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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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RICARDO RODRIGUEZ GAMA,
Plaintiff,

v.

KATHY A. BARAN, Director, U.S.
Citizenship and Immigration
Services, California Service
Center; LORI SCIALABBA, Acting
Director, Bureau of Citizenship
and Immigration Services, U.S.
Dept. of Homeland Security; JEH
CHARLES JOHNSON, U.S. Secretary
of Homeland Security; ERIC H.
HOLDER, JR., U.S. Attorney
General; JAMES COMEY, Director,
Federal Bureau of Investigation,
Defendants.

CIV. NO. 2:13-2162 WBS KJN

MEMORANDUM AND ORDER RE:
MOTION TO DISMISS

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Plaintiff Ricardo Rodriguez Gama brought this action
against defendants¹ arising out of the termination of his

¹ By operation of Federal Rule of Civil Procedure 25(d),
defendants Lori Scialabba, Jeh Charles Johnson, and James Comey

1 consideration for Deferred Action for Childhood Arrivals ("DACA")
2 by USCIS. Defendants now move to dismiss plaintiff's Complaint
3 for lack of subject matter jurisdiction under Federal Rule of
4 Civil Procedure 12(b)(1) and for failure to state a claim under
5 Rule 12(b)(6).

6 I. Factual Background

7 The material facts in this matter are largely
8 undisputed. Plaintiff, a Mexican national, entered the United
9 States without inspection in 1994 at the age of five. (Compl. ¶¶
10 2, 22 (Docket No. 2); Certified Administrative Record ("CAR") at
11 47.) He attended school in the United States and completed high
12 school in 2009. (Compl. ¶ 22.)

13 On May 24, 2011, plaintiff was convicted of possession
14 of a controlled substance in violation of California Health &
15 Safety Code section 11350. (Id. ¶ 3.) He received an entry of
16 deferred judgment on this conviction after he completed a
17 diversion program for individuals convicted of controlled
18 substance possession offenses. (Id. ¶¶ 3, 23-24, Ex. 1.) While
19 plaintiff was in custody, immigration officers created a Record
20 of Deportable/Inadmissible Alien, which alleges that plaintiff
21 admitted his membership in a criminal street gang and exhibited a
22 number of gang-related tattoos. (CAR at 52-54.) Plaintiff now
23 disputes that he is a gang member.

24 U.S. Immigration and Customs Enforcement ("ICE") placed
25
26
27 have been substituted for defendants Alejandro Mayorkas, Janet
28 Napolitano, and Robert S. Mueller, III, as USCIS Acting Director,
Secretary of Homeland Security, and Director of the Federal
Bureau of Investigation, respectively. (Docket No. 18.)

1 plaintiff in removal proceedings on June 9, 2011. (Compl. ¶ 4.)
2 He was released on a \$5,000 bond pending a hearing before an
3 immigration judge. (Id. Ex. 2; CAR at 50.)

4 In a June 15, 2012 memorandum, former Secretary of
5 Homeland Security Janet Napolitano announced the DACA program, in
6 which the Department of Homeland Security ("DHS") would exercise
7 its prosecutorial discretion to focus enforcement efforts away
8 from low priority cases, including individuals who came to the
9 United States as children. (Id. Ex. 10 ("Napolitano
10 Directive").) The memorandum listed a number of criteria that
11 "should be satisfied before an individual is considered for an
12 exercise of prosecutorial discretion," including that the
13 individual came to the United States under the age of sixteen,
14 has continually resided in the United States for at least five
15 years, is currently in school or has graduated from high school,
16 does not pose a threat to national security or public safety, and
17 is not above the age of thirty. (Id.)

18 On September 24, 2012, plaintiff submitted a request
19 for DACA consideration and subsequently moved for administrative
20 closure of his removal proceedings on May 14, 2013. (Compl. ¶¶
21 6-7.) On May 28, 2013, plaintiff received notice that USCIS had
22 approved his DACA application. (Id. ¶¶ 10, 26, Ex. 8.)

23 ICE opposed plaintiff's motion to administratively
24 close his removal proceedings on the basis that plaintiff was an
25 admitted gang member with a criminal history. (Id. ¶ 8, Ex. 6.)
26 However, an immigration judge granted plaintiff's motion on July
27 10, 2013, citing in part plaintiff's approved DACA application.
28

1 (Id. ¶ 9, Ex. 7.) On July 17, 2013, plaintiff received a letter
2 from Baran stating that, because "USCIS has determined that
3 exercising prosecutorial discretion in your case is not
4 consistent with the Department of Homeland Security's enforcement
5 priorities," plaintiff's consideration of deferred action had
6 been terminated. (Id. ¶ 27, Ex. 9.)

7 Plaintiff filed his Complaint in this case on October
8 17, 2013, alleging that USCIS terminated his DACA application
9 arbitrarily, capriciously, and contrary to law in violation of
10 the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A),
11 and seeking declaratory relief and an injunction preventing USCIS
12 from denying his DACA application. (Id. ¶¶ 29, 35.) On March
13 17, 2014, defendants filed the present motion to dismiss for lack
14 of subject matter jurisdiction under Rule 12(b)(1) and for
15 failure to state a claim under Rule 12(b)(6). (Docket No. 10.)

16 II. Discussion

17 Rule 12(b)(1) authorizes a court to dismiss an action
18 over which it lacks subject matter jurisdiction. When a party
19 challenges the court's jurisdiction, the party invoking its
20 jurisdiction bears the burden of proving that jurisdiction
21 exists. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375,
22 376 (1994); Tosco Corp. v. Cmtys. For a Better Env't, 236 F.3d
23 495, 499 (9th Cir. 2001), abrogated on other grounds by Hertz
24 Corp. v. Friend, 559 U.S. 77 (2010). In the immigration context,
25 both the Supreme Court and the Ninth Circuit have emphasized that
26 courts "should construe narrowly restrictions on jurisdiction."
27 Montero-Martinez v. Ashcroft, 277 F.3d 1137, 1141 (9th Cir. 2002)

1 (citing Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471,
2 482-83 (1999)).

3 The parties appear to agree that the court lacks
4 jurisdiction to consider DACA eligibility under 8 U.S.C. §
5 1252(g),² which provides that "no court shall have jurisdiction
6 to hear any cause or claim by or on behalf of any alien arising
7 from the decision or action by the Attorney General to commence
8 proceedings, adjudicate cases, or execute removal orders against
9 any alien under this chapter." 8 U.S.C. § 1252(g); see also
10 Fabian-Lopez v. Holder, 540 Fed. App'x 760, 761 n.2 (9th Cir.
11 2013) ("We lack jurisdiction to consider whether Fabian-Lopez is
12 eligible for consideration for Deferred Action for Childhood
13 Arrivals.").

14 Plaintiff now contends that § 1252(g) does not apply to
15 his claim, however, because he does not seek judicial
16 determination of his eligibility for DACA. He now claims he
17 objects only to USCIS reversing its decision without giving him
18 an opportunity to respond, in alleged violation of its own
19 procedures.

20 The court need not resolve the question of whether §
21 1252(g) also applies to procedural challenges arising from DACA
22 because plaintiff's Complaint makes no such procedural challenge.
23 As alleged, the Complaint does not even mention the supposed
24 procedural defects but instead seeks victory on the merits--he
25

26 ² Plaintiff's counsel appeared to concede this issue both
27 at oral argument and in his opposition brief. (See Pl.'s Opp'n
28 at 3:3-4 (Docket No. 13) ("Defendants assert that district courts
lack jurisdiction to consider DACA eligibility. We concur.").)

1 asks that the court enjoin USCIS from denying his DACA
2 application and order that the application be approved. (See,
3 e.g., Compl. ¶¶ 1, 35 (stating that plaintiff seeks review of
4 defendants' denial of his DACA application and "an order that his
5 application be approved".) Judicial determination of DACA
6 eligibility is precisely what plaintiff pursues in his Complaint
7 and, under Fabian-Lopez, § 1252(g) divests the court of
8 jurisdiction to hear this claim.

9
10 At oral argument, counsel for plaintiff appeared to
11 concede that § 1252(g) barred the relief sought in the Complaint,
12 but suggested that he intends to amend his Complaint to state a
13 procedural due process claim seeking an opportunity for plaintiff
14 to respond to the denial of his DACA consideration. Because §
15 1252(g) bars the court from considering plaintiff's claims as
16 alleged, the court must grant defendants' motion to dismiss the
17 Complaint for lack of subject matter jurisdiction. If plaintiff
18 wants the court to consider remanding this matter to the
19 defendants based upon an alleged due process violation, he will
20 have to amend his Complaint to properly make that request.

21 IT IS THEREFORE ORDERED that defendants' motion to
22 dismiss be, and the same hereby is, GRANTED without prejudice.

23 Plaintiff has 21 days from the date this Order is
24 signed to file an amended complaint, if he can do so consistent
25 with this Order.

26 Dated: April 22, 2014



27 **WILLIAM B. SHUBB**
28 **UNITED STATES DISTRICT JUDGE**