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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.

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.

**PLAINTIFFS' RESPONSE TO
DEFENDANTS' OBJECTIONS TO
FINDINGS AND
RECOMMENDATION**

CLASS ACTION

I. The Court Has Jurisdiction Over Plaintiffs' Allegations That USCIS and The Department of State Failed to Provide an Opportunity and a Reasonable Period to Rebut Consular Findings.

The Findings and Recommendation (“F&R”) correctly finds a legal duty to provide an opportunity to rebut consular decisions, and final agency action. K-1 visa applicants are treated as immigrant visa applicants, and the regulations providing for an opportunity to rebut consular findings are applicable to Plaintiffs and their fiancées. Defendants’ actions and nonactions resulting in the absence of any opportunity to rebut consular findings, and resulting in a permanent inadmissibility bar, constitutes final agency action over which this Court has jurisdiction pursuant to the Administrative Procedures Act (“APA”).

A. Defendants Have a Duty to Act Which They Have Failed to Fulfill.

The F&R correctly recognizes that the K-1 visa applicant is treated in most respects like an immigrant visa applicant, and therefore is to be given an opportunity to rebut Defendants’ findings of fraud. The F&R engages in thoughtful consideration of numerous factors that make the visa category subject to the mandatory rebuttal rules under 22 CFR § 42.81(e). F&R at 17-18. The F&R points to relevant sections of the Foreign Affairs Manual (“FAM”), which provides that consular officers are to determine the eligibility of a K-1 applicant to receive an immigrant visa, that K-1 applicants must take a medical examination as an immigrant visa applicant, must be processed only at immigrant visa issuing posts, must complete the application form for an immigrant visa, must undergo clearance procedures used in immigrant visa cases, and must attend an interview as an immigrant visa applicant. F&R at 17.¹

¹ Further factors not described in the F&R which set the K-1 process apart from nonimmigrants include: K-1 applicants are assigned permanent “alien numbers”, or “A” numbers by USCIS when the I-129F is filed, and are assigned immigrant visa case numbers (starting with “HCM” for Ho Chi Minh City) by the State Department’s National Visa Center before being sent to the Consulate (see FAC ¶¶ 43, 85, and 125); and the I-129F is considered to substitute for an I-130

Further, Defendants issued denial notices to Plaintiffs' fiancées "that incorporate the review procedures applicable to immigrant visas." F&R at 18. Defendants argue that the "notices do not create a procedural right to rebut a consular refusal." Def. Obj. at 4. Yet, the F&R did not solely rely on the notices in determining which provision to apply. The F&R considered the totality of the regulatory scheme in determining that rebuttal procedures are applicable. Defendants failed to rebut any of the multiple factors that the F&R outlined in making a determination that the State Department processes K-1 visas as immigrant visas.

Plaintiffs challenge "the authority of the consul to take or fail to take an action as opposed to a decision taken within the consul's discretion," and in such a challenge jurisdiction exists. F&R at 18, citing *Patel v. Reno*, 134 F.3d 929, 932-32 (9th Cir. 1997). Significantly, the F&R correctly notes that Plaintiffs "allege a duty based on 22 CFR § 42.81(e) sufficient to support an APA claim, both with respect to a failure to provide a reasonable time period to rebut consular findings prior to the return of the petitions and to provide any mechanism for rebutting consular findings after the return of the petitions." F&R at 19. Defendants have not agreed to produce any discovery to date, and as the F&R notes, "plaintiffs allegations may be proven incorrect" after further discovery. At this juncture, the Court is required to assume the truth of Plaintiffs' allegations "in the context of various regulations and provisions". *Id.*

The F&R correctly rejects Defendants' claims that their actions are not subject to review, stating that "[a]lthough the consular decisions regarding visa eligibility are not subject to judicial review [because of the Doctrine of Consular Nonreviewability], actions relating to review and revocation of the K-1 petitions by the USCIS are potentially subject to both

immigrant petition when the K-1 visa holder enters the United States and marries the U.S. citizen petitioner, obviating the need to file an immigrant petition.

administrative and judicial review.” F&R at 17. Defendants claim that because the State Department regulations do not apply to USCIS, that USCIS need not consider evidence rebutting consular officers’ decisions to refuse K-1 visas. Def. Obj. at 6. Defendants have confused the issue by interchangeably using “revocation”, “termination”, and “denial” throughout its regulations and guidance, and in its notices to Plaintiffs.

If USCIS denies a K-1 petition, that petition may be appealed to the Administrative Appeals Office (“AAO”), by submitting within 30 days of the decision a Notice of Appeal form (Form I-290B) with the service Center that denied the petition. 8 CFR § 103.3(a)(2)(i); FAC ¶ 20. The AAO is currently deciding K-1 appeals in two months. If USCIS intends to “revoke” a petition, notice and an opportunity to offer evidence in support of the petition and in opposition to the grounds alleged for revocation must be provided to the petitioner. 8 CFR § 205.2(b). If USCIS determines, after reviewing the rebuttal evidence, that the petition should still be revoked, written notification of the decision which explains the specific reasons for revocation is to be provided to the petitioner. 8 CFR § 205.2(c). The petitioner may take administrative appeal of such adverse revocation action. 8 CFR § 205.2(d). Defendants argue that USCIS action in this case amounts to “USCIS’ allowing [the] K-1 petition to expire”, and that it does not amount to a denial or a revocation. Def. Obj. at 9. As the F&R correctly found, “[a]s a result, the K-1 petitions are effectively denied, and the fiancées are denied K-1 visas. This nonaction by the USCIS is the same as an implied revocation of the K-1 petitions which requires plaintiffs to file new K-1 petitions.” F&R at 20. Whether a denial or a revocation, Plaintiffs are entitled to administrative and judicial review of the adverse decision, without being required to re-file completely new petitions with new filing fees and begin the process anew.

Defendants argue that because no Plaintiff indicated the intention to submit rebuttal evidence that Defendants have no duty to consider evidence. This argument does not accurately portray Plaintiffs' attempts to offer or put forward evidence, and fails for three reasons. First, 22 C.F.R. § 42.81(e) allows the applicant one year from the date of refusal to “adduc[e] further evidence tending to overcome the ground of ineligibility on which the refusal was based”, and Plaintiffs in their complaint adduced a number of very specific reasons that their evidence should be considered. The complaint was filed within one year of each of Plaintiffs' denials. Additionally, two of the three denials are not yet even at the one year mark.

Second, Plaintiff Dzu Cong Tran, through the Office of Senator Ron Wyden (D-OR), contacted the Consulate General in Ho Chi Minh City on May 17, 2010. In response, the Consular Section Chief of the Consulate General, Defendant Bennett, issued a letter on May 19, 2010, foreclosing all consideration of any evidence. See FAC ¶ 72. Plaintiff Daniel Mai Dinh also contacted the Consulate, through the office of Senator Maria Cantwell (D-WA) on January 7, 2010. Again, Defendant Bennett issued a letter stating the petition had been returned for revocation. See FAC ¶ 114. It can fairly be inferred that these were attempts to adduce evidence. Third, Plaintiffs were advised on the same day of the denials that no further review of the case would be undertaken at the Consulate, and cannot be required to engage in futility in order to pursue their claims.

B. The Consular Recommendation Operates as a Final Agency Action.

Defendants argue that because “K-1 visas are denied or refused before consular officers return K-1 petitions to USCIS, the consular officer’s recommendation carries with it no determination of rights or obligations, and such recommendation carries no legal consequences.” Def. Obj. at 7. The F&R points out that, “after receiving the recommendation from the consular

officer, the USCIS fails to take any further action on the K-1 petition returns and lets them expire in accordance with 8 CFR § 214.2(k)(5).” F&R at 19. The F&R correctly concludes that the consular recommendation operates as a final denial by depriving Plaintiffs of an opportunity to rebut the consular officers’ recommendations, because USCIS takes no further action on the petition.

II. The Defendants’ Use of a P6C1 Marker is Unlawful and In Excess of Statutory Authority and the Court has Jurisdiction to Redress Plaintiffs’ Injuries That Result From The Use of The Marker.

The F&R should be adopted as to the First Claim challenging 9 FAM 40.63 N10.1 and Defendants’ use of the P6C1 Marker. The Foreign Affairs Manual, at 9 FAM 40.63, guides consular officers in adjudicating misrepresentations. 9 FAM § 40.63 N1.1. To deter fraud Congress severely penalizes misrepresentations made in connection with immigration applications: “Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure . . . a visa, other documentation, or admission in the United States . . . is *inadmissible*.” 8 USC § 1182(a)(6)(C)(i)(emphasis added). A finding of misrepresentation by a consular officer results in a permanent bar from admission to the United States.

The Foreign Affairs Manual, at 9 FAM 40.63N10.1, is unlawful and in excess of statutory authority because it allows Defendants’ to summarily make findings of fraud, evidenced through their use of a P6C1 marker, without an opportunity to rebut the findings. The result for Plaintiffs alleged in the complaint is that their fiancées now face a permanent bar to admission into the United States without due process.

A. Defendants Finding of Fraudulent Misrepresentation in Plaintiffs’ Visa Applications Results in a Permanent Bar to Admission to the United States Without Due Process.

When Defendants denied Plaintiffs’ fiancées a visa to enter the United States,

they did so on the basis that the fiancées made a fraudulent misrepresentation in their visa applications. FAC ¶¶ 64, 94, and 142. In making this finding of fraud, Defendants placed a P6C1 marker in the files of Plaintiffs and their fiancées. FAC ¶¶ 71, 113, and 146. From now on, whenever Plaintiffs or their fiancées appear before any immigration official, they will have to contend with the legal consequences of the P6C1 marker.

The F&R was correct in rejecting Defendants' arguments that due to their inaction, the P6C1 marker has no legal effect on Plaintiffs and their fiancées. Def. Obj. at 9. The Foreign Affairs Manual instructs consular officers that "USCIS retains exclusive authority to disapprove or revoke family-relationship" immigrant visa petitions. 9 FAM § 40.63 N10.1. Therefore a "misrepresentation with respect to entitlement to status under a family-relationship petition . . . cannot be deemed material as long as the petition is valid. Upon discovery of a misrepresentation, you must return the petition to the appropriate USCIS office. If the petition is revoked, the materiality of the misrepresentation is established." *Id.* Defendants' letters to Plaintiffs' fiancées confirm the effect of the denial and subsequent marker, explaining: "If USCIS revokes the petition, beneficiary will become ineligible for a visa under section 212(a)(6)(C)(i) of the Act." F&R at 26, *citing* Response in Opposition to Motion to Dismiss, Ex. A.

Defendants claim that despite the FAM and their own notices, the P6C1 marker has no legal effect because USCIS does not revoke the fiancée petitions after they are returned by Department of State. Def. Obj. at 9. Defendants assert that only if USCIS calls it a revocation of the fiancée petitions will there be a finding of fraud. *Id.* However Defendants ignore that the FAM provides that a finding of misrepresentation "cannot be deemed material as long as the petition is valid." 9 FAM § 40.63 N.10.1. When Department of State returned

Plaintiffs' fiancée petitions to USCIS with a P6C1 marker of fraud, USCIS allowed the petitions to expire, taking no other action except to send Plaintiffs a letter stating that the petitions were no longer valid. *Id* and F&R at 5. According to the FAM, the materiality of the finding of fraud is established because Defendants' allowed the visa petitions to expire. Therefore, the petitions are not considered valid by Defendants, and the F&R was correct to find that nonaction by USCIS is equivalent to an implied revocation. F&R at 26.

B. Plaintiffs' Anticipatory Injury is Capable of Redress by The Court and Defendants' Use of The P6C1 Marker is Final Agency Action.

The F&R correctly finds that Plaintiffs' injury caused by the P6C1 marker is anticipatory but sufficient to give Plaintiffs standing to have their claim heard by the Court. F&R at 26-27. The injury caused by the P6C1 marker is anticipatory because Plaintiffs' fiancées have yet to be afforded the opportunity to seek, due to further delays in the chance to even receive an adjudication on a new application, another admission to the United States. However, the F&R was correct to find the injury is now capable of redress because Plaintiffs are not required to "engage in a futile act by paying additional fees to file additional K-1 petitions and visa applications to determine if Defendants will enforce 8 USC § 1182(a)(6)(C)(i)." *Id.* at 27. The F&R was also correct in finding Department of State's placement of the marker in Plaintiffs' files and USCIS subsequent nonaction is final agency action and subject to provisions of the APA. F&R at 19.

Defendants found Plaintiffs' fiancées made fraudulent claims in their visa applications; this finding is now a permanent part of Plaintiffs and their fiancées immigration record because of the use of the P6C1 marker. Defendants' use of the marker is unlawful and in excess of statutory authority because Plaintiffs and their fiancées were not given one opportunity

to rebut the finding of fraud and now they suffer the legal consequence of facing a permanent bar to admission to the United States. As counsel stated during oral argument, there is a world of difference between one opportunity to present rebuttal evidence and none.

DATED this 3rd day of January, 2011.

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By /s/
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PROOF OF SERVICE

On January 3, 2011, true and correct copies of the Plaintiffs': PLAINTIFFS' RESPONSE TO DEFENDANTS' OBJECTIONS TO FINDINGS AND RECOMMENDATION, were served pursuant to the district court's ECF system as to ECF filers, to the following ECF filers:

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

EXECUTED on January 3, 2011, at Portland, Oregon.

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