IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
May 6, 2020

Lyle W. Cayce
Clerk

No. 19-30646

JOSUE BENAVIDES NOLASCO,

Plaintiff - Appellant

v.

STANLEY CROCKETT, Field Office Director, New Orleans Field Office, U.S. Citizenship and Immigration Services; U.S. CITIZENSHIP AND IMMIGRATION SERVICES,

Defendants - Appellees

Appeal from the United States District Court
for the Eastern District of Louisiana

Before JOLLY, JONES, and ENGELHARDT, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

In this appeal, we are asked to determine whether, under the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq.*, the district court had jurisdiction to review the denial of Josue Benavides Nolasco's application to United States Citizenship and Immigration Services (USCIS) for lawful permanent resident (LPR) status, where no removal proceedings had been initiated against him. That question has already been addressed and answered. *Cardoso v. Reno,* 216 F.3d 512, 517–18 (5th Cir. 2000); *Petrenko-Gunter v. Upchurch*, No. 05-11249, 2006 WL 2852359, at *1 (5th Cir. Oct. 2, 2006) (unpublished); *Velasquez v. Nielsen*, 754 F. App'x 256, 261 (5th Cir.

2018). Because the answer is unfavorable to Nolasco's claim, we affirm the district court's dismissal of the case for want of subject-matter jurisdiction. Fed. R. Civ. P. 12(b)(1).

I.

Appellant Josue Benavides Nolasco is a national and citizen of El Salvador. He enjoys temporary protected status (TPS), which means, among other things, that he is entitled to live and work in the United States until his TPS is withdrawn. *United States v. Orellana*, 405 F.3d 360, 361–62 (5th Cir. 2005); 8 U.S.C. § 1254a(a)(1). Nolasco admits that years ago he crossed the southern border "without inspection," and he does not claim to have ever been "paroled into the United States." *See* 8 U.S.C. § 1255(a) (to be eligible for an adjustment to LPR status, aliens must be "inspected and admitted or paroled into the United States"). Nevertheless, he has spent more than a decade trying to obtain an adjustment to LPR status. He has long maintained that, pursuant to 8 U.S.C. § 1254a(f)(4), his TPS automatically renders him "inspected and admitted" for adjustment-of-status purposes. But USCIS has disagreed. Indeed, USCIS has rebuffed Nolasco's efforts to obtain LPR status on more than one occasion, most recently by rejecting a status-adjustment application submitted in 2014.

II.

Having tried and failed to persuade USCIS of his statutory eligibility, Nolasco has now turned to the courts. He sued USCIS and the director of its New Orleans field office in the Eastern District of Louisiana, seeking injunctive and declaratory relief including an "order [requiring] that [his status-adjustment] application be approved." Nolasco has asserted

jurisdiction under the APA and an assortment of other federal statutes.[1] The complaint iterated Nolasco's view that TPS "makes [him] eligible as a matter of law to adjust his status to that of a Lawful Permanent Resident." Nolasco further asserted that the denial of his application for LPR status constitutes an error of law for the district court to review. Dismissing these contentions, the district court granted the government's motion to dismiss for lack of jurisdiction. Relying on our decision in *Cardoso v. Reno*, the district court reasoned that "there is still a remedy available to [Nolasco], and where there is still an adequate remedy available during removal proceedings, the denial of a request for adjustment of status is not a [reviewable] agency action." To put it another way, the district court held that Nolasco has not exhausted his administrative remedies and, consequently, the federal courts have no jurisdiction to hear his claim under the APA. *See* 8 C.F.R. § 245.2(a)(5)(ii).

III.

We think the district court did not err, and we thus affirm its judgment. *Cardoso* controls this case. In *Cardoso*, we considered a status-adjustment claim brought by an alien named Aurora Moran, who, like Nolasco, had "never faced a removal order." 216 F.3d at 517. Moran, like Nolasco, had argued that the denial of her application was premised on a legal error, which the district court had jurisdiction to decide. *Id.* at 514. Moreover, like Nolasco here, Moran had no means of compelling the Executive Branch to initiate removal proceedings, meaning that she also lacked a procedural means of self-initiating the process that could eventually result in judicial review of her claim. *See Alvidres-Reyes v. Reno*, 180 F.3d 199, 205 (5th Cir. 1999) (aliens cannot compel

[1] The district court rejected Nolasco's arguments for jurisdiction under the Immigration and Nationality Act, the Declaratory Judgment Act, the All Writs Act, and the Mandamus Act. On appeal, Nolasco abandons these statutes and relies exclusively on the APA.

the Executive Branch to "initiate [removal] proceedings or adjudicate . . . deportability"). Indeed, like Nolasco, Moran contended that she was entitled to pursue her claim for adjustment of status in federal district court rather than wait for removal proceedings that might never take place.

We were not persuaded by Moran's arguments. We held that the district court lacked jurisdiction to hear Moran's claim. *Cardoso*, 216 F.3d at 518. Citing 8 U.S.C. § 1252(d), 8 C.F.R. § 245.2(a)(5)(ii), and two out-of-circuit opinions, we explained that aliens denied adjustment to LPR status must "renew [their] request[s] upon the commencement of removal proceedings." *Cardoso*, 216 F.3d at 518 (citing *McBrearty v. Perryman*, 212 F.3d 985, 987 (7th Cir. 2000) and *Randall v. Meese*, 854 F.2d 472, 482 (D.C. Cir. 1988)). Otherwise, we said, they have not "yet exhausted [their] administrative remedies and this Court may not exercise jurisdiction." *Id.*

Cardoso would certainly seem to settle the matter. To be sure, Nolasco even concedes that, like the alien in *Cardoso*, he has "sought judicial review of [an] adjustment-of-status denial[] that could also be reviewed in removal proceedings." But Nolasco further says that *Cardoso* should not be the "first and last word on APA review in [his] case." He distinguishes *Cardoso*'s holding from this case, arguing that, unlike Moran, he has asserted jurisdiction under the APA's jurisdictional provision, 5 U.S.C. § 704. But in *Petrenko-Gunter*, an unpublished case, we rejected a similar argument and applied *Cardoso* to an APA claim:

> It is true that the plaintiff in *Cardoso* asserted jurisdiction under a different statute, but both statutes require final agency action as a prerequisite to judicial review. The APA, like 8 U.S.C. § 1252(d), which we considered in *Cardoso*, makes it clear that only "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704. *Cardoso*, which held that denial

> of a request for adjustment of status is not a final agency action for which there are no other remedies, thus controls. 216 F.3d at 518.

Petrenko-Gunter, 2006 WL 2852359, at *1.

We recognize that this unpublished authority is only persuasive precedent, but we are convinced by its reasoning and today adopt it as the law of the circuit. As explained in *Petrenko-Gunter*, the principles espoused in *Cardoso* apply with equal force in the APA context because the APA requires exhaustion of remedies, the same as does the statute under which the plaintiffs in *Cardoso* sought relief.[2]

IV.

To sum up: *Cardoso* controls the appeal before us, and *Petrenko-Gunter*, which we have adopted as precedent of this circuit, underscores and supports our conclusion. The controlling principle is: federal courts lack jurisdiction over challenges to the denial of aliens' applications for LPR status unless and until the challenge has been exhausted in removal proceedings. Accordingly, the district court's judgment is

AFFIRMED.

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[2] In addition to his assertion that *Cardoso* does not apply in the APA context, Nolasco argues, without supporting authority, that *Cardoso* does not apply to TPS beneficiaries or to claims against USCIS. We reiterate that *Cardoso* announced a principle of broad applicability: federal courts lack jurisdiction over aliens' challenges to the denial of their status-adjustment applications unless and until those challenges have been exhausted in removal proceedings. 216 F.3d at 517–18.

Nolasco also cites to a number Supreme Court decisions: *McNary v. Haitian Refugee Center, Inc.,* 498 U.S. 479 (1991), *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999), *Ross v. Blake*, 136 S. Ct. 1850 (2016), and *Pereira v. Sessions*, 138 S. Ct. 2105 (2018). But none of those cases dislodges the authority of *Cardoso* and *Petrenko-Gunter*.