United States District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

RONY B PENA POCASANGRE,[1]

Plaintiff,

v.

JOHN F. KELLY, et al.,

Defendants.

Case No. 16-cv-06930-JSC

ORDER RE: DEFENDANTS' MOTION TO DISMISS

Re: Dkt. No. 16

Plaintiff filed this declaratory judgment action seeking an order compelling the Department of Homeland Security to grant his employment authorization and to enact regulations regarding removal proceedings for unaccompanied undocumented minors detained at the border. Now pending before the Court is Defendants' Motion to Dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) and failure to state a claim upon which relief can be granted under Rule 12(b)(6). (Dkt. No. 16.) After carefully considering the papers submitted by the parties and having had the benefit of oral argument on June 29, 2017, the Court GRANTS Defendants' Motion to Dismiss.[2] As Defendants have granted Plaintiff employment authorization through January 2019, his claim seeking that he be granted such authorization is now moot.

[1] Plaintiff was no longer a minor when he filed this civil suit and thus must be identified by his full name pursuant to Federal Rule of Civil Procedure 5.2.

[2] Both parties have consented to the jurisdiction of a magistrate judge pursuant to 28 U.S.C. § 636(c). (Dkt. Nos. 9 & 14.)

Plaintiff also lacks standing to seek an order requiring Defendants to adopt regulations governing unaccompanied minors.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff is a citizen of El Salvador who illegally entered the United States when he was 15 years old. (Complaint ¶ 3, Dkt. No. 1.) Shortly thereafter, on February 4, 2014, Plaintiff was detained by the Department of Homeland Security ("DHS") who instituted removal proceedings against him. (*Id.*; Dkt. No. 1-1 (Notice to Appear Instituting Removal Proceedings).[3]) He was released from custody three weeks later. (Dkt. No. 1-1 at 4.) On October 22, 2015, Plaintiff applied for asylum as an unaccompanied minor under the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Public Law 110-457, 122 Stat. 5044 (principally codified in relevant part at 8 U.S.C. § 1232) (December 23, 2008) ("TVPRA").[4] (Complaint ¶ 9.) On March 22, 2016, an asylum officer determined that Plaintiff was ineligible for asylum, but did not deny his application. (Complaint ¶ 10; Dkt. No. 1-3.) Plaintiff's removal proceedings remain pending and he may seek administrative review of his asylum application by an Immigration Judge. (*Id.*)

8 C.F.R. § 274a.12(c)(8) makes an asylum applicant eligible to request employment authorization from the United States Citizenship and Immigration Services ("USCIS") at least 150 days after filing an asylum application, as long as the individual's asylum application remains pending. (Complaint ¶ 11.) The USCIS must issue an employment authorization no earlier than 180 days after the individual has filed an asylum application. (*Id.*)

Upon learning of his ineligibility for asylum on March 22, 2016, Plaintiff received a notice regarding employment authorization. (Dkt. No. 16 at 11.)[5] The USCIS explained that the earliest possible date Plaintiff would be eligible to apply for employment authorization was March 20,

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[3] Docket Nos. 1-1–1-6 refer to Exhibits A-F to Plaintiff's Complaint.

[4] An unaccompanied minor is "a child who has no legal immigration status in the United States; has not attained 18 years of age; and has no parent or legal guardian in the United States, or for whom no parent or legal guardian in the United States is available to provide care and physical custody." (Complaint ¶ 2.)

[5] Record citations are to material in the Electronic Case File ("ECF"); pinpoint citations are to the ECF-generated page numbers at the top of the documents.

2016. (*Id.*) On October 7, 2016, 351 days after filing his asylum application, Plaintiff applied for employment authorization pursuant to 8 C.F.R. § 274a.12(c)(8). (Complaint ¶ 15; Dkt. No. 1-5.) On November 1, 2016, the USCIS denied Plaintiff's employment authorization application upon finding that zero days had elapsed since he had filed his asylum application, less than the required 150 days, thus making him ineligible. (Complaint ¶ 16; Dkt. No. 1-6; Dkt. No. 16 at 12.) Two months later, on January 11, 2016, the USCIS granted Plaintiff employment authorization through January 10, 2019. (Dkt. No. 17 at 7; Dkt. No. 16-1.)[6]

On December 2, 2016, before the USCIS granted Plaintiff employment authorization, Plaintiff filed this civil action seeking declaratory and injunctive relief against Defendants Jeh Johnson, the Secretary of Homeland Security, and Loretta E. Lynch, the Attorney General of the United States.[7] The Complaint seeks relief (1) declaring that Plaintiff was unlawfully denied an employment authorization pursuant to 8 C.F.R. §§ 274a.12(c)(8) and 208.7, (2) enjoining Defendants to adjudicate Plaintiff's employment authorization, (3) declaring that Defendants violated the TVPRA, 8 U.S.C. § 1232(d)(8), by failing to promulgate regulations taking into account the specialized needs of unaccompanied minors, and (4) enjoining Defendants to promulgate such regulations. (Dkt. No. 1.)

Defendants have moved to dismiss the action for lack of subject matter jurisdiction and failure to state a claim. (Dkt. No. 16.)

LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(b)(1), a district court must dismiss an action if it lacks jurisdiction over the subject matter of the suit. *See* Fed. R. Civ. P. 12(b)(1). "Subject matter jurisdiction can never be forfeited or waived and federal courts have a continuing independent obligation to determine whether subject-matter jurisdiction exists." *Leeson v. Transamerica Disability Income Plan*, 671 F.3d 969, 975 n.12 (9th Cir. 2012) (internal quotation marks and

[6] Docket No. 16-1 refers to Exhibit 1 to Defendants' Motion to Dismiss.

[7] John Kelly became the Secretary of Homeland Security on January 20, 2017 and is therefore substituted for Jeh Johnson as a Defendant in this action. *See* 42 U.S.C. § 405(g); Fed. R. Civ. P. 25(d). Likewise, Jeff Sessions became the Attorney General of the United States on February 9, 2017 and is substituted for Loretta Lynch as a Defendant in this action.

citations omitted). Where, as here, a defendant challenges subject matter jurisdiction pursuant to Rule 12(b)(1), "the plaintiff has the burden of proving jurisdiction in order to survive the motion." *Kingman Reef Atoll Invs., LLC v. United States*, 541 F.3d 1189, 1197 (9th Cir. 2008) (internal quotation marks and citations omitted). In evaluating a facial attack to jurisdiction, the court accepts the factual allegations in the complaint as true. *See Miranda v. Reno*, 238 F.3d 1156, 1157 n.1 (9th Cir. 2001).

Pursuant to Federal Rule of Civil Procedure 12(b)(6), a complaint may be dismissed for failure to state a claim upon which relief may be granted based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). For purposes of evaluating a motion to dismiss, the court "must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the nonmoving party." *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). However, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.*

DISCUSSION

Plaintiff seeks injunctive and declaratory relief on the basis of two claims: (1) that Defendants violated 8 C.F.R. §§ 274a.12(c)(8) and 208.7 by initially denying Plaintiff's employment authorization on November 1, 2016 (the employment authorization claim), and (2) that Defendants violated 8 U.S.C. § 1232(d)(8) by failing to promulgate regulations regarding the removal of unaccompanied minors (the TVPRA claim). Defendants contend that the Court lacks subject matter jurisdiction to hear Plaintiff's claims due to mootness and a lack of standing.

Alternatively, Defendants argue that Plaintiff fails to state a claim upon which relief can be granted with regard to the TVPRA regulations.

I. PLAINTIFF'S CLAIMS LACK A PROPER PROCEDURAL VEHICLE

There is a question whether Plaintiff's request for relief is procedurally proper. Plaintiff's Complaint seeks declaratory and injunctive relief, but does not specify the statute under which these claims are brought. Plaintiff includes reference to General Order 61("Immigration Mandamus Cases") and asks the Court to exercise its authority under that Order to determine if Defendants' failure to promulgate TVPRA regulations violates 8 U.S.C. § 1232(d)(8) and if so, to enjoin Defendants to comply. (Complaint ¶ 3.) General Order 61, however, applies to civil actions seeking a writ of mandamus "filed pursuant to the mandamus statute, 28 USC § 1361, and/or the Administrative Procedure Act, 5 USC §§ 701." N.D. Cal. Gen. Order 61. Plaintiff—who is represented by counsel—did not file the action as an immigration mandamus, nor does he cite to the mandamus statute, 28 U.S.C. § 1361, or the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 *et seq*, anywhere in his Complaint. Instead, Plaintiff generally argues that "it is well within the District Court's authority to interpret a statute and enjoin agency action unlawfully withheld or denied." (Dkt. No. 1 at 5.) Thus, Plaintiff has not shown that he is utilizing the proper procedural vehicle to bring his claims. As Plaintiff could amend to allege a mandamus or APA claim, the Court will nonetheless address Defendants' mootness and standing arguments.

II. PLAINTIFF LACKS STANDING FOR BOTH OF HIS CLAIMS

> To establish Article III standing
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> a plaintiff must show (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Sacks v. Office of Foreign Assets Control, 466 F.3d 764, 771 (9th Cir. 2006) (internal quotation marks and citations omitted).

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A. Plaintiff's Employment Authorization Claim is Moot

"Mootness can be characterized as the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Foster v. Carson*, 347 F.3d 742, 745 (9th Cir. 2003) (internal quotation marks and citations omitted). "Thus, the central inquiry in any mootness challenge is whether changes in the circumstances existing when the action was filed have forestalled any meaningful relief." *Moeller v. Taco Bell Corp.*, 816 F.Supp.2d 831, 860 (N.D. Cal. 2011). "So long as the court can grant some effective relief, it does not matter that the relief originally sought is unavailable due to changed circumstances." *Id.* at 860.

Plaintiff's claim seeking an order enjoining Defendants to grant him employment authorization pursuant to 8 C.F.R. §§ 274a.12(c)(8) and 208.7 is moot as he has already been granted authorization pursuant to those regulations; there is nothing more that this Court can order. Two exceptions to the mootness doctrine are when a defendant voluntarily ceases alleged unlawful conduct ("voluntary cessation") and when a claim is "capable of repetition yet evading review." *Ctr. For Biological Diversity v. Lohn*, 511 F.3d 960, 964 (9th Cir. 2007). A defendant's voluntary compliance only moots a request for prospective relief where the defendant meets the "formidable burden" of demonstrating that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189-90, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) (internal quotation marks and citations omitted). A claim is "capable of repetition yet evading review" "where (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 735, 128 S. Ct. 2759, 2769, 171 L. Ed. 2d 737 (2008) (internal quotation marks and citations omitted). Here, Plaintiff's claim falls short of both mootness exceptions because it is not likely that his injury, being initially denied an employment authorization, will recur.

First, although Defendants voluntarily complied with Plaintiff's request for relief by granting him an employment authorization, they have shown that the wrongful behavior—denying his request on the grounds that his asylum application had not been pending for 150 days—will not happen again because it cannot happen again. As Plaintiff concedes, he has been granted an employment authorization through January 10, 2019 pursuant to 8 C.F.R. Section 274a.12(c)(8). For the same problem to happen again his authorization would have to be revoked and a new application denied on the grounds that his asylum application had not been pending for 150 days. There is no suggestion in the record that such an occurrence is even a remote possibility.

Second, Plaintiff's claim falls short of the "capable of repetition yet evading review" mootness exception for the same reason. There is no reasonable expectation that Defendants will deny any request to renew Plaintiff's employment authorization based on the same type of miscalculation that occurred the first time around. "Mere possibility that event will recur is insufficient." *Sekhon v. Meissner*, No. C 99-4908 SI, 2000 WL 868521, at *3 (N.D. Cal. June 19, 2000) (internal quotation marks and citations omitted). Here, it is more than just unlikely that Plaintiff's injury will recur; it is in fact nearly impossible given that a "renewal" means the application was initially granted (as it was), and if it was initially granted, it cannot be denied on the grounds that it should not have been initially granted. "The mere showing that plaintiff might possibly be subject to another erroneous denial on similar grounds does not suffice to establish a reasonable expectation that this possibility will be realized." *Id.* at *3.

Plaintiff does not appear to dispute this fact and instead argues that his employment authorization approval "does not explain the agency's rationale for its abrupt change of position to grant employment authorization" and that the Executive Office for Immigration Review ("EOIR") never admitted or corrected the miscalculation made regarding his "asylum clock." (Dkt. No. 17 at 8-9.) That the USCIS has not explicitly corrected its calculation of Plaintiff's "asylum clock" does not suggest that Plaintiff's renewal application is reasonably likely to be denied on the grounds that it should not have been approved in the first instance. This is especially so given that Defendants have admitted their mistake during these proceedings in noting that "USCIS

mistakenly denied the application for work authorization after miscalculating the length of time the asylum application had been pending." (Dkt. No. 16 at 12.) Further, Defendants' March 2016 letter to Plaintiff correctly calculated the date he would be eligible for employment authorization. Moreover, Defendants note that the date Plaintiff filed his asylum application is not necessarily the start date for his "asylum clock" and likewise that the number listed on Plaintiff's EOIR hotline is not the determining factor for the USCIS in making its employment authorization decision. Since the USCIS had initial review of Plaintiff's asylum application, Plaintiff's "asylum clock" is calculated using the date of filing with the USCIS and not the number listed on the EOIR hotline.

Since Plaintiff's injury is not likely to be repeated, his employment authorization claim is dismissed as moot.

B. Plaintiff Lacks Standing to Bring his TVPRA Claim

The TVPRA, which was passed on December 23, 2008, aims to "enhance measures to combat trafficking in persons." 122 Stat. 5044. Specifically, 8 U.S.C. § 1232(d) details protections for certain at-risk children, including unaccompanied minors. Among other things, it provides that "[a]pplications for asylum and other forms of relief from removal in which an unaccompanied alien child is the principal applicant shall be governed by regulations which take into account the specialized needs of unaccompanied alien children and which address both procedural and substantive aspects of handling unaccompanied alien children's cases." *Id.* § 1232(d)(8).

The parties do not dispute that the regulations referred to in Section 1232(d)(8) have not been enacted. Plaintiff alleges that the lack of formal regulations as to how to transfer an asylum case from the DHS to the Immigration Court has detrimentally impacted him. In particular, Plaintiff alleges that he was denied substantive protection when DHS exercised initial jurisdiction over his asylum case without any regulatory guidance. Plaintiff also insists that the lack of regulations led to the denial of his employment authorization in the first instance. Without any regulations in place, Plaintiff contends that an Immigration Judge will decide his case without taking into account his unique needs. Finally, Plaintiff argues that the DHS and the Department of

Justice are expediting his case instead of waiting for these regulations to be published, which is making matters worse.

Plaintiff lacks standing to make this claim. First, Plaintiff fails to meet the "injury in fact" requirement of Article III standing because his alleged injury is not concrete, particularized, actual, or imminent. *See Sacks v. Office of Foreign Assets Control*, 466 F.3d at 771. As his asylum application is currently pending, the lack of regulations has not led to an injury of his application being denied. Indeed, the Immigration Court may grant his asylum application. The most concrete part of Plaintiff's alleged injury stemming from the lack of these regulations is Plaintiff's initial denial of an employment authorization, and as discussed above, this claim has been rendered moot by Plaintiff's subsequent employment authorization approval.

Second, Plaintiff has not shown that his "injury" will be redressed by the relief he seeks. Section 1232(d)(8) refers to regulations, but it includes no detail as to what should be included in these regulations other than the requirement that they "take into account the specialized needs" of unaccompanied minors. § 1232(d)(8). At oral argument Plaintiff focused on the TVPRA's "voluntary departure" provision and its effect on his removal proceedings, but there is no indication that any regulations that are promulgated will address this provision at all, let alone in a way that will redress Plaintiff's particular situation. Additionally, as discussed above, if Plaintiff's asylum application is approved, there will be no need for Plaintiff to invoke the option of voluntary departure.

Since Plaintiff fails to allege an "injury in fact" that can be redressed by the Court, he lacks Article III standing with regard to his TVPRA regulations claim.

CONCLUSION

For the reasons stated above, the Court GRANTS Defendants' Motion to Dismiss for lack of jurisdiction without leave to amend. The Clerk is directed to close the case.

This Order disposes of Docket No. 16.

IT IS SO ORDERED.

Dated: July 14, 2017

JACQUELINE SCOTT CORLEY
United States Magistrate Judge