No. 21-

IN THE

Supreme Court of the United States

SIMIN NOURITAJER, THE RAZI SCHOOL,

Petitioners,

– v. –

UR M. JADDOU, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether considering the strong presumption of jurisdiction to review agency action repeatedly recognized by this Court, 8 U.S.C. §1155 and 8 U.S.C. §1252(a)(2)(B)(ii) should be construed to foreclose all judicial review of the revocation of an approved immigrant preference petition when denial of the petition would be subject to judicial review and revocation is governed by established legal standards?

RELATED CASES

The Razi School v. Cissna, No. 18-cv-6512, U.S. District Court for the Eastern District of New York. Judgment entered February 17, 2021.

Nouritajer v. Jaddou, No. 21-632, U.S. Court of Appeals for the Second Circuit. Judgment entered November 15, 2021.

TABLE OF CONTENTS

Table of Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

CASES

Page

Page

Page

STATUTES AND OTHER AUTHORITIES:

Page

OPINIONS BELOW

The decision of the Court of Appeals is reported at 18 F.4th 85 (2d Cir. 2021) and appears in Appendix A to this Petition at App. 1a—11a. The District Court decision is reported at 579 F.Supp.3d 144 (E.D.N.Y. 2021) and appears in Appendix B to this Petition at App. 12a-24a.

JURISDICTION

The judgment of the Court of Appeals was entered on November 15, 2021, and a timely petition for rehearing with a suggestion for rehearing en banc was denied on February 4, 2022. (App. 25a—26a). This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

8 U.S.C. §§1155 and 1252(a)(2)(B)(ii) (App. 27a)

PRELIMINARY STATEMENT

At issue on this petition is a decision from the Second Circuit that has deepened the Circuit split over judicial review of the revocation of an immigrant preference petition and that conflicts with both past and more recent decisions of this Court on the strong presumption in favor of judicial review. See, e.g., Dep't of Homeland Security v. Regents of the Univ. of Cal., 140 S.Ct. 1891, 1905-06 (2020)("Regents") and Kucana v. Holder, 558 U.S. 233 (2010). Moreover, this petition arises against the backdrop of a pending decision from this Court in Patel v. Attorney General, Sup. Ct. Dkt. No. 20-979 (argued December 6, 2021) on whether 8 U.S.C. §1252(a)(2)(B) precludes

judicial review of underlying legal issues involved in an admittedly discretionary decision. Furthermore, the decision below yields the absurd result that denial of an immigrant preference petition is subject to judicial review but revocation a day after approval is not.

STATEMENT OF THE CASE

Since the decisions below arose from the grant of a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure, the basic facts relevant to this petition are taken from the Petitioners' Second Amended Complaint ("SAC"). See, e.g., Carter v. Health Port Techs. LLC, 822 F.3d 47, 57 (2d Cir. 2016).

A. The Petitioners

The Razi School provides education in an Islamic environment for students from pre-K through the 12th grade. (App. 13-14a). Simin Nouritajer is a native and citizen of Iran and has been a teacher at the Razi School since January 2002. (A. 14a). Her husband, Mehdi Faridzadeh, formerly served with the Iranian Mission to the United Nations and was a visiting scholar at Columbia University. (App. 14a).

B. The Legal Background

In general, the Immigration and Nationality Act of 1952, as amended (the "Act") allocates immigrant visas based upon preferences grounded in family or employment relationships. See 8 U.S.C. §1153. Among those preferences is 8 U.S.C. §1153(b)(3)(A)(ii) for an alien

with a professional degree who will be sponsored by an employer. For this preference an employer must first file a labor certification with the Department of Labor ("DOL") to demonstrate that there are no available United States workers to fill the position for which certification is sought and that the prospective employee has the experience required for the position.

Upon DOL approval of the labor certification, the employer files an immigrant preference petition on USCIS form I-140 to establish the immigrant preference for the beneficiary of the labor certification in accordance with the procedures set forth in 8 U.S.C. §1154. An approved I-140 is necessary for the beneficiary and family members to adjust status to permanent residence under 8 U.S.C. §1255 once the quota for the immigrant preference becomes current. The grant of such a preference petition under 8 U.S.C. §1153(b)(3)(A)(ii) is not discretionary unlike other benefits under the Act. Compare 8 U.S.C. §1154(b) (immigrant preference petition shall be approved if eligibility established) with §1255 (adjustment of status to permanent residence in the United States is discretionary once eligibility is established).

C. The Applications and Decisions

On December 28, 2004, the Razi School filed a labor certification for Simin Nouritajer as a teacher setting forth the qualifications for this position. (App. 14a). The DOL approved the labor certification on January 18, 2007, concluding that Simin Nouritajer possessed the requisite qualifications and that there were no qualified United States workers to fill the position. (App. 14a). On May 7, 2007 the Razi School filed an I-140 preference petition for

Simin Nouritajer with USCIS under 8 U.S.C. §1153(b)(3)(A)(ii) given the approved labor certification. (App. 14a). Simultaneously with the filing of the I-140 preference petition, Simin Nouritajer as the direct beneficiary of the preference petition, and her husband Mehdi Faridzadeh and their daughter Leily Faridzadeh as derivative beneficiaries filed adjustment applications since the quota was current for this preference category. On November 19, 2013, USCIS finally approved the I-140 petition. (App. 14a-15a). Yet USCIS took no action on the adjustment applications by Simin Nouritajer or her family.

After ten years of having taken no action on the adjustment applications, on or about July 11, 2017, USCIS issued a notice of intent to revoke the previously approved I-140 petition, the Razi School responded opposing revocation, and on August 18, 2017 USCIS revoked the I-140 petition on the legal issues of ability to pay and qualifications for the position and denied the adjustment applications. (App. 15a). The Razi School then appealed the revocation to the Administrative Appeals Office ("AAO") of USCIS. (App. 25a-16a). The regulation authorizing such an appeal, 8 C.F.R. §103.3(a)(1) and (2), did not make the appeal a matter of discretion, and on August 1, 2018, the AAO issued a decision denying this appeal on the merits after de novo review and not in the exercise of discretion. (App. 15a-16a).

The Razi School then moved to reopen this decision under 8 C.F.R. §103.5, which did not make reopening a matter of discretion. (App. 16a-17a). On May 29, 2019, the AAO issued a decision on the merits and not in the exercise of discretion denying the motion to reopen. (App. 17a).

D. FBI Involvement

From in or about 2010 to 2015 Simin Nouritajer and her family were subjected to repeated surveillance and questioning by FBI agents who repeatedly told them that their applications for permanent residence, which, as the FBI knew, were dependent upon an approved I-140, would be delayed and/or eventually denied unless they "cooperated," by offering alleged "information" about Iran's relationship with the United States that they did not possess. (App. 4a-5a; 17a). The FBI agents never once suggested, much less accused them of having broken any law. Indeed, in an attempt to apply additional pressure during these interrogations, the FBI referenced the spotless record and background of Simin Nouritajer and her family living and growing up in the United States. (App. 4a-5a; 17a).

Among the instances when this occurred was on February 27, 2010 when Simin Nouritajer's husband and daughter were stopped from boarding a flight to Iran and on March 10, 2010 when they returned to the United States, with Mehdi Faridzadeh being questioned for more than five hours, and the rest of the family, including Simin Nouritajer and her children, separated and held for questioning for the same amount of time. (App. 4a-5a; 17a). Similarly, when Simin Nouritajer's husband, having traveled abroad to attend his father's funeral in 2013, attempted to board a return flight to the United States, United States customs officials informed him he was not allowed to return to the United States citing a decision from "above" their ranks even though Mr. Faridzadeh's advance parole document legally entitled him to return. (App. 4a-5a; 17a)).

E. The Claims for Relief

The SAC asserted several claims for relief. Count One alleged that the requirement imposed by USCIS that the Razi School be able to pay the beneficiary's salary from the time the labor certification is filed until the beneficiary becomes a permanent resident was contrary to the Act. In addition, the regulations purportedly imposing this requirement were ultra vires from the Act, were promulgated contrary to the notice and comment requirements of the Administrative Procedure Act, 5 U.S.C. §553 and, as the May 29, 2019 AAO decision had conceded, did not impose such a requirement. (App. 8a-11a; 19a-20a). Count Two alleged that even if imposing the ability to pay requirement were valid, the Razi School had satisfied that requirement as a matter of law. (App. 8a-11a; 19a-20a).

Count Three alleged that in approving the labor certification, the DOL had determined that the experience cited by Simin Nouritajer in the labor certification met the experience required for the teaching position and this determination was binding upon USCIS. (App. 8a-11a; 19a-20a).

Count Four alleged that USCIS has established a program known as the Controlled Application Review and Resolution Program ("CARRP") which subjects Muslims, including Middle Eastern and primarily Iranian applicants to harsh scrutiny that would not be applied to applications benefiting those of other religious faiths or nationalities. (App. 8a-11a; 19a-20a). The revocation of the I-140 was done through the CARRP program at the behest of the FBI to coerce cooperation, was pretextual

and was based upon the Islamic character for the Razi School and the religion and/or national origin of Simin Nouritajer and her family contrary to 8 U.S.C. §1152(a)(1) and the due process clause of the Fifth Amendment. (App. 8a-11a; 19a-20a).

The existence of the CARRP program has been acknowledged by the government itself in Wagafe v. Trump, 2017 U.S. Dist. LEXIS 95887 (W.D. Wash. June 21, 2017), in which the plaintiffs in this ongoing litigation had alleged that the program was directed against Muslim applicants and established criteria for adjudication untethered to the actual statutory or regulatory requirements. For persons falling within this program, officers are instructed to delay action on pending applications and even unlawfully deny them.[1]

F. The District Court Opinion

In granting the defendants' motion to dismiss for lack of subject matter jurisdiction, the District Court held that the gravamen of Petitioners' claims was to review the decision to revoke the I-140. (App. 20a). Accordingly, the District Court held that subject matter jurisdiction was foreclosed by two statutes, 8 U.S.C. §1155 governing revocation itself and 8 U.S.C. §1252(a)(2)(B)(ii), which limits review of decisions specified to be made in the exercise of discretion. (App. 19a-23a).

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1. See, e.g., Defendants' Status Report on Progress for Completing Policy Review of CARRP by May 10, 2022, Document 596, Wagafe v. Biden, 17 cv 0094-LK (filed May 5, 2022).

G. The Second Circuit Opinion

In affirming the District Court the Second Circuit panel agreed that the gravamen of the Petitioners' action was a challenge to what the panel characterized as the "substantive discretionary" decision to revoke the I-140 for which, the panel held, subject matter jurisdiction was barred under U.S.C. §1155 and 8 U.S.C. §1252(a)(2)(B)(ii) citing both Mantena v. Johnson, 809 F.3d 721 (2d Cir. 2015) and Firstland Int'l Inc. v. INS, 377 F.3d 127 (2d Cir. 2004). (App. 6a-7a). With respect to the claim of pretext in Count Four, the panel concluded that this claim was simply a claim that the revocation was wrong, citing Proyecto San Pablo v. INS, 189 F.3d 1130 (9th Cir. 1999). (App. 8a). At the same time, the decision did not discuss that part of the claim alleging national origin discrimination. (App. 8a).

In the same vein, the decision rejected Petitioners' arguments that the initial revocation was based upon the merits and not in the exercise of discretion, concluding instead that the first decision was by definition discretionary and that the AAO decision affirming that decision had to be considered discretionary as well. In this connection, the panel drew an analogy to the lack of subject matter jurisdiction to review a motion to reopen a removal order where the order itself was not subject to review, citing Durant v. USINS, 393 F.3d 113 (2d Cir. 2004). (App. 9a). Likewise, the panel rejected the Petitioners' other claims as "essentially challenges to USCIS's substantive decision to revoke the I-140," and thus barred "because they fall within the unreviewable discretion of [USCIS]." (App. 9a-11a).

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for two reasons. First, the decision below widens a split among the Courts of Appeal over whether all judicial review has been eliminated for decisions to revoke an approved immigrant preference petition. Supreme Court Rule 10 (conflict among the circuits a basis for certiorari). Second, the decision is inconsistent with decisions of this Court on the strong presumption in favor of judicial review. See, e.g., Lugar v. Edmonson Oil Co., 457 U.S. 922, 926 (1982) (certiorari granted where opinion below "appears to be inconsistent with prior decisions of this Court.").

A. Certiorari Should Be Granted To Resolve An Intercircuit Conflict

Certiorari is appropriate to resolve a conflict among the circuits. Here the decision from the Second Circuit foreclosing all judicial review of revocation under 8 U.S.C. §1155 conflicts with the majority opinion in ANA Int'l Inc. v. Way, 393F.3d 886, 894 (9th Cir. 2004) which allows such review because prior administrative precedent has created a meaningful legal standard to govern revocation and precludes revocation purely as a matter of discretion. For example, Matter of Tawfik, 20 I&N 166 (BIA 1990) gives meaning to "good and sufficient cause" as when the evidence of record at the time of approval was sufficient to warrant a denial. See also Matter of Ho, 19 I & N Dec. 582, 590 (BIA 1988); Matter of Estime, 19 I & N Dec 450, 452 (BIA 1987). In short, according to the Ninth Circuit administrative precedent has given substantive meaning to 8 U.S.C. §1155 and limits discretion by establishing meaningful criteria defining good and sufficient cause.

Likewise the dissent in Bernardo v. Johnson, 814 F.3d 481, 494-508 (1st Cir. 2016) (Lipez, J. dissenting), cert. denied, 579 U.S. 917 (2016) reaches the same conclusion as the majority in ANA Int'l Inc. that administrative precedent has created meaningful standards governing revocation.

The dissent in Bernardo, 814 F.3d at 499-500 adds that Congress can be presumed to have been familiar with these administrative standards in place for more than 30 years and implicitly approved them in subsequent reenactment of the revocation provision. See, e.g., Lorillard v. Pons, 434 U.S. 575, 580 (1978); New York Trust Co. v. Eisner, 256 U.S.345, 349 (1922) (Holmes, J.).("A page of history is worth a volume of logic."). Furthermore, applicable regulations require that this administrative precedent be followed. See 8 C.F.R. §103.3(c). Accordingly, the holding below that judicial review should be foreclosed because revocation under 8 U.S.C. §1155 amounts to an act of pure discretion devoid of any standards runs counter to ANA Int'l Inc. and the dissent in Bernardo. While the dissent in Bernardo acknowledges, 814 F.3d at 507-08, that all the other circuits to have considered this issue have rejected judicial review of revocation, the majority of those decisions were handed down before Kucana and all, except the Second Circuit decision here, predate Regents, which the Second Circuit decision does not discuss. In any event, the fact that the split may be lopsided should not distract from the fact that a split exists and is squarely presented for resolution in the precedent from the Second Circuit. Moreover, this would hardly be the first time that this Court has granted certiorari to resolve an issue of statutory construction under the immigration law where the divide was heavily in the government's favor. See Nasrallah v. Barr, 140 S.Ct. 1683, 1684 (2020)("most Courts of Appeals have sided with the government. . .");

Pereira v. Sessions, 138 S.Ct. 2015, 2113 (2018)(conflict created by only one Court of Appeals not adopting the government's view).

B. The Decision Below Conflicts With Supreme Court Precedent

First, as the dissent in Bernardo persuasively recognizes, 814 F.3d at 495-96, the supposed elimination of all judicial review in 8 U.S.C. §1252(a)(2)(B)(ii) conflicts with the interpretation of this provision in Kucana, which emphasizes that decision as a matter of discretion must be specified and 8 U.S.C. §1155 does no such thing. Similarly the decision below can hardly be squared with the broad reiteration of the presumption favoring judicial review in Regents and the narrow construction accorded supposed limitations upon such review. In other words, the use of "may," "at any time," or "deems" does not provide the clarity required under Regents to oust judicial review. Kucana, 558 U.S. at 243 (language purportedly ousting judicial review must state so explicitly, implication or anticipation not enough to overcome the presumption in favor of judicial review). In this connection, moreover, "deems" cannot be unmoored from "good and sufficient cause," from which binding administrative precedent has created controlling standards governing revocation. As the dissent in Bernardo, 814 F.3d at 503 cogently summarizes this point, [T]he word 'deems' cannot nullify the established meaning of 'good and sufficient cause' that the relevant agency has applied for almost three decades, and that formed the backdrop against which Congress reenacted §1155."

Furthermore, Congress knew how to make decisions discretionary under the Act but did not employ such

language in §1155. Compare, e.g., 8 U.S.C. §1158 (asylum is discretionary), §1255 (adjustment is discretionary). Cf. INS v. Cardoza-Fonseca, 480 U.S. 421, 432 (1987) ("[w]here Congress includes particular language in one section of a statute but omits it another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion."). Moreover, even when Congress prescribes discretion, an agency may limit that discretion by regulation or administrative precedent. In this regard Service v. Dulles, 354 U.S. 363 (1957) is instructive, for in that case Congress had granted the Secretary of State "absolute discretion" to discharge an employee for disloyalty. Nevertheless in allowing judicial review of the dismissal, this Court held in language directly applicable here, 354 U.S. at 370, that while an agency is not required "to impose upon [it]self . . . more rigorous *substantive and procedural standards*" than are contemplated by statute, "having done so [it can] not proceed without regard to them." (Emphasis supplied). Moreover, even if §1155 were viewed as discretionary—which is not the case-- administrative precedent and applicable regulations have created substantive standards cabining this assertedly absolute discretion to revoke an approved immigrant preference petition, thus making application of those standards subject to judicial review under the sound logic of Service as well as the strong presumption in favor of judicial review.

In addition, earlier decisions from this Court and the Second Circuit arising from the Stellas litigation and involving a revocation provision substantively identical to 8 U.S.C. §1155 provide additional support for considering "good and sufficient cause" as subject to judicial review

in line with the strong presumption favoring judicial review. At issue in that litigation was a regulation by the then Immigration & Naturalization Service automatically revoking a visa petition withdrawn by the petitioner. The majority opinion in United States ex rel. Stellas v. Esperdy, 366 F.2d 266 (2d Cir. 1966), rev'd 388 U.S. 462 (1967) did not allow judicial review while the dissent reasoned that the power of revocation was not limitless and had to be exercised in accordance with the statutory standard of good and sufficient cause, thus viewing that language as importing statutory standards governing revocation. 366 F.2d at 272 (Moore, J., dissenting).

Later, in Pierno v. INS, 397 F.2d 949, 950 (2d Cir. 1968), the Second Circuit viewed this Court's reversal in Stellas as vindicating Judge Moore's earlier dissent, which was cited with approval. At issue in Pierno was the automatic revocation of a visa petition upon the death of a petitioner. There the Second Circuit held that "good and sufficient cause" was subject to judicial review, concluding that this language "should not be interpreted to authorize [the agency's] "wooden application of rules for automatic revocation," and noting that the Supreme Court reversal in Stellas had called for further proceedings on the invocation of automatic revocation under the revocation statute. 397 F.2d at 950-51. Moreover, at least one District Court decision within the Second Circuit has recently held that legal issues underlying revocation are subject to judicial review. See Coniglio v. Garland, 2021 U.S. Dist. LEXIS 155016 (E.D.N.Y. Aug. 17, 2021)(8 U.S.C. §1155 and 8 U.S.C. §1252(a)(2)(B)(ii) do not foreclose judicial review of legal issues underlying revocation).

The conflict with two other lines of precedent from this Court further supports a grant of certiorari. First, as this Court has made clear, statutory interpretations that produce absurd results are to be avoided. Griffin v. Oceanic Contractors, Inc. 458 U.S. 564, 575 (1982). While denial of a visa petition under 8 U.S.C. §1154 is subject to judicial review, see, e.g., Soltane v. U.S. Department of Justice, 381 F.3d 143, 147-8 (3d Cir. 2004), revocation of that same petition a day after approval would, under the decision below, be immune from judicial review. See Bernardo, 814 F.3d at 507 (Lipez, J., dissenting)("to hold that revocation decisions are not reviewable in court would result in an incoherent understanding of the [Act], in which judicial recourse is available if the petition is denied but not available if the petition is revoked, even where both the denial and revocation are based on the same factual ground, such as a failure to satisfy the minimum prior work experience."); J.C. Penney v. CIR, 312 F.2d 65, 68 (2d Cir. 1962)("Congress is free, within constitutional limitations, to legislate eccentrically if it should wish, but courts should not lightly assume that it has done so.").

Second, as this Court has repeatedly held, statutory provisions should be construed in a manner that gives effect to both and avoids conflict. See, e.g., Epic Sys. Corp. v. Lewis, 138 S.Ct. 1612, 1624 (2018); Morton v. Mancari, 417 U.S. 535, 551 (1974).Thus 8 U.S.C. §1152(a)(1) prohibits the allocation of visas on the basis of national origin. Yet the decision below would allow 8 U.S.C. §1155 to be used as a means to conceal a violation of 8 U.S.C. §1152(a)(1), as alleged in Count Four. See Department of Commerce v. New York, 139 S.Ct. 2551 (2019), which holds that there may be times when the actual reasons for administrative action differ from the stated grounds and, in that

connection, quotes from United States v. Stanchich, 550 F.2d 1294, 1300 (2d Cir. 1977) that while judicial review should be deferential, a reviewing Court is "not required to exhibit a naiveté from which ordinary citizens are free." By contrast, giving effect to 8 U.S.C. §1152(a)(1) as alleged in Count Four, despite 8 U.S.C. §1155, would be consistent with the controlling principle of giving effect to both statutory provisions and avoiding conflict.

Apart from rules of statutory construction, the importance of the issue presented here also supports certiorari. Thus 8 U.S.C. §1155 applies to all immigrant preference petitions under 8 U.S.C. §1154 from those based on marriage to United States citizens to those investing in the United States to create jobs for Americans. See 8 U.S.C. §§1151, 1153. The I-140 form alone is used to establish immigrant preferences for (1)aliens with extraordinary ability; (2)outstanding professor or researchers; (3)multinational executives or managers; (4)members of the professions holding advance degrees; (5) professionals with the minimum of a bachelor's degree; (6) a skilled worker(requiring at least two years of specialized training or experience) and (7) any other worker (requiring less than two years training or experience). See 8 U.S.C. §1153(b). Yet all these applicants for preferences allotted by Congress for the benefit of this country face non-uniform judicial protections as they engage with the immigration system.

A construction of 8 U.S.C. §1155 that allows revocation based upon administrative whim without judicial review of compliance with controlling legal standards also threatens fundamental principles undergirding the rule of law. See, e.g., St. Joseph Stockyards Co. v. United States,

289 U.S. 38, 56 (1936) (Brandeis, J., concurring) ("The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied. . ."). Indeed, in this country "[t]he underlying constitutional conception is that the wielders of governmental power must be subject to the limits of the law, and that the applicable limits should be determined, not by those institutions whose authority is in question, but by an impartial judiciary." Richard H. Fallon, Jr., "Of Legislative Courts, Administrative Agencies, and Article III," 101 Harv. L. Rev. 915, 938 (1988). Cf. Marbury v. Madison, 5 U.S.C. 137, 163 (1803)("The Government of the United States has been emphatically termed a government of laws and not of men.").

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Dated: Newark, New Jersey
May 5, 2022

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED NOVEMBER 15, 2021

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AUGUST TERM 2021

No. 21-632-cv

SIMIN NOURITAJER, THE RAZI SCHOOL,

Plaintiffs-Appellants,

- v. –

UR M. JADDOU, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES,

Defendants-Appellees.[*]

November 1, 2021, Argued
November 15, 2021, Decided

Before: BIANCO, PARK, NARDINI, *Circuit Judges.*

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* The Clerk of Court is respectfully instructed to amend the caption as set forth above. Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Director Ur M. Jaddou has been automatically substituted for Director L. Francis Cissna of the United States Citizenship and Immigration Services.

Appendix A

PER CURIAM:

Plaintiffs-Appellants Simin Nouritajer and the Razi School (together, "Plaintiffs") appeal from the United States District Court for the Eastern District of New York's (Matsumoto, *J.*) order and judgment dismissing without prejudice their Second Amended Complaint (the "SAC") for lack of subject matter jurisdiction. Plaintiffs' SAC sought review of the following: (1) the August 18, 2017 revocation by the United States Citizenship and Immigration Services ("USCIS") of Nouritajer's previously-approved Form I-140, Immigrant Petition for Alien Worker ("I-140"); (2) the USCIS Administrative Appeals Office's ("AAO") denial of Nouritajer's revocation appeal on August 1, 2018; and (3) the May 29, 2019 denial of Plaintiffs' motion to reopen and reconsider the revocation.

In dismissing the SAC under Federal Rule of Civil Procedure 12(b)(1), the district court correctly analyzed the relevant jurisdiction-stripping statutes—8 U.S.C. § 1155, which governs revocation of approved immigration petitions, and 8 U.S.C. § 1252(a)(2)(B), which limits judicial review of certain discretionary decisions. We agree with the district court that the jurisdictional bar to a substantive challenge to a discretionary decision by the Secretary of Homeland Security applies here, as Plaintiffs do not assert a procedural challenge to the revocation decision, but rather assert several arguments which, in sum and substance, challenge the underlying reasons for the revocation of the immigration petition.

Accordingly, we **AFFIRM** the district court's order and judgment dismissing the action for lack of subject matter jurisdiction.

I. BACKGROUND

Nouritajer, who resides in the Eastern District of New York with her family, is a native and citizen of Iran. Since 2002, Nouritajer has taught at the Razi School, which provides education in an Islamic environment for students from pre-kindergarten through the twelfth grade. On December 28, 2004, the Razi School filed a labor certification with the Department of Labor ("DOL") for Nouritajer as a teacher, which DOL approved on January 18, 2007. On May 7, 2007, the Razi School filed a Form I-140 on behalf of Nouritajer, seeking to classify her as an Employment-Based Third Preference category ("EB-3") professional, which USCIS approved on November 19, 2013.

On July 11, 2017, USCIS issued a Notice of Intent to Revoke the I-140, finding the initial approval had been in error. The Razi School was provided the opportunity to oppose the revocation, and it did. On August 18, 2017, USCIS revoked the I-140, finding the previous grant was in error, as the Razi School had not established its ability to pay the proffered wage, nor had Nouritajer established her qualifications for the offered teaching position. The Razi School appealed the revocation to the USCIS AAO, and the appeal was dismissed on August 1, 2018. In its decision, the AAO agreed with USCIS's conclusion that Plaintiffs had failed to demonstrate Nouritajer's requisite

experience for the job offered by the Razi School. The AAO explained that, among other things, although Nouritajer established that she had experience teaching mathematics and limited part-time experience teaching English, she did not have any previous experience in teaching language arts and Islamic literature, as the position at the Razi School required. The AAO also agreed with USCIS's finding that the Razi School did not demonstrate its financial ability to pay the proffered wage. Relying on two additional pending petitions by the Razi School, the AAO noted that it lacked sufficient information to determine whether it would be able to pay the combined proffered wages of the pending petitioners, including Nouritajer. The Razi School filed a motion to reopen and reconsider with the AAO, which was denied on May 29, 2019.

Plaintiffs commenced the district court action on November 15, 2018 and filed the SAC on October 7, 2019. The SAC asserted five claims for relief under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.*, based upon "several legal errors committed in revoking a previously approved immigrant petition and in denying a motion to reopen the revocation," Joint App'x at 7. The SAC centered upon the allegation that the revocation of Nouritajer's I-140 was pretextual. In particular, Plaintiffs allege that, from approximately 2010 to 2015, Nouritajer and her family were surveilled and questioned by agents of the Federal Bureau of Investigation ("FBI") and told that their immigration status would be in jeopardy unless they cooperated and offered information about Iran's relationship with the United States. They allege that Nouritajer and her family

did not possess such information and therefore could not offer such cooperation.

The district court dismissed the SAC for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). More specifically, the district court concluded that subject matter jurisdiction was foreclosed by two statutes — namely, 8 U.S.C. § 1155, which governs revocation of approved immigration petitions, and 8 U.S.C. § 1252(a)(2)(B), which limits judicial review of certain discretionary decisions. Because the district court concluded that it lacked subject matter jurisdiction, it dismissed Plaintiffs' claims without prejudice.

II. DISCUSSION

On appeal, Plaintiffs argue that their challenge to USCIS's revocation of the I-140 was based on USCIS's flawed legal conclusions and procedural errors. Accordingly, they say the district court erred in holding that it lacked subject matter jurisdiction over their action. We disagree with Plaintiffs' characterization of their claims, and agree with the district court's conclusion that it lacked jurisdiction.

A. Standard of Review

In reviewing a district court's determination of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), we review legal conclusions *de novo* and factual findings for clear error. *See Mastafa v. Chevron Corp.*, 770 F.3d 170, 177 (2d Cir. 2014). Although we draw all

inferences in favor of Plaintiffs, they must prove by a preponderance of the evidence that subject matter jurisdiction exists. *See Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000).

B. Subject Matter Jurisdiction

Under 8 U.S.C. § 1252(a)(2)(B), "no court shall have jurisdiction to review — any . . . decision or action of the . . . Secretary of Homeland Security . . . which is specified . . . to be in the discretion of . . . the Secretary of Homeland Security," and, pursuant to 8 U.S.C. § 1155, "[t]he Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him." Therefore, these statutes operate to strip federal courts of jurisdiction to review a substantive discretionary decision revoking the approval of an I-140 visa petition. *See Mantena v. Johnson*, 809 F.3d 721, 728 (2d Cir. 2015) (noting that Section 1252 "strips jurisdiction over a substantive discretionary decision"); *accord Firstland Int'l, Inc. v. U.S. I.N.S.*, 377 F.3d 127, 131 (2d Cir. 2004). In the instant case, the district court correctly concluded that the "gravamen" of all of Plaintiffs' claims challenge the agency's substantive discretionary decision to revoke Nouritajer's I-140, thereby leaving the district court with no jurisdiction to review Plaintiffs' claims. Joint App'x at 66.

Although Plaintiffs attempt to avoid this jurisdictional bar by characterizing their claims as "procedural" challenges on appeal, the use of that label does not control the jurisdictional question. *See, e.g.*, *Ottey v. Barr*, 965

F.3d 84, 91-92 (2d Cir. 2020) ("Regardless of the rhetoric and labels used in the petition for review, a challenge that merely quarrels over the correctness of the factual findings or justification for the discretionary choices is not reviewable." (internal quotation marks and citation omitted)). To be sure, we have emphasized that "although the substance of the decision that there should be a revocation is committed to the discretion of the Attorney General [or Secretary of Homeland Security], Section 1155 establishes mandatory notice requirements that must be met in order for the revocation to be effective, and courts retain jurisdiction to review whether those requirements have been met." *Firstland Int'l, Inc.*, 377 F.3d at 131; *see also Mantena*, 809 F.3d at 728 ("Although the statute strips jurisdiction over a substantive discretionary decision, [S]ection 1252 does not strip jurisdiction over procedural challenges."). However, the SAC makes no allegation that the agency failed to comply with any of the requisite procedures prior to revoking an approved visa petition, which are set forth in 8 C.F.R. § 205.2. In fact, Plaintiffs do not dispute that they timely received USCIS's notice of intent to revoke the I-140, offered evidence in opposition to the notice of intent to revoke, and received a written notification of the decision explaining why the agency revoked approval of the petition. Contrary to Plaintiffs' characterization of their claims as "procedural," the relief they seek is judicial review of USCIS's substantive revocation decision, which is clearly precluded by the plain text of Section 1252(a)(2)(B)(ii). Plaintiffs cannot end-run this jurisdictional bar "by artfully framing a challenge to the agency's substantive decision as a procedural claim." *Doe v. McAleenan*, 926 F.3d 910, 915 (7th Cir.

2019) (recognizing that "[c]ourts may review identifiable procedural rulings that don't implicate a petition's merits" but not challenges to "discretionary revocations on nominally 'procedural' grounds"). Thus, where, as here, there are no alleged violations of statutory procedural requirements for revocation, and where, in any event, the gravamen of Plaintiffs' claims challenges the Secretary of Homeland Security's exercise of discretion in making a revocation decision, subject matter jurisdiction is lacking. We address each of Plaintiffs' arguments in turn.

First, the claim of pretext in Count Four — that is, that the revocation of the I-140 and the subsequent denial of the reopening was done in response to communications from the FBI — is an inherently substantive challenge. In other words, Plaintiffs make no challenge to the procedures utilized for the revocation, but rather challenge the *reasons* for the revocation, which is an inquiry into the discretionary decision that is precluded by Section 1252's jurisdictional bar. An applicant's argument "that a denial was pretextual is no different from arguing that it was wrong" as "[b]oth arguments challenge the validity of the grounds for denial," not the procedures used. *Proyecto San Pablo v. I.N.S.*, 189 F.3d 1130, 1141 (9th Cir. 1999) (concluding that the relevant statute's "jurisdictional scheme precludes district court review of such claims"). Thus, Plaintiffs' claim that the discretionary revocation decision was arbitrary and capricious under the APA because it was pretextual, as well as the related claims based on the pretext allegation, are not subject to judicial review because such revocation determinations are committed to agency discretion by law under Section

1252, and review is precluded by statute under Section 1155. *See* 5 U.S.C. § 701(a)(1)-(2) (judicial review under the APA is limited "to the extent that – (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law").

Plaintiffs' related argument, that the AAO's decision denying the appeal was a non-discretionary eligibility determination on the merits that is subject to judicial review, is similarly flawed. The AAO decision, in addition to outlining the eligibility requirements for an employment-based visa, makes clear that "USCIS may revoke a petition's approval for 'good and sufficient cause,'" Joint App'x at 37 (quoting 8 U.S.C. § 1155), which confers discretion on USCIS to revoke a previously approved petition. The fact that the AAO reviewed USCIS's discretionary decision *de novo*, and affirmed the revocation, does not subject this discretionary decision to judicial review. In short, subject matter jurisdiction is lacking to review the underlying discretionary revocation decision by USCIS, so jurisdiction is similarly lacking to review the AAO decision affirming that revocation on the same grounds, as well as to review the denial of the motion to reopen. *See generally Durant v. U.S. I.N.S*, 393 F.3d 113, 115 (2d Cir. 2004) (holding that the jurisdictional bar under 8 U.S.C. § 1252(a)(2)(C) applies to orders denying motions to reopen removal proceedings that were "sufficiently connected" to final orders of removal).

For the same reasons, each of Plaintiffs' additional challenges are essentially challenges to USCIS's substantive decision to revoke the I-140 and are therefore

barred because they fall within the unreviewable discretion of the Secretary. In Counts One and Two, Plaintiffs allege that the requirement that a sponsoring employer "be able to pay the beneficiary's salary from the time the labor certification is filed until the beneficiary becomes a permanent resident is contrary to the [INA]," and they challenge "the regulations purportedly imposing this requirement." Joint App'x at 12. They also argue in the alternative that, even if the regulation is valid, they satisfied it as a factual matter. Again, Plaintiffs seek to litigate the substantive basis for USCIS's decision to revoke the I-140, not a failure to comply with statutorily mandated procedures.

Similarly, Plaintiffs raise two claims effectively arguing that USCIS was bound by prior decisions – by DOL or by itself – to reach a different decision. In Count Three, Plaintiffs complain of USCIS's "failure to give effect to the prior determination by [the] DOL that . . . Nouritajer had the required qualifications," Plaintiffs Br. at 22; *see also* Joint App'x at 12. And in Count Five, Plaintiffs argue that USCIS should be estopped from revoking the I-140 because the revocation and denial of reopening "constituted an impermissible re-adjudication of the petition *over three years* after approval." Joint App'x at 14. Both amount to claims that USCIS should not have exercised its discretion for the reasons it cited. But simply framing those questions reveals that they are essentially challenges to the substance of a revocation decision that is committed to the agency's unreviewable discretion.[1]

1. The district court also held that "[t]o the extent that plaintiffs claim legal errors or a constitutional violation, their claim is not cognizable in this court," because the statutory exception to

III. CONCLUSION

For the reasons set forth above, we **AFFIRM** the district court's order and judgment dismissing Plaintiffs' claims for lack of subject matter jurisdiction.

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the jurisdiction-stripping provision preserves judicial review over such claims only through a very limited procedure – namely, "a petition for review filed with an appropriate court of appeals." Joint App'x at 70. The district court relied upon 8 U.S.C. § 1252(a)(2)(D) ("Nothing in [§ 1252(a)(2)(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 . . . ."), as well as our decision in *Shabaj v. Holder*, 718 F.3d 48, 51 (2d Cir. 2013) ("Thus, while *this court* would have jurisdiction to review any constitutional claims or questions of law properly raised in a petition for review, the *district court* did not have jurisdiction to review [plaintiff's] challenge [under § 1252(a)(2)(D)]."). In the present case, of course, we are not presented with a "petition for review" over a final order of removal, and so the statutory exception set forth in § 1252(a)(2)(D) does not apply.

APPENDIX B — MEMORANDUM & ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, FILED FEBRUARY 16, 2021

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

18-CV-6512 (KAM)

THE RAZI SCHOOL AND SIMIN NOURITAJER,

Plaintiffs,

-against-

L. FRANCIS CISSNA, DIRECTOR, UNITED STATES CITIZENSHIP & IMMIGRATION SERVICES AND UNITED STATES CITIZENSHIP & IMMIGRATION SERVICES,

Defendants.

February 16, 2021, Decided
February 16, 2021, Filed

MEMORANDUM & ORDER

MATSUMOTO, United States District Judge:

In a Second Amended Complaint ("SAC"), plaintiffs the Razi School (the "Razi School") and Simin Nouritajer ("Nouritajer") (together, "plaintiffs") seek judicial review, pursuant to the Administrative Procedure Act ("APA"), 5

U.S.C. § 701 *et seq.*, of the United States Citizenship and Immigration Service's ("USCIS") revocation of Plaintiffs' Form I-140, Immigrant Petition for Alien Workers ("I-140"), and denial of Plaintiffs' motion to reopen the revocation. (Plaintiffs' Second Amended Complaint ("SAC"), ECF No. 17, ¶ 1.) Defendants L. Francis Cissna, Director, USCIS, and USCIS (the "defendants" or "government") move to dismiss the SAC for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1). (Mem. of Law in Support of Def.'s Mot. to Dis. Pl.'s Sec. Am. Compl. ("Def. Mem."), ECF No. 28.) For the following reasons, plaintiffs' complaint is dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure.

BACKGROUND

The following allegations from the complaint are taken as true for the purposes of a motion to dismiss.[1] *See Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-56, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007); *see also Morrison v. Nat'l Australia Bank Ltd.*, 547 F.3d 167, 170 (2d Cir. 2008) (citations omitted) (discussing treatment of material factual allegations in complaint for purposes of Rule 12(b)(1) analysis), *aff'd on other grounds*, 561 U.S. 247, 130 S. Ct. 2869, 177 L. Ed. 2d 535 (2010).

Plaintiff the Razi School was established in the Eastern District of New York in 1995 and provides education in an

1. Citation refers to ECF pagination, unless otherwise noted.

Islamic environment for from pre-Kindergarten through the 12th grade. (SAC ¶ 2.) Plaintiff Simin Nouritajer, a resident of the Eastern District of New York, is a native and citizen of Iran, and has taught at the Razi School since January 2002. *Id.* Ms. Nouritajer's husband, Mehdi Faridzadeh, a nonparty to this action, formerly served in the Iranian Mission to the United Nations and was a visiting scholar at Columbia University. *Id.*

On December 28, 2004, the Razi School filed an application for a labor certification with the Department of Labor seeking certification for Ms. Nouritajer as a teacher. (*Id.* ¶ 7; Dep't of Labor ("DOL") Approved Labor Cert., Exh. A ("Exh. A"), ECF No. 17.) The application specified Ms. Nouritajer's qualifications for the teaching position including a bachelor's degree in English and over 19 years of experience teaching middle school English. (*Id.*; SAC ¶ 2.) On January 18, 2007, the Department of Labor approved Ms. Nouritajer's labor certification. (*Id.* at 10; Exh. A, ECF No. 17.)

On May 7, 2007, the Razi School filed a Form I-140, Immigrant Petition for Alien Workers, on behalf of Ms. Nouritajer, seeking to classify her as an Employment-Based Third Preference category ("EB-3") professional. (*Id.* ¶¶ 5, 8; *see* 8 U.S.C. § 1153(b)(3)(A)(ii).) USCIS submitted a request to the Razi School for additional information that the school lost, and Ms. Nouritajer never received. (SAC ¶ 8.) USCIS subsequently denied the petition for abandonment and reopened the case in March 2013. *Id.* In April 2013, USCIS sent the same request for additional information and received a timely reply. *Id.* On

November 19, 2013[2], USCIS approved Ms. Nouritajer's I-140. (USCIS Mot. on Admin. Appeals Reconsideration Decision, Exh. F ("Exh. F"), ECF No. 17 at 3.)

On July 11, 2017, USCIS issued a Notice of Intent to Revoke ("NOIR") the I-140, finding that the initial grant of Ms. Nouritajer's I-140 had been in error. (SAC ¶ 9; USCIS Mot. on Admin. Appeals Decision, Exh. D ("Exh. D"), ECF No. 17 at 30.) The Razi School opposed the revocation. (Plaintiffs' Brief in Support of I-290B Notice of Appeal, Exh. C ("Exh. C"), ECF No. 17.) On August 18, 2017, USCIS revoked the I-140 concluding that the previous grant had been in error, as the Razi School did not establish its ability to pay the proffered wage and Ms. Nouritajer did not establish sufficient qualifications for the offered position. (*See* ECF No. 17, Exh. D.)

The Razi School appealed the revocation to the USCIS Administrative Appeals Office ("USCIS AAO"), citing new evidence and, on August 1, 2018, USCIS rejected plaintiffs' appeal, finding that the Razi School had failed to establish that: (1) Ms. Nouritajer had the necessary experience and qualifications listed in the approved labor certification, and (2) the Razi School had the ability to pay Ms. Nouritajer

2. In its brief, the government clarifies that the plaintiff incorrectly identified the approval date as November 13, 2013, when it is actually November 19, 2013. (Def. Mem. at 2.) However, there is no exhibit accompanying the Exhibit B cover sheet in plaintiffs' submission. (*See* SAC at 16.) As a result, the court cites to Exhibit F, USCIS Motion on Administrative Appeals Decision, ECF No. 17, confirming that November 19, 2013 is the correct approval date.

the proffered wage. (*See* ECF No. 17, Exhs. C, D.) First, the USCIS AAO found that Ms. Nouritajer's experience while still in Iran, over 2.7 years, as a mathematics teacher in two Iranian middle schools, did not qualify her for the elementary school teacher job description put forward by the Razi School for children from kindergarten to fourth grade, instructing students in English, language arts, and Islamic literature. (ECF No. 17, Exh. D at 31.) The application for Ms. Nouritajer's labor certification stated that her experience at the Iranian middle school was 2.7 years of teaching English. (ECF No. 17, Exh. A at 12-13.) Next, the USCIS AAO found that the Razi School had filed immigrant petitions, in addition to Ms. Nouritajer's, that were pending, approved, or submitted after Ms. Nouritajer's priority date. (*Id.* at 32.) The Razi School failed to withdraw two other petitions that had been approved before Ms. Nouritajer's petition priority date of December 28, 2004, because the two employees with approved petitions no longer worked at the Razi School, and the school was no longer responsible to demonstrate an ability to pay the other approved employees. (ECF No. 17, Exh. F at 48.) Because the Razi School did not withdraw these two other petitions, though the Razi School had the requisite funds to pay Ms. Nouritajer's wages, the USCIS AAO found that the Razi School, as a non-profit organization employing Ms. Nouritajer in a non-revenue generating position, did not have sufficient funds to pay the wages for all of the petitions filed for the beneficiaries supported by the Razi School until the beneficiaries obtain lawful permanent residence. (ECF No. 17, Exh. D at 34.) The Razi School filed a motion to reopen the AAO decision. (Plaintiffs' Motion to Reopen, Exh. E ("Exh. E"), ECF

No. 17.) The USCIS AAO denied the Razi School's motion on May 29, 2019. (*See* ECF No. 17, Exh. F.) The instant action followed.

In addition, Plaintiffs also allege that from 2010 to 2015, Ms. Nouritajer, her husband and child were subjected to repeated surveillance and questioning from agents from the Federal Bureau of Investigations ("FBI"). (SAC ¶ 11.) The FBI and its agents are not named as a party or parties to this action. *Id.* Plaintiffs allege that the FBI agents told them that their applications for permanent residence would be delayed or denied if they did not offer information about Iran's relationship with the United States. *Id.* Plaintiffs further allege that Ms. Nouritajer's husband and child were temporarily stopped from boarding a flight to Iran on February 27, 2010, and upon their return on March 10, 2010, Ms. Nouritajer's husband was questioned for over five hours, and Ms. Nouritajer and her child were also separately held and questioned. *Id.* Plaintiffs also allege that Mr. Nouritajer's husband, a nonparty to this action, was denied reentry into the United States in 2013 by United States Customs and Border Patrol ("CBP") agents. *Id.*

Plaintiffs seek an order (1) reversing the revocation of the I-140 and the denial of their motion to reopen, and (2) finding that the revocation of the I-140 and the denial of their motion to reopen was pretextual based on Plaintiffs' religion and national origin. (*Id.* at 8 (Prayer for Relief ¶¶ (a), (b)), ECF No. 17.)

Appendix B

LEGAL STANDARD

I. Motion to Dismiss for Lack of Subject Matter Jurisdiction

"A case is properly dismissed for lack of subject matter jurisdiction under [Federal Rule of Civil Procedure] 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000) (citing Fed. R. Civ. P. 12(b)(1)). The court "may refer to evidence outside the pleadings" when resolving a Rule 12(b)(1) motion. *Id.*

A Rule 12(b)(1) challenge to subject matter jurisdiction may be facial, that is, based solely on the pleadings, in which case the court must determine whether the pleadings "allege facts that affirmatively and plausibly suggest that [the plaintiff] has standing to sue." *Amidax Trading Grp. v. S.W.I.F.T. SCRL*, 671 F.3d 140, 145 (2d Cir. 2011); *accord Carter v. HealthPort Techs., LLC*, 822 F.3d 47, 56 (2d Cir. 2016). A Rule 12(b)(1) motion may also be fact-based and rely on evidence beyond the pleadings, in which case a plaintiff must present controverting evidence unless the evidence is "immaterial because it does not contradict plausible allegations that are themselves sufficient to show standing." *Carter*, 822 F.3d at 57. A plaintiff bears the burden of proving by a preponderance of the evidence that subject matter jurisdiction exists. *Makarova*, 201 F.3d at 110.

In applying Rule 12(b)(1), "'the court must take all facts alleged in the complaint as true and draw all

reasonable inferences in favor of plaintiff,' but 'jurisdiction must be shown affirmatively, and that showing is not made by drawing from the pleadings inferences favorable to the party asserting it.'" *Morrison*, 547 F.3d at 170 (quoting *Natural Res. Def. Council v. Johnson*, 461 F.3d 164, 171 (2d Cir. 2006) and *APWU v. Potter*, 343 F.3d 619, 623 (2d Cir. 2003)). Additionally, the court "may consider affidavits and other materials beyond the pleadings to resolve the jurisdictional issue, but . . . may not rely on conclusory or hearsay statements contained in the affidavits." *J.S. ex rel. N.S. v. Attica Cent. Sch.*, 386 F.3d 107, 110 (2d Cir. 2004) (citing *Zappia Middle E. Const. Co. Ltd. v. Emirate of Abu Dhabi*, 215 F.3d 247, 253 (2d Cir. 2000) and *Kamen v. Am. Tel. & Tel. Co.*, 791 F.2d 1006, 1011 (2d Cir.1986)).

DISCUSSION

Plaintiffs submit a five-count complaint. Counts one and two allege violations of the Administrative Procedure Act's notice and comment requirements, 5 U.S.C. § 553, and that USCIS's revocation decision was arbitrary and capricious based on the Razi School's demonstrated ability to pay for Ms. Nouritajer's position. (*See* SAC ¶¶ 13, 15.) Count three alleges that USCIS' decision was arbitrary and capricious based on the Department of Labor's ("DOL") labor certification for Ms. Nouritajer's teaching position. (*See id.* ¶¶ 17-18.) Count four alleges that the FBI's referral of Ms. Nouritajer and her family to the Controlled Application Review and Resolution Program ("CARRP"), that subjects Muslim and Iranian applicants to harsh scrutiny based on their race and national origin, violates the due process clause of the Fifth Amendment.

(*See id.* ¶ 20.) Count five alleges that USCIS' revocation of Ms. Nouritajer's I-140 over three years after the I-140's initial approval unduly prejudiced Ms. Nouritajer's, and her family's, common law reliance interests. (*See id.* ¶ 22.)

As the government correctly argues, the gravamen of plaintiffs' complaint is a request to review USCIS's decision to revoke plaintiffs' I-140 immigrant petition for alien workers. (Def. Mem. at 3.) As a threshold matter, the court lacks jurisdiction to review the USCIS' substantive discretionary decision to revoke Ms. Nouritajer's I-140 immigrant petition for alien workers, and thus does not reach the remaining grounds for relief in plaintiffs' second amended complaint.

To the extent that plaintiffs are attempting to challenge the substantive basis for USCIS' decision, this court does not have subject matter jurisdiction to entertain such a claim. Two related sections of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 *et seq.*, preclude judicial review. First, 8 U.S.C. § 1252(a)(2)(B)(ii) provides that "no court shall have jurisdiction to review ... any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security." Furthermore, 8 U.S.C. § 1155 provides that "[t]he Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 1154 of this title." 8 U.S.C. § 1155. I-140 petitions are among the petitions that fall within the Secretary's § 1155

revocation discretion and authority, and the Secretary has delegated his revocation authority to any USCIS officer authorized to approve immigrant visa petitions. *See* 6 U.S.C. § 271(b)(1); 8 C.F.R. § 205.2(a).

The court's holding is in line with the weight of appellate opinion across the country and in this Circuit. The Second Circuit has held and reaffirmed "that 8 U.S.C. § 1252 'strips jurisdiction over a substantive discretionary decision'" by the Secretary. *Chen v. Coven*, 672 F. App'x 136, 137 (2d Cir. 2017) (citing *Mantena v. Johnson*, 809 F.3d 721, 728 (2d Cir. 2015); *see Firstland Int'l Inc. v. INS*, 377 F.3d 127, 131 (2d Cir. 2004) (observing in dicta that "the substance of the decision that there should be a revocation is committed to the discretion of the [Secretary]"). In addition, "nine federal courts of appeals have held (and a tenth has said in dicta) that courts lack jurisdiction to consider...claims [regarding whether these INA provisions deprive courts of jurisdiction to consider challenges to petition-revocation decisions]." *iTech US, Inc. v. Cuccinelli*, 474 F. Supp. 3d 291, 293 (D.D.C. 2020) (collecting cases from the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth and Eleventh Circuits); *compare ANA Int'l Inc. v. Way*, 393 F.3d 886, 893-95 (9th Cir. 2004) (holding in a divided panel opinion that § 1155's reference to "good and sufficient cause" provides a justiciable standard for reviewing petition-revocation decisions), *but see Poursina v. USCIS*, 936 F.3d 868, 875 (9th Cir. 2019) (noting that the Circuit's position is "an outlier among the federal circuit courts" and declining to extend *ANA Int'l Inc.* beyond "its narrow holding").

Appendix B

Plaintiffs' attempt to argue against the overwhelming weight of authority fails. First, Ms. Nouritajer filed her I-140 immigrant visa petition under the EB-3 visa category and thus is subject to revocation under § 1155. *See* 8 U.S.C. §§ 1153(b)(3)(A)(ii), 1154(a)(1)(F) ("Any employer desiring and intending to employ within the United States an alien entitled to classification under section . . . 1153(b)(3) of this title may file a petition with the Attorney General for such classification"). Revocation of a previously approved visa petition by the USCIS "for . . . good and sufficient cause", and its subsequent review through the administrative appeals process, is a discretionary act. *See* 8 U.S.C. §§ 1155, 1153(b)(3)(A)(ii), 1154(a)(1)(F). As the government persuasively argues, the statute confers discretion on the agency to revoke an approved petition. *Firstland*, 377 F.3d at 131; *Mantena*, 809 F.3d at 728. The appeals process does not alter the underlying revocation decision made by the USCIS, which is discretionary, *see* 8 U.S.C § 1155, despite the statutory appeals process afforded to plaintiffs. 8 C.F.R. §§ 205.2(d), 103.3(a)(1)(ii). Plaintiffs attempt to argue, without citation to a contravening statute or authority from this circuit, that *Mantena* and *Firstland* should not be read to impose a jurisdictional bar on discretionary revocation decisions and their substance. Pl. Opp. at 12-13. As discussed *supra*, however, plaintiffs' summary reading of *Mantena* and *Firstland* is self-serving, confusing and without merit. *Id.* To the extent that plaintiffs attempt to frame their substantive claims as procedural claims to avoid § 1252's jurisdictional bar, "a plaintiff cannot sidestep § 1252(a)(2)(B)(ii) by artfully framing a challenge to the agency's substantive decision as a procedural claim." *Doe v. McAleenan*, 926 F.3d 910, 915

(7th Cir. 2019). As the statues and caselaw from this and ten other Circuits make clear, *see supra*, the revocation of an I-140 petition is a discretionary decision, not reviewable by this court.

To the extent that plaintiffs claim legal errors or a constitutional violation, their claim is not cognizable in this court. (*See* SAC ¶¶ 1, 12-23.) The REAL ID Act of 2005, codified at 8 U.S.C. § 1252(a)(2)(D) creates an exception to § 1252's jurisdiction stripping provision: "[n]othing in [§ 1252(a)(2)(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 ...." This statutory exception is limited by its express terms to courts of appeals. *See also Shabaj v. Holder*, 718 F.3d 48, 51 (2d Cir. 2013) ("Thus, while *this court* would have jurisdiction to review any constitutional claims or questions of law properly raised in a petition for review, the *district court* did not have jurisdiction to review [plaintiff's] challenge [under § 1252(a)(2)(D)]." (emphasis in original)). Plaintiffs' claim that the USCIS AAO's revocation decision was arbitrary and capricious in violation of the Administrative Procedure Act ("APA") fails for the same reason. *Delgado v. Quarantillo*, 643 F.3d 52, 55-56 (2d Cir. 2011) (APA review is not available when claim falls within the scope of 8 U.S.C. § 1252(a)(2)(B)(i)'s jurisdictional limits).

For the foregoing reasons, the court lacks subject matter jurisdiction over plaintiffs' claims and the action is dismissed without prejudice. *Mantena*, 809 F.3d 728.

Appendix B

CONCLUSION

For the foregoing reasons, the complaint is dismissed for lack of subject matter jurisdiction pursuant to Rule 12(b)(1). "When a case is dismissed for lack of federal subject matter jurisdiction, 'Article III deprives the court of the power to dismiss the case with prejudice.'" *Katz v. Donna Karan Co., L.L.C.*, 872 F.3d 114, 121 (2d Cir. 2017) (quoting *Hernandez v. Conriv Realty Assocs.*, 182 F.3d 121, 123 (2d Cir. 1999)). Therefore, dismissal of this action is without prejudice. The Clerk of Court is respectfully directed to enter judgment dismissing plaintiff's claims without prejudice and close this case.

SO ORDERED.

Dated: Brooklyn, New York
February 16, 2021

/s/ **KIYO A. MATSUMOTO**
United States District Judge
Eastern District of New York

APPENDIX C — ORDER DENYING REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED FEBRUARY 4, 2022

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

ORDER

Docket No: 21-632

SIMIN NOURITAJER, THE RAZI SCHOOL,

Plaintiffs-Appellants,

v.

UR M. JADDOU, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES,

Defendants-Appellees.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 4th day of February, two thousand twenty-two.

Appellants Simin Nouritajer and The Razi School, filed a petition for rehearing *en banc*. The active members of the Court have considered the request for rehearing *en banc*.

Appendix C

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
/s/ Catherine O'Hagan Wolfe
Catherine O'Hagan Wolfe, Clerk

APPENDIX D — RELEVANT STATUTORY PROVISIONS

8 U.S.C. §1155

The Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under Section 204 [8 U.S.C. §1154]. Such revocation shall be effective as of the date of the approval of any such petition.

8 U.S.C. §1252(a)(2)(B)(ii)

Notwithstanding any of provision of law. . .no court shall have jurisdiction to review any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this title to be in the discretion of the Attorney General or the Secretary of Homeland Security.