District Judge Marsha J. Pechman

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

FELIX RUBIO HERNANDEZ,

Plaintiff,

v.

U.S. CITIZENSHIP AND IMMIGRATION SERVICES; ALEJANDRO MAYORKAS, Secretary of Homeland Security; UR M. JADDOU, Director, U.S. Citizenship and Immigration Services,

Defendants.

Case No. 2:22-cv-00904-MJP

MOTION FOR RECONSIDERATION

Noted For Consideration:
December 14, 2022

ORAL ARGUMENT REQUESTED

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BACKGROUND

On November 30, 2022, this Court denied Defendants' Rule 12(b)(1) motion to dismiss. Denial, 17. Central to the Court's decision were two holdings which constitute manifest error. *See* L. Civ. R. 7(h)(1). First, the Court held that that 8 U.S.C. § 1252(a)(2)(B)(i), which strips courts of jurisdiction to review "any judgment regarding the granting of relief under section . . .1255" without regard to "whether the judgment, decision, or action is made in removal proceedings," does not apply outside of removal proceedings in contravention of established Ninth Circuit law. Denial, 11–13; *Hassan v. Chertoff*, 593 F.3d 785, 788 (9th Cir. 2010). Second, the Court contradicted the plain language of 8 U.S.C. § 1252(a)(2)(D), which preserves review of certain claims "raised upon a petition for review filed with an appropriate court of appeals." Denial, 14.

ARGUMENT

This Court disfavors motions to reconsider. L. Civ. R. 7(h). Such motions are, however, appropriate where a party shows a "manifest error of law," *Chung v. Washington Interscholastic Activities Ass'n*, 550 F. Supp. 3d 920, 923 (W.D. Wash. 2021), and when there is "new…legal authority which could not have been brought to its attention earlier with reasonable diligence." L. Civ. R. 7(h)(1). Because the Ninth Circuit has held that 8 U.S.C. § 1252(a)(2)(B) applies outside of removal proceedings and because the text of 8 U.S.C. § 1252(a)(2)(D) limits its application to petitions for review, reconsideration is appropriate here based on manifest error. Moreover, reconsideration is appropriate based on the Ninth Circuit's recent decision in *Herrera v. Garland*, No. 21-17052, 2022 WL 17101156 (9th Cir. Nov. 22, 2022) (unpublished), which the Ninth Circuit issued after briefing was completed on Defendants' motion to dismiss.

A. 8 U.S.C. § 1252(a)(2)(B) applies outside of removal proceedings.

Section 1252(a)(2)(B)(i) applies to adjustment of status determinations made by USCIS outside of removal proceedings. This Court held that 8 U.S.C. § 1252(a)(2)(B) "strips jurisdiction only where the plaintiff is in removal proceedings." Denial, 13. The Court further stated that "Ninth Circuit case law similarly leaves unresolved whether Subparagraph (B) applies outside of the removal challenges." *Id.* at 10. In support thereof, the Court cites *Spencer Enterprises*

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Incorporated v. United States, 345 F.3d 683 (9th Cir. 2003), where the Ninth Circuit provided that, it would not determine whether § 1252(a)(2)(B) applied outside the context of removal proceedings. Yet since *Spencer*, Congress amended § 1252(a)(2)(B) to clarify that it does indeed apply to USCIS's decisions, and thus, the Court's conclusion of law to the contrary is manifest error. *Jimenez Verastegui v. Wolf*, 468 F. Supp. 3d 94, 98 n.5 (D.D.C. 2020).

In *Spencer,* the Ninth Circuit was interpreting a prior version of § 1252. In 2005, the statute was amended with the passage of the REAL ID Act to add the words "regardless of whether the judgment, decision, or action is made in removal proceedings." *See* 8 U.S.C. § 1252(a)(2)(B) (effective until May 10, 2005); PL 109–13 (HR 1268) (May 11, 2005); *see also Jimenez*, 468 F. Supp. 3d at 98 n.5 (D.D.C. 2020) ("Congress . . . added the language 'regardless of whether the judgment, decision, or action is made in removal proceedings,' 8 U.S.C. § 1252(a)(2)(B), 'presumably to resolve a disagreement between some... circuits and district courts as to whether § 1252(a)(2)(B) applied outside the context of removal proceedings . . . .'" (citation omitted)). The Supreme Court specifically noted that the REAL ID Act amendments, "expressly extended the jurisdictional bar to judgments made outside of removal proceedings at the same time that they preserved review of legal and constitutional questions made within removal proceedings." *Patel v. Garland*, 142 S. Ct. 1614, 1626 (2022) (citing § 1252(a)(2)(B), (D)). This Court's decision, asserting that the *Patel* majority declined to reach this question, Denial, 9, is in conflict with *Patel*'s specific acknowledgement that the REAL ID Act amendments extended § 1252(a)(2)(B)'s applicability to adjudications outside of the removal context, and constitutes manifest error.

After the passage of the REAL ID Act, the Ninth Circuit Court of Appeals held that § 1252(a)(2)(B) applies even when review of USCIS's decisions is sought outside of the removal context. *Hassan*, 593 F.3d at 788. In *Hassan*, the appellant challenged USCIS's denial of his adjustment of status application in district court. *Id.* at 788. In affirming the district court's dismissal of the claim, the Ninth Circuit held, "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)." *Id.* at 788–89 *see also Mamigonian v. Biggs*, 710 F.3d 936, 943–46 (9th Cir.

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2013) (recognizing that § 1252(a)(2)(B)(i) bars district court review of USCIS's discretionary adjustment of status decisions but, prior to *Patel*, permitted review of eligibility determinations).

The Ninth Circuit, since *Hassan*, has not deviated from this holding. *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). As recent as November 22, 2022, in *Herrera v. Garland*, the Ninth Circuit reaffirmed its holding that § 1252(a)(2)(B) applies to USCIS's decisions. The Court's finding that 8 U.S.C. § 1252(a)(2)(B) only applies to removal proceedings directly conflicts with the aforementioned Ninth Circuit holdings and is thus manifest error.

B. 8 U.S.C. § 1252(a)(2)(D) only applies in petitions for review at a circuit court of appeals.

The Court found that even if 8 U.S.C. § 1252(a)(2)(B)(i) applied to bar review of Plaintiff's claim, that jurisdiction was nevertheless restored to the Court by 8 U.S.C. § 1252(a)(2)(D). Denial, 14–15. This was a manifest error. Section 1252(a)(2)(D) reinstates 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." *See also Patel*, 142 S. Ct. at 1626 ("subparagraph (D) preserves review of legal and constitutional questions *only* when raised in a petition for review of a final removal order.") (emphasis added). By its plain terms, 8 U.S.C. § 1252(a)(2)(D) does not apply to district court proceedings. The Supreme Court in *Patel* provided, "[t]he post-*St. Cyr* amendments [including § 1252(a)(2)(D)] expressly extended the jurisdictional bar to judgment made outside of removal proceedings at the same time that they preserved judicial review of legal and constitutional questions *made within removal proceedings*.") 142 S. Ct. at 1626 (emphasis added); *see also Herrera*, 2022 WL 17101156 at *1. Assuming for the sake of argument that there was a legal question here, 8 U.S.C. § 1252(a)(2)(D) is inapplicable because the question did not arise in removal proceedings and arrive at a court of appeals via a petition for review. None

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of the authority the Court relies upon in its section discussing 8 U.S.C. § 1252(a)(2)(D) either reinstated or otherwise provided jurisdiction to a district court because each case was a petition for review on appeal from the Board of Immigration Appeals. *See* Denial, 14–15.

Contrary to the Court's conclusion, the fact that there may be no judicial review of USCIS's discretionary decision to deny Plaintiff's adjustment of status application does not raise "substantial constitutional questions." Denial, 15. The Supreme Court has never held that a noncitizen is entitled to *more* judicial review of a denial of an adjustment of status application than is provided by statute. Rather, courts must start with the premise that an immigration proceeding "is not a criminal proceeding and has never been held to be punishment" and thus "no judicial review is guaranteed by the Constitution." *Carlson v. Landon,* 342 U.S. 524, 537 (2007); *Duldaloa v. INS,* 90 F.3d 396, 400 (9th Cir. 1996) (quoting *Carlson*). Nor can this Court apply the canon of constitutional avoidance to exercise jurisdiction over Plaintiff's claims because, as explained in Defendants' motion to dismiss (Dkt. 7, 14–15), there is no plausible reading of § 1252(a)(2)(B)(i), either before or after *Patel,* that allows district court review of Plaintiff's claims. *See Jennings v. Rodriguez,* 138 S. Ct. 830, 843 (2018) ("Spotting a constitutional issue does not give the court the authority to rewrite a statute as it pleases. Instead, the canon permits a court to choose from competing plausible interpretations of a statutory text."). Because Plaintiff has not raised "a constitutional claim[] or question[] of law," in a petition for review, the Court's interpretation and reliance on 8 U.S.C. § 1252(a)(2)(D) was manifest error.

C. The issue in this case has been squarely addressed by the Ninth Circuit and Supreme Court.

It was manifest error for this Court to discount decades of precedent from the Ninth Circuit and the Supreme Court's recent decision in *Patel* by concluding that these higher courts had not squarely addressed the jurisdictional issue in this case. Denial, 9. It is a "firmly established principle" that courts have an obligation to determine their subject-matter jurisdiction. *United States v. Ceja-Prado*, 333 F.3d 1046, 1049, 1051 (9th Cir. 2003). Courts cannot allow "jurisdiction to depend on either malfeasance or well-intentioned agreement of the parties." *Id.* at 1049. This is

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because "[n]othing is to be more jealously guarded by a court than its jurisdiction. Jurisdiction is what its power rests on. Without jurisdiction it is nothing." *Id.*

While the Court found that the authority cited in Defendants' motion to dismiss assumed without deciding that § 1252(a)(2)(B)(i) applied outside of removal proceedings, Denial, 10, this cannot be so. A court has an independent obligation to assess its jurisdiction. *Ceja-Prado*, 333 F.3d at 1049. Thus, the Ninth Circuit necessarily reached the determination that § 1252(a)(2)(B)(i) applies outside removal proceedings. *See Hassan*, 593 F.3d at 788; *Mamigonian*, 710 F.3d at 943–46; *Herrera*, 2022 WL 17101156 at *1. The cases this Court cites underscore this point for neither of them concerned a jurisdictional issue. Denial, 11 (citing *Brecht v. Abrahamson,* 507 U.S. 619, 631 (1993) (considering the non-jurisdictional issue of a standard of review); *Amalgamated Transit Union Local 1309, AFL-CIO v. Laidlaw Transit Services, Inc.,* 435 F.3d 1140, 1146 n.5 (9th Cir. 2006) (Determining that section 1453(c)(1) of the Class Action Fairness Act is a claims processing rule, which is not jurisdictional)). This Court incorrectly stated that it is not bound by the Ninth Circuit's assumptions, Denial, 11, however, "it is not only the result but also those portions of the opinion necessary to that result by which [the Court is] bound." *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 67 (1996). As a result, *Hassan* and *Mamigonian* clearly require this Court to find § 1252(a)(2)(B) applies to USCIS's decisions.

Finally, the Court's reliance on *Sanchez v. Mayorkas,*141 S. Ct. 1809 (2021), is inapposite. Denial, 9–10. *Sanchez* centered around the statutory eligibility requirement that a noncitizen be in lawful nonimmigrant status in order to adjust status. *Id.* at 1813. Before *Patel*, statutory eligibility requirements were generally thought to escape the scope of 8 U.S.C. § 1252(a)(2)(B)(i) and thus in the Sanchez proceeding the parties neither raised the issue of jurisdiction under 8 U.S.C. § 1252, nor did the Court address it. After *Patel* it is clear that 8 U.S.C. § 1252(a)(2)(B)(i) applies to both statutory eligibility requirements and discretionary decisions pursuant to 8 U.S.C. § 1255. *Patel*, 142 S. Ct. at 1622.

D. *Herrera v. Garland* constitutes new legal authority.

The Ninth Circuit in its decision on November 22, 2022, *Herrera v. Garland*, held that

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there was no jurisdiction to review USCIS's denial of an adjustment of status application in a similar case. *Herrera*, 2022 WL 17101156 at *1. In *Herrera*, the appellant was a noncitizen in U-nonimmigrant status who was denied adjustment of status on both evidentiary and discretionary grounds. *Molina Herrera v. Garland*, 570 F. Supp. 3d 750, 754 (N.D. Cal. 2021), *aff'd sub nom. Herrera*, 2022 WL 17101156. The *Herrera* Court held that the district court properly dismissed the adjustment of status challenge because, in addition to the decision being unreviewable as a discretionary decision, "[i]t is also unreviewable under the Immigration and Nationality Act as a judgment 'regarding the granting of relief under 1255.'" 2022 WL 17101156 at *1 (citing 8 U.S.C. § 1252(a)(2)(B)(i)). The Court also held that 8 U.S.C. § 1252(a)(2)(D) did not apply, "because this case is not before us on 'a petition for review' but on an appeal from the district court." *Herrera*, 2022 WL 17101156 at *1.

This Court should consider *Herrera* new legal authority "which could not have been brought to [the Court's] attention earlier with reasonable diligence." Briefing on the motion to dismiss closed on September 30, 2022. *Herrera* issued on November 22, 2022, but was unpublished. Counsel did not have a reasonable opportunity to locate this authority within the short timeframe (which included the Thanksgiving holiday) to bring it to the Court's attention.

CONCLUSION

This Court should reconsider its Denial of Defendants' motion to dismiss on November 30, 2022. *See* Denial. The Court's holdings that (1) 8 U.S.C. § 1252(a)(2)(B)(i) does not apply outside of removal proceedings and (2) that regardless, 8 U.S.C. § 1252(a)(2)(D) provided it jurisdiction over questions of law, are manifestly erroneous. Moreover, the Court should reconsider Defendants' motion to dismiss in light of the recent *Herrera* decision.[1]

[1] Since *Patel*, district courts in varying jurisdictions have found no jurisdiction over USCIS adjustment of status denials. *See Walsh v. Mayorkas*, 2022 WL 17357729, at *1 (N.D. Ill. Dec. 1, 2022) (dismissing challenge for lack of subject matter jurisdiction because USCIS adjudicated plaintiff's application under 8 U.S.C. § 1255 and the INA "prohibits courts from reviewing 'any judgment[s] regarding the granting of relief under section ... 1255 of this title[.]'") (quoting § 1252(a)(2)(B)(i)); *Atanasovska v. Barr*, — F. Supp. 3d —,2022 WL 17039146, at *2 (W.D. Tenn. Nov. 8, 2022) (similar); *Doe v. Mayorkas*, 2022 WL 4450272, at *3–4 (D. Minn. Sept. 23, 2022) (similar); *Badra v. Jaddou*, 2022 WL 4376331, at *1–2 (S.D. Fla. Sept. 22, 2022) (similar); *Rabinovych v. Mayorkas*, — F. Supp. 3d —,2022 WL 3908951, at *5–6 (D. Mass. Aug. 31, 2022), *appeal docketed*, No. 22-1731 (1st Cir. Oct. 4, 2022) (similar); *Garcia v. USCIS*, 2022 WL 3349151, at *9–10 (N.D. Tex. Aug. 12, 2022) (similar).

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DATED this 14th day of December, 2022.

Respectfully submitted,

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