the IJ to consider the appellant's "criminal background, the repetitive nature of [his] DUI offenses." *Zamorano*, 2 F.4th at 1221. And the Court acknowledged "the IJ need not follow a particular formula or incant magic words in exercising its discretion to grant voluntary departure, and a reviewing court must uphold even a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Id.* at 1222 (cleaned up). Similarly here too, USCIS was not required to use some specific standard or magic words to reach its decision.

In *Avila-Ramirez v. Holder*, 764 F.3d 717 (7th Cir. 2014), the Seventh Circuit stated that: "Legal questions include challenges to the BIA's interpretation of a statute, regulation, or constitutional provision, claims that the BIA misread its own precedent or applied the wrong legal standard, or claims that the BIA failed to exercise discretion at all." *Id.* at 722. There, the issue was whether the BIA applied its own precedent correctly. Rubio does not allege that USCIS failed to follow any binding precedent.

*Paredes-Urrestarazu* does not prohibit consideration of an arrest record, but instead acknowledges it may have some weight: "The fact of arrest, insofar as it bears upon whether an alien might have engaged in underlying conduct and insofar as facts probative of a [noncitizen's] bad character or undesirability as a permanent resident arise from the arrest itself, plainly can have relevance in performing the analysis required by section 212(c)." *Paredes-Urrestarazu*, 36



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F.3d at 810. In *Sierra-Reyes v. INS*, 585 F.2d 762, 764 (5th Cir. 1978), the court expressed some concern with placing too much weight on police reports, by themselves, but did not reverse and noted its review is quite limited. *Id.* at n.3. *Igwebuike v. Caterisano*, 230 F. App'x 278, 283 (4th Cir. 2007) considered a wholly different issue, whether an individual is a drug trafficker pursuant to 8 U.S.C. § 1182(a)(2)(C), for which there was a meaningful standard of review. *See also Murphy v. INS*, 54 F.3d 605 (9th Cir. 1995) (discussing weight given to I-213 forms); *Olivas-Motta v. Holder*, 746 F.3d 907, 908 (9th Cir. 2013) (discussing weight of police reports for determining whether someone was convicted of a "crime of moral turpitude" under 8 U.S.C. § 1227(a)(2)(A)(ii), which requires *conviction* of two or more such crimes); *Prudencio v. Holder*, 669 F.3d 472 (4th Cir. 2012) (same).

In *Chuil Chulin v. Zuchowski*, 2021 WL 3847825 (N.D. Cal. Aug. 27, 2021), the district court noted that "it is [not] *per se* improper to consider an arrest report." *Id.* at *7. (considering a U-visa application and not an I-485 application). Similar to the other cases Rubio cites, this issue is starkly different than what is here. *Chuil Chulin* could be understood to find that the agency violated administrative precedent by *only* or even primarily considering uncorroborated arrest reports, similar to *Avila-Ramirez* on which it primarily relies. That is neither the factual situation alleged nor the legal cause of action pled here.

Rubio's argument, while disguised as an ultimate legal issue, goes to whether it was appropriate for USCIS to consider certain evidence to the extent Rubio believes the agency did, not that it was illegal to do so. Moreover, none of the points that Rubio raises in his opposition are in his complaint. His complaint only takes issue with how USCIS exercised its discretion, alleging that it was arbitrary and capricious. There is no allegation that USCIS violated any specific law, binding precedent, or other relevant standard.[4]

[4] The government filed its motion pursuant to Rule 12(b)(1). To the extent, however, the Court finds that the issue is merely a pleading error, the government would ask the Court to dismiss pursuant to Rule 12(b)(6) with leave for plaintiff to refile.



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**C. Section 1252(a)(2) applies beyond removal proceedings.**

The government explained at length why 8 U.S.C. § 1252 (a)(2)(B)(i) applies here. Rubio's primary argument to the contrary is that it does not apply to removal proceedings, which the government also addressed in its motion. *See* MTD, pp. 7-9. The statute itself specifies that the jurisdiction-stripping provisions apply "regardless of whether the judgment, decision, or action is made in removal proceedings." *Id.* at 7. In the recent *Patel* decision, the Supreme Court recognized that this statutory amendment "expressly extended the jurisdictional bar to judgments made outside of removal proceedings…" *Patel*, 142 S. Ct. at 1626.

Even Rubio acknowledges that the Supreme Court majority in *Patel* suggested that this section applies beyond removal proceedings, acknowledges that Justice Gorsuch understood the *Patel* decision to necessarily reach that result, and acknowledges that the Ninth Circuit has suggested that this section applies beyond removal proceeding. Opp., pp. 9, 14-15 (recognizing that the Ninth Circuit has "assumed" § 1252(a)(2)(B)(ii) applies outside removal proceedings). But far more than assuming, the Ninth Circuit and district courts, including in this district, have held as much. *See, e.g.*, *Poursina v. USCIS*, 936 F.3d 868, 875 (9th Cir. 2019) ("In sum, because USCIS's decision to deny a national-interest waiver is specified to be in its discretion, § 1252(a)(2)(B)(ii) strips the federal courts of jurisdiction to review USCIS's refusal."); *Gebhardt v. Nielsen*, 879 F.3d 980, 984 (9th Cir. 2018) (holding that 1252(a)(2)(B)(ii) bars review of USCIS's immigrant visa petition adjudications under the Adam Walsh Act) *Hassan v. Chertoff*, 593 F.3d 785, 788 (9th Cir. 2010) ("As the district court correctly noted, judicial review of the denial of an adjustment of status application—a decision governed by 8 U.S.C. § 1255—is expressly precluded by 8 U.S.C. § 1252(a)(2)(B)(i)."); *Xinyi Jiang v. USCIS*, No. 20-cv-1693-TSZ, 2021 WL 764264, at *1 (W.D. Wash. Feb. 26, 2021); *Cath. Charities CYO v. Chertoff*, 622 F. Supp. 2d 865, 880 (N.D. Cal. 2008), *aff'd sub nom.*, 368 F. App'x 750 (9th Cir. 2010); *Molina Herrera v. Garland*, 570 F. Supp. 3d 750, 756 (N.D. Cal. 2021) ("USCIS's ultimate decision and weighing of the factors in granting or denying Plaintiff's status adjustment



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application [under § 1255(m)] is a discretionary determination."). Nothing in any of the above decisions indicates the appellants were in removal proceedings.

Rubio tries to take issue with or cabin the limits of these holdings, but they all lead to the same conclusion: USCIS's decision to deny Rubio's I-485 is not reviewable because of § 1252(a)(2)(B)(i). Clearly, counsel does not agree with *Patel's* holding—and its necessarily logical ramifications. Its brief largely attacks the underpinnings of the Supreme Court's judgment and attempts to limit it significantly. But this Court should not accept counsel's invitation to relitigate *Patel* or effectively ignore it. Even before *Patel*, the Ninth Circuit already agreed with its logic as to the specific point at issue here that § 1252(a)(2)(B)(i) applies beyond removal proceedings.

**D. There are no pure legal or constitutional issues alleged.**

Much of Rubio's opposition explains in extensive detail, including with quotations from seminal decisions such as *Marbury v. Madison*, that Congress did not and never could preclude the judiciary from considering constitutional issues. The government recognizes this as a truism and specifically noted that was beyond the scope of what is at issue here: "The Ninth Circuit noted it retained jurisdiction over constitutional claims, but none are alleged here." MTD, p. 8, *see Patel*, 142 S. Ct. at 1618 ("Federal courts have a very limited role to play in this process. With an exception for legal and constitutional questions, Congress has barred judicial review of the Attorney General's decisions denying discretionary relief from removal. We must decide how far this bar extends—specifically, whether it precludes judicial review of factual findings that underlie a denial of relief. It does."). Rubio never alleged any constitutional issues and never raised any in his opposition.

Rubio's argument that 8 U.S.C. § 1252(a)(D) affords him relief here is not persuasive. That section allows review of "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) (emphasis added). The cases Rubio cites were based upon petitions for review



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filed with the Ninth Circuit. *See Hernandez v. Ashcroft*, 345 F.3d 824, 832 (9th Cir. 2003); *Zamorano v. Garland*, 2 F.4th 1213, 1221 (9th Cir. 2021) ("Zamorano now petitions for review of the BIA decision and the IJ decision."). They therefore do not necessarily speak to the question of whether *district courts* have jurisdiction to consider legal questions raised in discretionary adjudications covered by the jurisdictional bar at 8 U.S.C. § 1252(a)(2)(B).

On this matter, Congress has spoken clearly. In May 2005, Congress passed the REAL ID Act, which preserved judicial review of constitutional and legal questions in petitions for review before courts of appeals, rather than district courts, and clarified that the 8 U.S.C. § 1252(a)(2)(B) jurisdictional bars apply regardless of whether the challenged decision took place in the removal context. *Mamigonian v. Biggs*, 710 F.3d 936, 940 (9th Cir. 2013) ("Among other things, the REAL ID Act consolidated federal court review of certain immigration agency decisions in the courts of appeals while stripping district courts of jurisdiction."). Congress placed U-visa adjustments within the sole jurisdiction of the Department of Homeland Security. 8 U.S.C. § 1255(m)(1).

But whether or not this section applies is immaterial because what Rubio calls a legal challenge is actually a factual, evidence-weighing dispute. Rubio's argument attacks the agency's methodology not as illegal—but as unsound. Even that attack is misplaced and based on highlighting disparate points without recognizing the whole of the analysis. The AAO reviewed a number of factors, both positive and negative, regarding Rubio's application and gave full and fair consideration to the circumstances, including the not-guilty finding and Rubio's explanation. USCIS considered the arrests themselves as one point of consideration in the discretionary analysis among many factors. *See* AAO Decision, attached as Exhibit A to the Declaration of Nickolas Bohl, p. 4. No law or standard prevents this as discussed above. Moreover, his contention that USCIS improperly considered his failure to produce certain reports is misplaced. The AAO did not consider his failure to produce that documentation as an adverse factor. AAO Decision, pp. 3-4. Rather, the AAO simply noted that "Because the Applicant's



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statements and other documentary evidence do not fully explain the circumstances of the 2000, 2001, and 2004 arrests, and the reasons for dismissal, we are unable to fully ascertain the Applicant's conduct that resulted in these arrests." *Id.*

Nor was USCIS bound to its prior U-visa determination, which was a separate determination under a different statute. Again, Rubio does not demonstrate how this is legal error—nor could he. United States immigration law distinguishes between (1) nonimmigrants, who are admitted to the United States for a temporary period of time for a particular, limited purpose; and (2) lawful permanent residents, who are granted the privilege of residing permanently in the U.S. as immigrants. 8 U.S.C. §§ 1101(a)(15), 1101(a)(20), 1184(a)(1); *see also Elkins v. Moreno*, 435 U.S. 647, 663-66 (1978). Several courts in the Ninth Circuit have held that USCIS is not bound to come to the same conclusion in similar nonimmigrant and immigrant benefit adjudications for the same individual. *Décor Team LLC v. McAleenan*, 520 F.Supp. 3d 1212, 1218 (D. Ariz. 2021), *citing Noble House, Inc. v. Wiles*, 2013 WL 1164093, at *7 (C.D. Cal. Mar. 19, 2013) ("The benefits associated with the granting of an I-140 petition—permanent residence—are sufficiently distinct from the status provided by a L-1A visa—temporary non-immigrant status—that the results of USCIS's analysis of an I-140 petition need not automatically mimic the conclusion USCIS reached when it approved an L-1A visa application[.]").

The AAO gave strongest weight to Rubio's domestic violence-related conviction: "Thus, considering both the length and serious nature of the Applicant's criminal history, with a *particular focus* on his most recent conviction for assault, the adverse factors in the case continue to outweigh the positive and mitigating equities." AAO, Decision, p. 5 (emphasis added). Rubio had an extensive criminal history that involved arrests with and without convictions. No law, regulation, or holding prevents USCIS from considering the totality of this evidence. It is USCIS's discretion—not Rubio's—to decide how to balance these equities and arrive at its conclusion, which USCIS did fairly and thoughtfully.



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Rubio argues that he is not asking for the Court to reweigh the equities itself, but merely to remand with instructions of what not to consider. This is a distinction without a difference. Any such remand is tantamount to an instruction from the Court to USCIS to reconsider its ruling pursuant to § 1255(m), not because of some legal violation, but because, in Rubio's estimation, such evidence is not as important and should be effectively excluded. This is precisely what the Supreme Court and the Ninth Circuit have held is impermissible under § 1252(a)(2)(B)(i), which plainly states: "[R]egardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review any judgment regarding the granting of relief under…section 1255."

**CONCLUSION**

Rubio disagrees with how USCIS made its determination. But both § 1252(a)(2)(B)(i) and the APA prevent a district court from reviewing USCIS's discretionary judgment regarding the granting of relief under § 1255. There are no constitutional or legal issues present here. USCIS was authorized to consider "all factors" and it did so, focusing particularly on Rubio's assault conviction.

For the reasons set forth above, the United States requests that the Court dismiss the complaint for lack of subject-matter jurisdiction.

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DATED this 30th day of September, 2022.

Respectfully submitted,

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