In the

United States Court of Appeals

For the Seventh Circuit

No. 21-3160

ILLYA BRITKOVYY,

Plaintiff-Appellant,

v.

ALEJANDRO MAYORKAS, Secretary of Homeland Security, and KAY LEOPOLD,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 18-cv-718 — **Nancy Joseph**, *Magistrate Judge*.

ARGUED AUGUST 3, 2022 — DECIDED FEBRUARY 17, 2023

Before SYKES, *Chief Judge*, and SCUDDER and ST. EVE, *Circuit Judges*.

ST. EVE, *Circuit Judge*. Illya Britkovyy is a Ukrainian citizen who hopes to become a lawful permanent resident of the United States. He applied to the U.S. Citizenship and Immigration Services ("USCIS") to adjust his immigration status, but USCIS denied his application, a decision Britkovyy argues was legally erroneous. The immigration statutes do not

provide for judicial review of this denial, so Britkovyy filed this suit under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701–706. For the reasons stated below, we hold that we lack jurisdiction to hear this case.

I. Background

In 2000, Britkovyy entered the United States on foot through Tijuana, Mexico. A U.S. immigration inspector twice asked for Britkovyy's country of citizenship, and each time Britkovyy replied that he was born in the United States. The following day, Britkovyy—with the assistance of an interpreter—explained that he had misunderstood the inspector's question, that he was Ukrainian, and that he had not claimed to be a U.S. citizen. Britkovyy was paroled into the United States—allowed to enter temporarily but not "admitted" to the country, *see* 8 U.S.C. § 1101(a)(13)—and charged as inadmissible in immigration court for falsely representing himself as a U.S. citizen. Britkovyy did not appear at his removal hearing, so an immigration judge ("IJ") ordered him removed in absentia. Britkovyy never left the country and later married a U.S. citizen. In 2007, a police officer discovered Britkovyy's outstanding immigration warrant during a traffic stop and turned him over to Immigration and Customs Enforcement.

Britkovyy successfully moved to reopen his removal proceedings in immigration court. In 2009, his wife petitioned for family-based permanent residency for Britkovyy. He then applied to adjust his immigration status to lawful permanent resident with both the immigration court and with USCIS, a separate agency. For different reasons, neither the immigration court nor USCIS granted his application.

The IJ overseeing Britkovyy's removal proceedings determined that the immigration court lacked jurisdiction over the adjustment-of-status application. Regulations give USCIS exclusive jurisdiction to adjust the status of an "arriving alien," 8 C.F.R. §§ 245.2(a)(1), 1245.2(a)(1), and Britkovyy is an arriving alien because he was paroled, not admitted, to the United States. *See* 8 C.F.R. § 1001.1(q). Thus, the immigration court could not consider Britkovyy's adjustment-of-status application. At the parties' request, the IJ administratively closed the case in March 2012 to await USCIS's decision.

A month later, USCIS denied Britkovyy's application on the merits. It found that he was inadmissible because he had falsely claimed to be a U.S. citizen with the intent of entering the country, which made him ineligible for adjustment of status. *See* 8 U.S.C. §§ 1182(a)(6)(C)(ii), 1255(a). Britkovyy moved USCIS to reopen and reconsider his application, but in 2018 USCIS denied the motion. Because USCIS had made a final decision denying Britkovyy's adjustment-of-status application, the immigration court reopened the removal proceedings. That case remains pending and may result in the IJ ordering Britkovyy removed from the United States.

In an attempt to receive judicial review of USCIS's denial of his application, Britkovyy sued USCIS under the APA. He argued that the denial was reviewable under 5 U.S.C. § 704, and he asked the court to set aside USCIS's decision under § 706(2)(A). The magistrate judge, presiding by consent, concluded that 8 U.S.C. § 1252(a)(2)(B)(i)—which governs judicial review of removal orders and denials of discretionary relief from removal—deprived the court of jurisdiction to review USCIS's decision because it was a discretionary judgment. Britkovyy appealed, and the parties jointly moved to

remand, arguing that under *Morales-Morales v. Ashcroft*, 384 F.3d 418 (7th Cir. 2004), and *Iddir v. I.N.S.*, 301 F.3d 492 (7th Cir. 2002), Britkovyy had raised a reviewable question about the application of a nondiscretionary "statutory ineligibility bar." We granted the motion and remanded the case. The magistrate judge then considered Britkovyy's claim on the merits and granted summary judgment in favor of USCIS because the denial of Britkovyy's adjustment-of-status application did not violate § 706(2)(A). Britkovyy appealed again.

While his appeal was pending, the Supreme Court decided *Patel v. Garland*, holding that 8 U.S.C. § 1252(a)(2)(B)(i) strips federal courts of "jurisdiction to review facts found as part of discretionary-relief proceedings under § 1255," which governs adjustment of status. 142 S. Ct. 1614, 1627 (2022). The parties in *Patel* argued that this reading of § 1252(a)(2)(B)(i) would "have the unintended consequence of precluding all review of USCIS denials of discretionary relief." *Id.* at 1626. That question was not at issue in *Patel*, so the Court did not decide it, but the Court observed that "it is possible that Congress did, in fact, intend to close that door." *Id.* Resolving this appeal requires us to determine whether § 1252(a)(2)(B)(i) precludes judicial review of adjustment-of-status denials by USCIS, so we ordered supplemental briefing—and accepted a brief from the National Immigrant Justice Center (the "Center") as amicus curiae—on the effect of *Patel* on our jurisdiction.

II. Discussion

Congress provides for judicial review of many administrative agency actions in agency-specific statutes, but agency action not otherwise reviewable may be reviewable under the APA. The APA provides that "final agency action for which

there is no other adequate remedy in a court [is] subject to judicial review," 5 U.S.C. § 704, and it instructs courts to "hold unlawful and set aside agency action, findings, and conclusions found to be … arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law …." § 706(2)(A). But Congress has sharply limited judicial review in the immigration context, and "the APA's general provision authorizing judicial review of final agency actions must yield to … immigration-specific limitations." *Dijamco v. Wolf*, 962 F.3d 999, 1003 (7th Cir. 2020) (citing *Bultasa Buddhist Temple of Chi. v. Nielsen*, 878 F.3d 570, 574 (7th Cir. 2017)). We must therefore determine whether an immigration-specific provision prevents Britkovyy from using the APA to challenge the denial of his adjustment-of-status application. We hold that 8 U.S.C. § 1252(a)(2)(B)(i) does just that.

A. Statutory and Regulatory Framework

Noncitizens present in the United States are removable if they fall within one of the categories listed in 8 U.S.C. § 1227, including "[a]ny alien who at the time of entry … was … inadmissible …." § 1227(a)(1)(A). Section 1182, in turn, enumerates the reasons why a noncitizen can be inadmissible, such as "falsely represent[ing] … himself … to be a citizen of the United States for any purpose or benefit under" the immigration laws. § 1182(a)(6)(C)(ii)(I).

IJs conduct removal proceedings in immigration court, with review by the Board of Immigration Appeals and the federal courts of appeals. *See* §§ 1229a, 1252(b); 8 C.F.R. §§ 1240.1, 1240.15. A noncitizen ordered removed by an IJ may be eligible for several forms of discretionary relief from removal. The relief at issue here is adjustment to lawful permanent resident status pursuant to 8 U.S.C. § 1255. In general,

noncitizens can seek adjustment of status during removal proceedings, 8 C.F.R. § 1245.2(a)(1)(i), but regulations give USCIS exclusive jurisdiction over adjustment-of-status applications filed by arriving aliens. *See* 8 C.F.R. §§ 245.2(a)(1), 1245.2(a)(1)(i)–(ii). Britkovyy is an arriving alien because he was paroled into the United States, so by regulation, only USCIS, not the immigration courts, can adjust his status.

The basis for judicial review of immigration decisions, including orders of removal (entered by immigration courts) and denials of adjustment-of-status applications (for arriving aliens, entered by USCIS), is 8 U.S.C. § 1252. Our power to review orders of removal is quite limited, and our review of denials of discretionary relief—such as adjustment of status—is even more so.

Section 1252 prescribes the procedure for judicial review of final orders of removal and otherwise strips courts of jurisdiction to review orders of removal and denials of discretionary relief. *See* § 1252(a)–(b). The jurisdiction-stripping provision, § 1252(a)(2)(B), provides, in relevant part:

> **(B) Denials of discretionary relief**
>
> Notwithstanding any other provision of law (statutory or nonstatutory), … and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review—
>
> > (i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title ….

But § 1252(a)(2)(D) preserves judicial review in a narrow set of circumstances:

> **(D) Judicial review of certain legal claims**
>
> Nothing in subparagraph (B) … shall be construed as precluding 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.

Taken together, these provisions provide for judicial review only of legal and constitutional claims and only if those claims are brought in a petition for review from a final order of removal. Because § 1255, which governs adjustment-of-status applications, is listed in § 1252(a)(2)(B)(i), a noncitizen can receive judicial review of a denial of adjustment of status only through a petition for review from a final order of removal, and even then, only for constitutional claims or questions of law.

The result is that § 1252(a)(2)(B)(i) operates to eliminate judicial review of the denial of an adjustment-of-status application by USCIS. Recall that USCIS has exclusive jurisdiction to adjudicate an arriving alien's adjustment-of-status application, 8 C.F.R. §§ 245.2(a)(1), 1245.2(a)(1)(i)–(ii), and that only the immigration courts conduct removal proceedings. 8 U.S.C. § 1229a. The plain text of § 1252(a)(2)(B)(i) precludes judicial review of the denial of Britkovyy's adjustment-of-status application, and § 1252(a)(2)(D) is inapplicable because Britkovyy has not received a final order of removal. Thus, § 1252(a)(2)(B)(i) is an immigration-specific jurisdictional limitation that trumps the APA's general grant of judicial review and deprives the federal courts of jurisdiction over this case. *See Dijamco*, 962 F.3d at 1003.

B. *Patel v. Garland*

Patel v. Garland further supports the conclusion that § 1252(a)(2)(B)(i) prevents a noncitizen from using the APA to challenge an adjustment-of-status denial by USCIS. In *Patel*, the Supreme Court considered whether § 1252(a)(2)(B)(i) precludes judicial review of "factual findings that underlie a denial of relief" and concluded that it does. 142 S. Ct. at 1618, 1627. The Court's decision turned on the interpretation of "judgment" in the phrase "any judgment regarding the granting of relief." § 1252(a)(2)(B)(i). The Court rejected the argument that "judgment" refers only to discretionary decisions or the ultimate denial of relief. *Patel*, 142 S. Ct. at 1622–26. Instead, it held that "judgment" in this provision means "any authoritative decision." *Id.* at 1621–22. "Under this broad definition, § 1252(a)(2)(B)(i)'s prohibition 'encompasses any and all decisions relating to the granting or denying' of discretionary relief," including factual findings. *Id.* at 1621.

The Court also rejected the policy-based argument that its reading "would arbitrarily prohibit review of some factual determinations made in the discretionary-relief context that would be reviewable if made elsewhere in removal proceedings." *Id.* at 1626. This distinction was not arbitrary, the Court explained, because "[i]t reflects Congress' choice to provide reduced procedural protection for discretionary relief," which is "'a matter of grace.'" *Id.* (quoting *I.N.S. v. St. Cyr*, 533 U.S. 289, 308 (2001)). The Court acknowledged in dicta that its reading of § 1252(a)(2)(B)(i) might preclude all judicial review of denials of discretionary relief by USCIS because those decisions are not made in the removal context. This possibility did not warrant a different reading of the statute, though, because "foreclosing judicial review unless and until removal

proceedings are initiated would be consistent with Congress' choice to reduce procedural protections in the context of discretionary relief." *Id.* at 1626–27 (citation omitted). And ultimately, whether the Court's reading of § 1252(a)(2)(B)(i) would have this effect did not matter because "policy concerns cannot trump the best interpretation of the statutory text." *Id.* at 1627 (citations omitted).

Finally, the Court rejected the argument that the statute was sufficiently ambiguous to trigger the presumption that agency action is reviewable. The Supreme Court has recognized a "'presumption favoring judicial review of administrative action' … when a statutory provision 'is reasonably susceptible to divergent interpretation ….'" *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1069 (2020) (quoting *Kucana v. Holder*, 558 U.S. 233, 251 (2010)). There must be "'clear and convincing evidence' of congressional intent to preclude judicial review" to overcome the presumption. *Id.* (quoting *Reno v. Cath. Soc. Servs., Inc.*, 509 U.S. 43, 64 (1993)). In *Patel*, the Court held that "the text and context of § 1252(a)(2)(B)(i) … clearly indicate that judicial review of fact determinations is precluded in the discretionary-relief context," so it saw "no reason to resort to the presumption of reviewability." 142 S. Ct. at 1627.

While *Patel* does not resolve the question presented in this appeal, its reasoning supports the conclusion that judicial review is unavailable. Neither policy-based arguments nor the presumption of reviewability can overcome the plain language of § 1252(a)(2)(B)(i). *Patel*, 142 S. Ct. at 1626–27. As explained above, that provision's plain language strips us of jurisdiction to review denials of relief by USCIS under § 1255.

C. Additional Arguments

Britkovyy and the Center offer several reasons why we should not interpret the plain language of § 1252(a)(2)(B)(i) as an immigration-specific bar that precludes APA review of an adjustment-of-status denial by USCIS. We find none of their arguments convincing.

1. The Presumption of Reviewability

Although the Supreme Court in *Patel* found that the presumption that agency action is reviewable did not apply because § 1252(a)(2)(B)(i) was an unambiguous bar on judicial review, the Center urges us to reach the opposite conclusion here. It argues that "the bar relates to 'the granting of relief,' as opposed to judgments about relief eligibility or how to construe the statute," which implies that the bar "is intended to apply to particular applications, such as the claim under review in *Patel*."

We disagree. As the Supreme Court has made clear, a statute must be ambiguous for the presumption of reviewability to apply. *Guerrero-Lasprilla*, 140 S. Ct. at 1069. Here, the statute is clear:

> Notwithstanding *any other provision of law* (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and *regardless of whether the judgment, decision, or action is made in removal proceedings*, no court shall have jurisdiction [except as provided herein] ….

§ 1252(a)(2)(B) (emphases added). If that language were not clear enough to establish that we lack jurisdiction to review USCIS's decision, surrounding provisions would drive that

conclusion home. For example, another provision in the jurisdiction-stripping subsection states:

> Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e). For purposes of this chapter, in *every provision* that limits or eliminates judicial review or jurisdiction to review, the terms "judicial review" and "jurisdiction to review" include habeas corpus review pursuant to section 2241 of title 28, or any other habeas corpus provision, sections 1361 and 1651 of such title, and review pursuant to *any other provision of law* (statutory or nonstatutory).

§ 1252(a)(5) (emphases added). Congress's intent to preclude judicial review other than through the process outlined in § 1252 is clear.

The Center's reliance on *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991), and *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43 (1993), does not compel a different result. Both of those cases involved challenges that fell outside the scope of the jurisdiction-stripping provision. In *McNary*, the Court interpreted a statute barring review "of *a determination* respecting *an application*," § 1160(e)(1) (emphases by the Court), not to prevent courts from hearing "general collateral challenges to unconstitutional practices and policies used by the agency in processing applications," which did not concern a

particular determination with respect to a specific application. 498 U.S. at 491–92. *Reno* involved similar language, which barred judicial review of "a determination respecting an application for adjustment of status under this section except in accordance with this subsection." § 1255a(f)(1). The Court held that this provision did not bar judicial review over an agency policy that "may well have placed some [plaintiffs] outside the scope of" the limited judicial review authorized by § 1255a(f)(1) because the statute did not demonstrate that Congress used "determination" broadly enough to eliminate judicial review of this agency policy. 509 U.S. at 61, 64. In contrast to *McNary* and *Reno*, Britkovyy falls squarely within the scope of the jurisdictional bar because he challenges a "judgment regarding the granting of relief under section … 1255." § 1252(a)(2)(B)(i).

The statutory language demonstrates clear congressional intent to strip our jurisdiction to review claims like this one, so Britkovyy cannot rely on the presumption of reviewability to circumvent § 1252(a)(2)(B)(i)'s plain language.

2. REAL ID Act Congressional Report

Britkovyy argues that a report accompanying the REAL ID Act, Pub. L. No. 109-13, 119 Stat. 302 (2005), supports his position. The REAL ID Act amended § 1252 to bar review of judgments regardless of whether they were made in removal proceedings, and the accompanying report explains that "the overall effect of the proposed reforms [was] to give every alien a fair opportunity to obtain judicial review." H.R. Conf. Rep. No. 109-72, at 174 (2005). Britkovyy reads this statement as a reflection of congressional intent not to bar judicial review of USCIS decisions. But Britkovyy's reliance on this report is misplaced because "when the meaning of the statutory text is

clear, we do not 'venture into legislative history.'" *Singh v. Sessions*, 898 F.3d 720, 725–26 (7th Cir. 2018) (internal alteration omitted) (quoting *In re Bronk*, 775 F.3d 871, 876 (7th Cir. 2015)).*

3. Inconsistent Treatment of T-Visa and U-Visa Holders

Next, Britkovyy argues that holding that § 1252(a)(2)(B)(i) bars review of adjustment-of-status denials by USCIS would frustrate Congress's intent to treat T- and U-Visa holders favorably. These visas are available to victims of human trafficking (T Visas) and victims of serious crimes (U Visas), § 1101(a)(15)(T)–(U), and they offer holders a path to permanent residency. § 1255(*l*)–(m). By regulation, USCIS has exclusive jurisdiction over adjustment-of-status applications filed by T- and U-Visa holders, just as it does over applications filed by arriving aliens such as Britkovyy. 8 C.F.R. §§ 245.23(d), 245.24(f). Britkovyy argues that "Congress has viewed assignment of adjustment of status applications to USCIS as a beneficial treatment afforded to particularly vulnerable noncitizens" and that reading § 1252(a)(2)(B)(i) to deny judicial review to these individuals would be inconsistent with this intent.

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* Even if we were to consider the report, it would not help Britkovyy. The statement he relies on refers primarily to "criminal aliens," for whom judicial review is governed by a different jurisdiction-stripping provision, § 1252(a)(2)(C). And according to the report, the aim of the REAL ID Act amendments was to "restore[]" judicial review, a goal that Congress achieved through § 1252(a)(2)(D), permitting courts to review legal and constitutional questions raised in a petition for review. The report does not reflect congressional intent to provide judicial review of USCIS's decision here, which falls outside the scope of § 1252(a)(2)(D).

These arguments are nonstarters because they are based in public policy, and "policy concerns cannot trump the best interpretation of the statutory text." *Patel*, 142 S. Ct. at 1627 (citations omitted). Moreover, the Supreme Court has indicated that the plain meaning of § 1252(a)(2)(B)(i)—stripping our jurisdiction to review adjustment-of-status denials by USCIS—is "consistent with Congress' choice to reduce procedural protections in the context of discretionary relief." *Id.* at 1626–27 (citation omitted). If Congress wishes to provide arriving aliens, T-Visa holders, and U-Visa holders with judicial review in this context, it may do so. It is not our place to elevate policy considerations above statutory text.

4. Regulatory Jurisdiction-Stripping

Finally, the Center argues that we have jurisdiction because regulation, not statute, gives USCIS exclusive authority over arriving aliens' adjustment-of-status applications, and administrative agencies should not be able to expand or contract the availability of judicial review. In *Kucana v. Holder*, the Supreme Court reversed our decision holding that § 1252(a)(2)(B)(ii) eliminated judicial review of decisions that regulation, rather than statute, made discretionary. The Court noted that under our interpretation of § 1252(a)(2)(B)(ii), "the Executive would have a free hand to shelter its own decisions from … appellate court review simply by issuing a regulation declaring those decisions 'discretionary,'" but "[s]uch an extraordinary delegation of authority [could not] be extracted from the statute Congress enacted." 558 U.S. at 251–52. The Center argues that the same situation exists here. Regulation, not statute, gives USCIS exclusive jurisdiction over certain adjustment-of-status applications. Allowing those regulations to

stand would "that give[] the agency a 'free hand' to insulate its decisions from review."

This argument may have merit, but we cannot entertain it here. We lack jurisdiction to review USCIS's decision pursuant to § 1252(a)(2)(B)(i), a statute, not a regulation, so the problem identified in *Kucana* does not arise in this case. Rather, the potential problem of regulatory jurisdiction-stripping arises from the IJ's conclusion that 8 C.F.R. §§ 245.2(a)(1) and 1245.2(a)(1) strip the immigration court of jurisdiction and, consequently, insulate the denial of Britkovyy's adjustment-of-status application from judicial review. Recognizing that we lack jurisdiction over this case will not preclude him from receiving judicial review of the IJ's decision. Britkovyy's removal proceedings remain pending. If those proceedings result in a final order of removal, Britkovyy can raise this issue on appeal to the Board of Immigration Appeals and, if necessary, in a petition for review by this court. *See* 8 U.S.C. §§ 1229a, 1252(b); 8 C.F.R. §§ 1240.1, 1240.15.

III. Conclusion

The plain text of 8 U.S.C. § 1252(a)(2)(B)(i) strips us of jurisdiction to review USCIS's denial of an adjustment-of-status application. This immigration-specific jurisdiction-stripping statute in turn bars Britkovyy from using the APA to challenge USCIS's denial of his application. *See Dijamco*, 962 F.3d at 1003. Therefore, we vacate the district court's judgment and remand with instructions to dismiss for lack of jurisdiction.