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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

DZU CONG TRAN, DANIEL MAI

DINH, and AUSTIN PETER TRAN, on
behalf of themselves and all others similarly
situated,

Civil No. **CV'10-724 ST**

PLAINTIFFS,

v.

**OBJECTIONS TO FINDINGS AND
RECOMMENDATION**

CLASS ACTION

JANET NAPOLITANO, Secretary,
Department of Homeland Security;
ALEJANDRO MAYORKAS, Director,
U.S. Citizenship and Immigration Services;
DONALD NEUFELD, Associate Director,
USCIS Service Center Operations
Directorate; **CHRISTINA POULOS**,
Director, USCIS California Service Center;
HILLARY RODHAM CLINTON,
Secretary of State, U.S. Department of State;
JANICE L. JACOBS, Assistant Secretary
for Consular Affairs, U.S. Department of
State; **CHARLES E. BENNETT**, Consular
Section Chief, U.S. Consulate General, Ho
Chi Minh City; **JOHN AND JANE DOE**
U.S. CONSULAR OFFICERS 1 through
1000,

DEFENDANTS.

I. INTRODUCTION

Plaintiffs respectfully object to portions of the Findings and Recommendation (F&R) filed in the instant action on December 3, 2010. The F&R included a scheduling order that requires objections to be filed by December 20, 2010, and this objection is filed within that time.

Plaintiffs object only to the recommendations to grant dismissal of Plaintiffs' First Claim challenging 8 CFR § 214.2(k)(5) (four-month petition validity period); the allegations of the Second Claim alleging a denial of due process by the State Department for their arbitrary denial of K-1 visas and return of K-1 petitions to the USCIS without the opportunity to rebut consular findings; the Third Claim alleging unreasonable delay in processing fiancé petitions and visas by Defendants; and allegations of the Fourth Claim seeking relief related to the dismissed claims as stated above.

Plaintiffs have no objections to Magistrate Stewart's findings regarding the statutory and regulatory background for the K-1 visa petition process, and do not object to the recommendation that Plaintiffs' First Claim challenging the use of the P6C1 marker be allowed to proceed, along with the allegations of the Second Claim based on a violation of the APA by the Defendants related to a reasonable period and opportunity to rebut consular findings.

The Court reviews the Findings and Recommendations *de novo*. The Court may "accept, reject or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions." Fed. R. Civ. P. 72(b)(3).

II. ARGUMENT

A. **Magistrate Stewart Was Correct in her Findings and Recommendation That Defendants' Use of the P6C1 Marker and Failure to Provide an Opportunity to Rebut Consular Findings Violate the APA.**

Plaintiffs have no objections to Magistrate Stewart's findings and recommendation on the First Claim challenging 9 FAM 40.63 N10.1, Defendants' use of the P6C1 Marker, as a violation of the Administrative Procedure Act (APA). Plaintiffs allege in the First Claim that 9 FAM 40.63 N10.1 is unlawful and in excess of statutory authority because Defendants' use of the P6C1 Marker, without an opportunity to rebut consular findings, results in a permanent bar to admission into the United States in violation of due process. F&R, p. 25-27.

Plaintiffs have no objections to Magistrate Stewart's findings and recommendation covering allegations of the Second Claim regarding the State Departments' violation of the APA in failing to provide a reasonable period to rebut consular findings and in Defendants' combined failures to provide any opportunity to rebut consular findings. F&R, p. 13-20.

Plaintiffs have no objections to Magistrate Stewart's findings and recommendation regarding the allegations in the Fourth Claim seeking relief related to the above claims. F&R, p. 27.

B. Magistrate Stewart Erred in her Findings and Recommendation Regarding Plaintiffs' Allegations of Denial of Due Process.

Plaintiffs have standing to raise a due process claim because they have a constitutionally protected liberty interest and Defendants have significantly interfered with this protected interest. Plaintiffs are all citizens of the United States, by birth or naturalization; they have a constitutionally protected interest in marriage, and Defendants' K-1 petition procedures result in a denial of due process in that they are an unreasonable interference with the right to marry. The Supreme Court has upheld state regulations of marriage that are reasonable and "do not significantly interfere with decisions to enter into the marital relationship." *Zablocki v.*

Redhail, 434 US 374, 386 (1978). However, regulations that “interfere directly and substantially with the right to marry” are unconstitutional. *Id.* Magistrate Stewart erred in finding that Defendants’ K-1 procedures are not a direct and substantial interference with the right to marry because Plaintiffs have the option of marrying their fiancées outside of the United States. F&R, p. 11. The following discussion explains why forcing Plaintiffs into a marriage outside of the United States fails to protect Plaintiffs’ liberty interest in marrying their fiancées in the United States.

a. Marriage Abroad is Not a Substitute for a Marriage in the United States.

Magistrate Stewart suggests that Plaintiffs’ interest in marriage to their fiancées is sufficiently protected because Plaintiffs are not restricted in their ability to travel abroad and marry their fiancées. F&R, pp. 10-13. Marriage abroad does not, however, protect Plaintiffs’ interests in marrying their fiancées at home. A marriage abroad requires that Plaintiffs and their fiancées continue a married life apart for an extended period of time, unless Plaintiffs abandon their work, homes and lives as U.S. citizens to join their fiancées outside of the United States. This forced separate married life is not a substitute for a shared married life at home in the United States.

The Supreme Court in *Kleindienst v. Mandel*, 408 U S 753 (1972) confronted the issue of a group of American professors who sought to hear the lectures of a Belgian journalist and Marxian theoretician *in this country*. The Court stated,

“The Government also suggests that the First Amendment is inapplicable because appellees have free access to Mandel’s ideas through his Books and speeches, and because ‘technological developments,’ such as takes or telephone hook-ups, readily supplant his physical presence. This argument overlooks what may be particular qualities inherent in sustained, face-to-face debate, discussion and

questioning. While alternative means of access to Mandel's ideas might be a relevant factor were we called upon to balance First Amendment rights against governmental regulatory interests – a balance we find unnecessary here in light of the discussion that follows in Part V – we are loath to hold on this record that the existence of other alternatives extinguishes altogether any constitutional interest on the part of appellees in this particular form of access. *Id.*, 408 U.S. at 765.

The Court in *Mandel* found that the American professors' First Amendment rights were implicated because they were not able to hear Mandel's ideas in the United States. Just as hearing ideas through books and speeches was no substitute for "particular qualities" of live, face-to-face discussion and debate in the United States, a marriage abroad is no substitute for the particular qualities of a marriage in the United States and a shared married life in the United States. While the Court in *Mandel* ultimately ruled that when the government claims a facially legitimate and bona fide reason for denying a visa, the Court would not look behind the reason due to the Doctrine of Consular Nonreviewability, the Court recognized that the professors' First Amendment rights were in fact implicated by the lack of a lecture in the United States. No balancing of the professors' rights against the governmental regulatory interests were undertaken in *Mandel* only because of the Doctrine, not because of a lack of a protected liberty interest. In the instant case, however, Plaintiffs allege that the reasons for denying the visas were not bona fide, which is a recognized exception to the Doctrine. Inasmuch as the Court in *Mandel* held that American professors' liberty interests in the particular qualities of live discussion and debate in the United States present a Constitutional question, so do Plaintiffs' liberty interests in the particular qualities of a marriage and shared life in the United States.

Magistrate Stewart erred in finding that Plaintiffs do not possess a protected liberty interest to marry in the United States. Plaintiffs liberty interests in marriage in the United States are indeed implicated. The questions as to whether Defendants' reasons are bona fide, and

whether the government's procedures sufficiently safeguard the risk of an erroneous deprivation of the liberty interest in marriage, are therefore properly presented.

b. The I-130 Process for Foreign Spouses of U.S. Citizens is a Substantial and Direct Interference with Plaintiffs' Protected Liberty Interests.

A marriage ceremony outside of the United States does not protect Plaintiffs' interest in marriage to their fiancées because it involves a lengthy and fundamentally flawed process that does not safeguard the interest in a marital life in the United States. For most people in the United States, including Plaintiffs, the right to marry means the right to share a life together, including co-habitation and the ability to share daily rituals with a loved one. For Plaintiffs marriage to their fiancées outside of the United States would not be the start of a shared life, but would be the start of a difficult, arduous separate life occasioned by a bureaucratic maze which offers no assurance of a married life in the United States. If Plaintiffs marry their fiancées abroad, they not only face logistical and financial disadvantages, as Magistrate Stewart noted, but they face the possibility of never being able to live together in the United States. F&R, p. 11.

If Plaintiffs were to marry their fiancées outside of the United States, before their married life could begin in the United States, they would be first required to file an I-130 immigrant petition. If approved, the petition would allow their fiancée/spouse to apply for an immigrant visa with the U.S. Consulate. *See* 8 U.S.C. 1151(b)(2)(A)(i) for definition of spouse as Immediate Relative and 8 U.S.C. § 1154(a)(1)(A)(i) for procedures for granting immigrant visas. The immigrant petition process requires that Plaintiffs travel abroad, comply with all local marriage requirements, and then return to the U.S. to submit an I-130 Immigrant Petition with USCIS. The Plaintiffs would have to provide USCIS with documentation proving the validity of their marriage. The standard for this petition is that the marriage must be documented as bona

fide and not entered into for the purpose of evading the immigration laws. 8 U.S.C. § 1154(c). The bride and groom must establish that they intend to establish a life together. *Lutwak v. U.S.*, 344 U.S. 604 (1954); *Bark v. INS*, 511 F.2d 1200 (9th Cir. 1975); *Agyeman v. INS*, 296 F.3d 871 (9th Cir. 2002). USCIS's filing instructions for I-130 Petitions based on marriage explain that to prove a bona fide marriage, applicants should submit: "Documentation showing joint ownership or property; or A lease showing joint tenancy of a common residence or Documentation showing co-mingling of financial resources." <http://www.uscis.gov/files/form/i-130instr.pdf>.

USCIS is currently taking five months to process and adjudicate I-130 Immigrant Petitions.¹ If USCIS has questions regarding the validity of Plaintiffs' marriage, they will issue a request for additional evidence (RFE), which will add one to four months to the processing times. If Plaintiffs and their fiancées are forced to start their married life on separate continents, it will extremely difficult or impossible to establish evidence of a valid marriage such as joint accounts and shared bills that evidence a residence together. U.S. citizens who marry abroad and yet live in the United States as opposed as living abroad, such as Plaintiffs, will be substantially prejudiced by such a requirement where they have been forced to maintain separate residences.

Even if Plaintiffs were able to prove that their marriage abroad and separate living arrangement is bona fide, despite living apart and not having any evidence of a shared married life together, long delays and further inquisition of the married-but-separate living situation will further prejudice Plaintiffs. Approved I-130 Petitions are sent to the National Visa Center for processing. The National Visa Center's processes the I-130 Petition after approval in three to four months after which Plaintiffs' files are sent to the State Department's Consulate General in

¹ USCIS processing times available online at: https://egov.uscis.gov/cris/processTimesDisplayInit.do;jsessionid=acbkcSIHyHksx_wHs71Zs.

Ho Chi Minh City, Vietnam for an interview to be scheduled. It will take approximately four months for the Consulate to schedule an interview and a post-interview decision could take another month, as was the case when Plaintiffs' fiancées had their fiancé interviews. See First Amended Complaint (FAC) ¶¶ 40-44, 83-87, and 122-125 for a description of NVC and Consulate processing times.²

This timeframe means that if Plaintiffs marry their fiancées abroad, they face a minimum of an additional one-year wait before their fiancées/spouses would be able to enter the United States to begin a shared, married life. Plaintiffs have already waited twelve to eighteen months to marry their fiancées. Plaintiffs have already experienced a four to six month processing time for their K-1 fiancée petitions to be approved by USCIS; a four-month wait for their K-1 visa applications to be processed by the National Visa Center and a four-month wait for their visa applications to be processed and arbitrarily rejected by the State Department, without the opportunity to rebut the allegations. FAC ¶¶ 40 to 45, 82-89, and 122-128.

This situation is to be contrasted with a U.S. citizen petitioner who marries a fiancé(e) in the United States. Pursuant to the K-1 entry the couple will be able to marry in the United States, and have family and friends present at the wedding ceremony.³ They will be able

² If an application for an immigrant visa is rejected by the Consulate, the waiting period for overcoming consular denials is another 1-2 years after the already multi-year delay, as reported by the USCIS Ombudsman's office. USCIS Ombudsman Annual Report 2009, June 30, 2009, pages 74-76 (Outlining complaints about the manner in which USCIS processes petitions returned by Department of State, the recommendations by the Ombudsman to improve the process, and the USCIS response rejecting the Ombudsman's recommendations (available at http://www.dhs.gov/xlibrary/assets/cisomb_annual_report_2009.pdf, last viewed December 20, 2010). The report notes that processing times for returned petitions ranges from 12 to over 48 months, and outlines the challenges for customers and stakeholders.

³ Defendants allegations of fraud in some of Plaintiffs cases has revolved around the lack of an engagement celebration numbering in the hundreds of guests. One could imagine a couple would face even more difficulty if they were married abroad in a celebration that included less people.

to share a home together, open joint accounts, attend functions with friends and family together, engage in domestic chores and leisure pursuits together. When they are interviewed again by USCIS in connection with an I-485 Application for Adjustment of Status they will have accumulated a great deal more evidence of a shared life together as required by the immigration statutes.

c. Defendants' Use of the P6C1 Marker Will Interfere With Plaintiffs' Ability to Sponsor Their Fiancées/Spouses for an Immigrant Visa.

If Plaintiffs marry abroad, they face an additional interference with their interest in a married life in the United States. The one year wait for the I-130 processing is a best-case scenario that does not account for the fact that Defendants have marked Plaintiffs and their fiancées files with a P6C1 marker, a finding of fraud. F&R, p. 25-27. This finding could all together prevent the fiancées/spouses from entering the U.S. or it could substantially hinder efforts, adding many months or years to the processing of their I-130 Petitions and subsequent immigrant visa processing. The P6C1 marker indicates that Defendants found that Plaintiffs' fiancées misrepresented a material fact to procure a visa, even though Plaintiffs never had any opportunity to rebut such findings. F&R, p. 26. The P6C1 marker indicates a quasi-refusal in the K-1 record, which in conjunction with DHS/USCIS constructive revocation of the K-1 Petition, means that the materiality of the supposed misrepresentation is established and operates as a permanent bar to admission into the U.S. with only a limited discretionary waiver. *Id.* At each stage in the I-130 process, when USCIS and Consular Officials are adjudicating the validity of Plaintiffs' marriage, Plaintiffs and their fiancées will have an additional burden of disproving that their relationship is fraudulent. Defendants have cast a cloud over Plaintiffs' cases, without providing any means by which Plaintiffs could clear their names. If the I-130 Petitions are

approved by USCIS, Plaintiffs' fiancées will need to apply for special waivers to overcome the permanent bar to admission that is triggered by the Defendants' use of the P6C1 marker. This burden of having to disprove a finding of fraud and the waiting period of an additional year or two or three constitute a direct and substantial interference with Plaintiffs' protected liberty interest in marriage.

d. Defendants Have Substantially and Directly Interfered With a Protected Liberty Interest in Violation of Due Process.

Defendants' K-1 procedures interfere with Plaintiffs' right to marry and are a violation of due process. Even if Defendants' procedures have not yet coerced Plaintiffs to not marry, they have prevented Plaintiffs and their fiancées from establishing a shared married life in the United States. Defendants' actions infringe on Plaintiffs' rights and ability to marry and their actions violate the Constitution because they do not comply with established due process protocol. *Mathews v. Eldridge* guides the Court in determining when state actions violate due process. 424 US 319 (1976). First the Court is to consider the private interest affected by the state action. *Id.* at 335. Second the Court weighs the "risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards and . . . the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.*

Applying *Mathews*, Defendants' K-1 procedures constitute a violation of due process. First, the private interest here is the fundamental right to marry, which has "long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and

survival.” *Loving v. Virginia*, 388 US 1, 12 (1967)(citations omitted). This interest is weighed against Defendants’ interest in preventing sham marriages. Second, the court is to consider the risk of erroneous deprivation of Plaintiffs’ interest in marriage and whether additional safeguards would minimize deprivation of this interest. Plaintiffs do not ask much. They ask to receive a bona fide decision that does not disregard the evidence in the record. Next, they ask to be heard. Additional safeguards, such as providing Plaintiffs and their fiancées with meaningful notice regarding the basis for the denial that is bona fide, and allowing Plaintiffs and their fiancées some reasonable period to rebut findings of fraud is a minimal additional safeguard that would burden Defendants in an insignificant way.

C. Magistrate Stewart Erred in her Findings and Recommendation Regarding the Rights Provided by the Fiancé Procedures Established in the INA.

Congress intended to provide U.S. citizens not only with a right but also an expedient process to bringing fiancés into the United States to marry. The Immigration and Nationality Act directs consular officers to issue K visas for the purpose of a marriage in the United States:

A visa shall not be issued under the provisions of section 101(a)(15)(K)(i) of this title until the consular officer has received a petition filed in the United States by the fiancée or fiancé of the applying alien and approved by the Secretary of Homeland Security. The petition shall be in such form and contain such information as the Secretary of Homeland Security shall, by regulation, prescribe. Such information shall include information on any criminal convictions of the petitioner for any specified crime. It shall be approved only after satisfactory evidence is submitted by the petitioner to establish that the parties have previously met in person within 2 years before the date of filing the petition, have a bona fide intention marry, and are legally able and actually willing to conclude a valid marriage in the United States within a period of ninety days after the aliens arrival, except that the Secretary of Homeland Security in his discretion may waive the requirement that the parties have previously met in person.

8 U.S.C. § 1184(d)(1)(emphasis added). Magistrate Stewart erred in finding that the statutory

language says “nothing about the obligation of a consular officer to issue a K-1 visa.” F&R, p. 12. Not only does the statute utilize mandatory “shall” language that consular officers issue a visa upon receiving an approved petition based on a finding of three elements of eligibility (in-person meeting within 2 years of filing, bona fide intention to marry and legal ability to marry), but the statute specifies that the marriage is to occur in the United States. Reference is made within the four corners of 8 U.S.C. § 1184(d)(1) to the mandatory visa issuance process by the consular officer, as well as the marriage in the United States. Because Congress combined reference to the visa process and the petition process into one paragraph, § 1184(d)(1), the requirements should be read together. Congress recognized the significance of marriage in the United States and has specifically provided Plaintiffs with the statutory right and the means to marry their fiancées at home instead of in a foreign country. This mandatory statutory language gives rise to a protected liberty interest in a marriage ceremony in the United States. See *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1 (1979); *Board of Pardons v. Allen*, 482 U.S. 369 (1987). While 8 U.S.C. § 1201(g) states that the consular officer shall not issue a visa to an alien who is ineligible for the visa, such separate authority does not conflict with the statutory right under § 1184(d)(1) to a marriage in the United States. Whether Plaintiffs’ fiancées are eligible for a K-1 visa is a different question than whether the K-1 statutory process creates a right to a marriage in the United States.

D. Magistrate Stewart Erred in her Findings and Recommendation Regarding Plaintiffs Allegations of Unreasonable Delay.

Magistrate Stewart erred in finding that Defendants’ K-1 procedures do not result in unreasonable delay. F&R p. 22. Even if Magistrate Stewart is correct that the U.S. Consulate processes K-1 visa applications within 30 days of the interview, this does not account for the

months of processing with USCIS, NVC and the months of waiting before an interview is scheduled with the Consulate. FAC ¶¶ 40-76, 82-118, and 122-146. This finding fails to account for the months of delay Plaintiffs and their fiancées faced in having the Consulate return their files to USCIS. *Id.* The finding also fails to account for the fact that Plaintiffs and their fiancées are enduring this entire delay again because of the Consulate's arbitrary and baseless denial of their fiancée visa applications, and the denial of any opportunity to rebut the erroneous findings.

Defendants' K-1 procedures have forced Plaintiffs and their fiancées to re-file their fiancée petitions and face a minimum of an additional twelve months processing before they can marry. Assuming Plaintiffs second fiancée petitions are approved by USCIS and their fiancées receive visas from the Consulate, they will have waited a total of over two years to marry. This two-year wait runs afoul of Congress's intent when it mandated that "It shall be policy of the Department to process each visa application from an alien classified as . . . a K-1 nonimmigrant within 30 day or the receipt of all necessary documents from the applicant and the Immigration and Naturalization Service." Public Law 107-228, 116 Stat. 1373. It is true, as Magistrate Stewart finds, that policy provisions do not equal a cause of action in and of themselves; however, Defendants have a duty to act within a reasonable time. F&R, p. 22. The statutory policy must be considered in determining what, in fact, is a reasonable time under the circumstances of the individual visa type. The Court failed to consider that delays of two years, which is required under current procedures to even rebut consular findings due to the automatic closure and return procedures, are unreasonable in light of the statutory policy and other cases involving administrative delay.

Plaintiffs seek relief for Defendants' unreasonable delays through two avenues.

First, the APA, 5 U.S.C. § 706(2), allows Courts to hold unlawful and set aside agency action, findings, and conclusions found to be contrary to constitutional right, power, privilege, or immunity or without observance of procedure required by law. Plaintiffs have suffered a legal wrong and have been adversely affected and aggrieved by agency delays. Second, the Mandamus Act, 28 U.S.C. § 1361, which provides that district courts shall have jurisdiction over any action in the nature of mandamus, and may compel an officer or employee of the United States or any agency thereof to perform a duty owed to plaintiff. Plaintiff must demonstrate that “(1) [his or her] claim is clear and certain; (2) the official’s duty is nondiscretionary, ministerial, and so plainly prescribed as to be free from doubt; and (3) no other adequate remedy is available.” *Patel v. Reno*, 134 F.3d 929, 931 (9th Cir. 1997).

Plaintiffs’ claims as set forth in the FAC qualify for relief under the APA and the Mandamus Act because they allege statutory and Constitutional interests that are being infringed by Defendants’ unreasonable delays and the claims demonstrate that Defendants have a duty to act within a reasonable time. District Courts have found that adjudications of immigrant visa petitions two to three years are unreasonable. *See* F&R, p. 17 for Magistrate Stewart’s findings that the K-1 Petition is treated like an immigrant visa and *see, Aslam v. Mukasey*, 531 F. Supp. 2d 736, 743 (E.D. Va. 2008) (finding a nearly three-year delay in the adjudication of an adjustment application unreasonable) and *Alkenani v. Barrows*, 356 F. Supp. 2d 652, 657, n.6 (N.D. Tex. 2005) (finding 15-month delay was not unreasonable, but noting that decisions from other jurisdictions suggest that delays approximating two years may be unreasonable).

E. Magistrate Stewart Erred in her Findings and Recommendation Regarding the Four-Month Validity Period for K-1 Petitions Established by 8 CFR § 214.2(k)(5).

The K-1 petition, when approved by DHS/USCIS, bears a four-month validity period. 8 C.F.R. § 214.2(k)(5). No statute authorizes the four-month validity period. Pursuant to this regulation, when USCIS approved Plaintiffs’ fiancée petitions the approved petitions were

valid for only four months. By the time the fiancée petitions had completed processing with NVC and Plaintiffs' fiancées were scheduled for an interview with the Consulate, the underlying petitions were no longer valid. Defendants used their discretion to extend the validity for the interview that was delayed beyond the period, but when the petitions were returned to USCIS the limited period of validity was invoked so that USCIS could terminate action without providing any opportunity to rebut the consular findings. FAC, ¶ 115.

Magistrate Stewart erred in finding that the four-month validity period for K-1 Petitions established by USCIS is a permissible regulation of the admission of non-immigrants pursuant to 8 USC § 1184(a) and 8 USC §§ 1101(a)(15)(K)(i), § 1184(d). *Chevron* provides that if a court finds a challenged statute ambiguous, the court must uphold the “implementing agency’s construction” of the statute if this interpretation is permissible. F&R, p. 23, *citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 US 837, 843-44 n11.

No statute permits a four-month limited validity period for the K-1 Petition and all other petitions filed on Form I-129 are granted for periods of two years to three years. FAC, ¶ 20 and *see* 8 CFR § 214.2(e)(19)(i)(petitions for E visa applicants are valid for 2 years); 8 CFR § 214.2(h)(9)(iii)(A)(1) (petitions for H-1B visa applicants are valid for 3 years); 8 CFR § 214.2(k)(8) (petitions for K-3 visa applicants are valid for 2 years); 8 CFR § 214.2 (l)(7)(i)(A)(2) (petitions for L visas applicants are valid for three years); 8 CFR § 214.2(o)(6)(iii) (petitions for O visa applicants are valid for 3 years). No other nonimmigrant visa petition, apart from the K-1, is limited to less than two years. USCIS also approves I-130 Immigrant Petitions with no expiration period whatsoever.

The government argues that the four-month validity period is based on a general mandate to regulate admissions pursuant to 8 USC § 1184(a). However, 8 U.S.C. § 1184(a)

governs the admission of aliens into the United States after the visa has been issued and the nonimmigrant seeks to enter the United States, not validity period of a K-1 petition. Admission period and validity period are two entirely different things. Indeed, the only statutory limitation is the requirement in 8 U.S.C. § 1184(d) that the parties intend to marry within ninety days of admission and that the marriage occur within three months after admission of the K-1 nonimmigrant. Pursuant to this statutory language, U.S. Customs and Border Protection limits the K-1 visa holder's admission upon entry to 90 days.⁴ The validity period of K-1 petitions, however, is not statutorily proscribed, the four-month period bars no relationship to the length of time Defendants take to proceed through the adjudication/return process. If Congress had wished to impose such a disproportionately short petition validity period as compared with all other visa types, it would have expressly stated so. Because Congress has not addressed the issue, under *Chevron* it is to be upheld only if it is permissible. Magistrate Stewart found the four-month validity period was permissible in light of Defendants' justification that it promotes expedient processing of fiancé(e) petitions.

The K-1 validity period is impermissible, however, in light of USCIS procedures for approving all other visa petitions for much longer periods of time, and it is impermissible in light of the fact that the limited validity period increases delays rather than provides expedient processing. Because the validity of the petition expired long before Defendants' combined petition/visa adjudication and return processes could possibly be completed, Defendants' stated reasons for the four-month limitation contradict the effect of the limitation. Given the expiration

⁴ See *U.S. Customs and Border Protection Inspector's Field Manual*, 15.4(k)(1), 2008 Distributed by AILA Publications, ISBN 978-1-57370-235-5. ("Terms of admission: Admit K-1 for 90 days.")

of the four-month period of petition validity, Plaintiffs are now forced to re-file new petitions and face an additional twelve months of processing and delays in their quest to marry their fiancées. Because the regulation's effect frustrates rather than effectuates its stated purpose, it is impermissible and the Court has authority to strike down the four-month period.

If the four-month validity period is upheld, Defendants may use the petition expiration to frustrate Plaintiffs' ability to rebut the consular findings and receive a fair adjudication on the petitions already filed and at issue in this lawsuit. As the recommendation stands, Magistrate Stewart has recommended denial of Defendants' motion to dismiss with respect to Plaintiffs' Second Claim based on Defendants' violation of the APA by failing to provide a reasonable period to rebut consular findings. If the four-month validity period is allowed to stand, any opportunity that Plaintiffs' receive to rebut consular findings will be illusory, as Defendants would be free to skirt the Court's ruling and, after receiving Plaintiffs' rebuttal evidence, deny the application based on the already-expired four-month visa petition validity in each case. This is not a just result, and this recommendation should not be adopted.

III. CONCLUSION

For these reasons, Plaintiffs urge the Court to accept Magistrate Stewart's Findings and Recommendation relating to: the First Claim challenging 9 FAM 40.63 N10.1, Defendants' use of the P6C1 Marker; allegations of the Second Claim regarding the State Departments' violation of the Administrative Procedure Act (APA) in failing to provide a reasonable period to rebut consular findings and in failing to provide an opportunity to rebut consular findings; and allegations in the Fourth Claim seeking relief related to the above claims. Plaintiffs respectfully request the Court to reject all other findings and recommendations as outlined above, and allow Plaintiffs to proceed on all claims.

DATED this 20th day of December, 2010.

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By /s/
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PROOF OF SERVICE

On December 20, 2010, true and correct copies of the Plaintiffs': OBJECTIONS TO FINDINGS AND RECOMMENDATION, were served pursuant to the district court's ECF system as to ECF filers, to the following ECF filers:

Jeffrey S. Robins
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USDOJ Civil Division
P.O. Box 878
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James E. Cox, Jr.
United States Attorney's Office
1000 SW Third Ave
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Portland, OR 97204

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

EXECUTED on December 20, 2010, at Portland, Oregon.

S/ Brent W. Renison
Brent W. Renison, Declarant