

IN THE SUPREME COURT OF THE UNITED STATES

No.

FATHI ELLTAIF SAAD ELLDAKLI;
NAGLLA KOUNI SALEM GHADAR;
HADIL FATHI EL ELLDAKLI;
RANIM FATHI EL ELLDAKLI;
TAHA FATHI EL ELLDAKLI, APPLICANTS

v.

MERRICK B. GARLAND, ATTORNEY GENERAL;
ALEJANDRO N. MAYORKAS, SECRETARY OF HOMELAND SECURITY;
UR M. JADDOU, DIRECTOR OF UNITED STATES CITIZENSHIP
AND IMMIGRATION SERVICES; JOHN ALLEN, DIRECTOR,
TEXAS SERVICE CENTER, UNITED STATES CITIZENSHIP
AND IMMIGRATION SERVICES; WALLACE L. CARROLL,
HOUSTON FIELD OFFICE DIRECTOR, UNITED STATES CITIZENSHIP
AND IMMIGRATION SERVICES; UNITED STATES OF AMERICA; DEPARTMENT
OF HOMELAND SECURITY; UNITED STATES CITIZENSHIP AND IMMIGRATION
SERVICES

APPLICATION FOR AN EXTENSION OF TIME
WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable Samuel A. Alito, Jr., Circuit Justice for
the United States Court of Appeals for the Fifth Circuit:

Pursuant to Rules 13.5 and 30.2 of this Court, Fathi Elltaif
Saad Elldakli; Naglla Kouni Salem Ghadar; Hadil Fathi El Elldakli;
Ranim Fathi El Elldakli; and Taha Fathi El Elldakli apply for a
30-day extension of time, to and including August 2, 2023, within
which to file a petition for writ of certiorari to review the
judgment of the United States Court of Appeals for the Fifth Cir-
cuit in this case. The Fifth Circuit entered its judgment on April

4, 2023. App., infra, 1a-12a. Unless extended, the time for filing a petition for a writ of certiorari will expire on July 3, 2023. The jurisdiction of this Court would be invoked under 28 U.S.C. 1254(1).

1. This case concerns the reviewability under the Administrative Procedure Act (APA) of decisions adjusting an alien's status when removal proceedings are not imminent. Under the Immigration and Nationality Act (INA), an alien who is physically present in the United States may apply to adjust his status to lawful permanent residency by filing a Form I-485. See 8 U.S.C. 1255(a). To be eligible for that status, an alien generally must have an immigrant visa "immediately available to him at the time his application is filed." Ibid. One such visa, an alien-worker visa, may be obtained by filing a Form I-140. See 8 U.S.C. 1154(a)(1)(F). Although aliens typically must have a job offer in order to qualify for an alien-worker visa, the Attorney General may grant a National Interest Waiver to aliens who are "members of the professions holding advanced degrees or * * * of exceptional ability." 8 U.S.C. 1153(b)(2).

2. Applicant Fathi Elltaif Saad Elldakli entered the United States in 2011 on an F-1 nonimmigrant student visa; his wife, applicant Naglla Kouni Salem Ghadar, and their three children, applicants Hadil Fathi El Elldakli, Ranim Fathi El Elldakli, and Taha Fathi El Elldakli, entered on F-2 nonimmigrant dependent visas. They emigrated from Libya, which was engulfed in civil war at the time. D. Ct. Dkt. 23, at 1.

Dr. Elldakli, a scientist specializing in petroleum engineering, filed a Form I-140 to apply for an alien-worker visa on December 14, 2017. He also sought a waiver as a "professional holding an advanced degree whose work is in the national interest of the United States." App., infra, 2a; D. Ct. Dkt. 23, at 2.

While Dr. Elldakli's petition was pending, on August 21, 2018, applicants filed Forms I-485 to apply for an adjustment of their status to lawful permanent residency. Following an interview in March 2019, the United States Citizenship and Immigration Services (USCIS) approved their applications and adjusted their status to legal permanent residency. App., infra, 2a; D. Ct. Dkt. 23, at 2.

Six months later, on September 4, 2019, USCIS denied Dr. Elldakli's I-140 petition for an alien-worker visa. He timely appealed to the Administrative Appeal Office. While that appeal was pending, USCIS issued a notice of intent to rescind applicants' status on May 12, 2020. The notice stated that USCIS had erroneously granted their applications for adjustment of status because Dr. Elldakli's I-140 petition had yet to be approved. The Administrative Appeal Office later affirmed the denial of the I-140 petition and dismissed the appeal. App., infra, 2a-3a; D. Ct. Dkt. 23, at 2.

3. Applicants filed an action in the United States District Court for the Southern District of Texas under the APA, 5 U.S.C. 702; the Declaratory Judgment Act, 28 U.S.C. 2201-2202; and 28 U.S.C. 1331. They sought a temporary restraining order preventing USCIS from rescinding their status and directing USCIS to reopen their I-485 applications. Applicants alleged that it was arbitrary

and capricious for USCIS to deny Dr. Elldakli's I-140 petition and that it was arbitrary and capricious for USCIS to grant their I-485 applications before Dr. Elldakli's I-140 petition had been granted. App., infra, 3a.

The district court denied a temporary restraining order and dismissed the case. The court concluded that it lacked jurisdiction to review USCIS's denial of Dr. Elldakli's I-140 petition because there was no final agency action for purposes of the APA. The court further concluded that the INA stripped it of jurisdiction to review USCIS's adjustment of their status. D. Ct. Dkt. 23, at 4-5.

4. The court of appeals affirmed. App., infra, 5a-6a. The court held that "status-adjustment decisions made by the USCIS outside the context of removal proceedings are not final agency actions reviewable under the [APA], nor are they final removal actions reviewable per the [INA]." Id. at 2a. The court reasoned that USCIS's decisions were not final because applicants could renew their requests in future removal proceedings, even though such removal proceedings were not imminent. Id. at 6a.

Judge Higginbotham filed an opinion concurring in the judgment. App., infra, 7a-12a. He noted that the panel's decision conflicts with decisions from other courts of appeals that have asserted jurisdiction to review USCIS's status-adjustment decisions when removal proceedings are not underway or imminent. Id. at 10a-11a & nn.16-17; see, e.g., Hosseini v. Johnson, 826 F.3d 354, 360 (6th Cir. 2016); Pinho v. Gonzales, 432 F.3d 193, 201-

202 (3d Cir. 2005); Perez v. USCIS, 774 F.3d 960, 966 (11th Cir. 2014).

5. Counsel for applicants respectfully requests a 30-day extension of time, to and including August 2, 2023, within which to file a petition for a writ of certiorari. This case presents complex issues with significant implications for the rights of noncitizens. The undersigned counsel was recently retained and requires additional time to review the record and underlying opinions. In addition, the undersigned counsel will be presenting oral argument in the Ninth Circuit in United States v. Fortenberry, No. 22-50144, on July 11, 2023. The undersigned counsel is also currently preparing an opening brief in the Eleventh Circuit in Havana Docks Corp. v. Royal Caribbean Cruises Ltd., No. 23-10171 (due June 30, 2023); an opening brief in the New York Appellate Division in Camelot Event Driven Fund v. Morgan Stanley & Co., No. 2023-983 (due July 14, 2023); a reply brief in the Eleventh Circuit in United States v. Bell, No. 22-12750 (due July 24, 2023); and a brief in the California Court of Appeal in In re Uber Rideshare Cases, Nos. A167458, A167709 (due Aug. 2, 2023). Additional time is therefore needed to prepare and print the petition in this case.

Respectfully submitted.

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