IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

DZU CONG TRAN, DANIEL MAI DINH, and AUSTIN PETER TRAN, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

JANET NAPOLITANO, Secretary, Department of Homeland Security, *et al*,

Defendants.

CV-10-724-ST

FINDINGS AND RECOMMENDATION

STEWART, Magistrate Judge:

INTRODUCTION

Plaintiffs are three United States citizens who desire to marry their non-citizen fiancees in the United States. Each of them has filed K-1 petitions in an unsuccessful effort to obtain K-1 visas for their fiancees to enter the United States for the marriage ceremony. They filed this case

as a class action on behalf of others similarly situated to challenge: (1) the polices and procedures of consular officers of the United States Department of State ("State Department") for processing K-1 visas; and (2) the policies and procedures of the United States Citizenship and Immigration Services ("USCIS") for revoking, denying, or terminating returns of their K-1 petitions.

The defendants are heads of various federal agencies: Department of Homeland Security ("DHS") (Janet Napolitano, Secretary); USCIS (Alejandro Mayorkas, Director); USCIS Service Center Operations Directorate (Donald Neufeld, Associate Director); USCIS California Service Center ("CSC") (Christina Poulos, Director); State Department (Hillary Rodham Clinton, Secretary of State, and Janice L. Jacobs, Assistant Secretary for Consular Affairs); and United States Consulate General, Ho Chi Minh City (Charles E. Bennett, Consular Section Chief). Defendants also include John and Jane Doe United States Consular Officers 1 through 1000. All defendants are sued in their official capacity.

In the First Amended Complaint, the First Claim alleges that the following regulation and provision exceed the agency's statutory authority and are unlawful under the Administrative Procedures Act, 5 USC § 701 *et seq* ("APA"): (1) 8 CFR § 214.2(k)(5), which provides a four-month validity period for K-1 petitions; and (2) a provision of Foreign Affairs Manual, 9 FAM 40.63 N10.1, which purports to establish the materiality of an alleged misrepresentation pursuant to 8 USC § 1182(a)(6)(C)(I) based only on the summary revocation of the K-1 petition. The Second Claim alleges that the procedures used by the State Department, DHS, USCIS and CSC to process K-1 visa petitions violate plaintiffs' right to due process of law under the Fifth Amendment of the United States Constitution and also violate the APA. The Third Claim

alleges that the State Department, DHS and the USCIS have violated the APA by unlawfully withholding and unreasonably delaying action on the K-1 visa petitions. As a result, the Fourth Claim seeks declaratory and mandamus relief to remedy these failures.

Based on claims arising under the United States Constitution and various federal statutes, this court has jurisdiction under 28 USC § 1331.

Defendants have filed a Motion to Dismiss all of plaintiffs' claims (docket # 16) for lack of subject matter jurisdiction and failure to state a claim under FRCP 12(b)(1) and (6). For the reasons set forth below, that motion should be GRANTED in part and DENIED in part.

STANDARDS

In order to state a claim for relief, a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief[.]" FRCP 8(a)(2). This standard "does not require 'detailed factual allegations,'" but does "demand[] more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 US – , 129 S Ct 1937, 1949 (2009), citing *Bell Atl. Corp. v. Twombly*, 550 US 544, 555 (2007). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id*, quoting *Twombly*, 550 US at 555. In order to survive a motion to dismiss for failure to state a claim pursuant to FRCP 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id*, quoting *Twombly*, 550 US at 570.

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FINDINGS

I. Statistory and Regulatory Background

In 1970, Congress created a new K-1 visa to allow aliens to enter the United States to marry their fiancees who are United States citizens within 90 days. 8 USC § 1101(a)(15)(K)(i). Before the K-1 visa, a United States citizen would have to marry his or her fiancee in a foreign country and then petition the new spouse to immigrate to the United States.

Unlike other nonimmigrant visas, an alien cannot simply apply for a K-1 visa at a consular office or embassy abroad. Instead, issuance of a K-1 visa involves two steps. First, the United States citizen is required to file a petition and obtain the approval of the Secretary of Homeland Security. 8 USC §1184(d)(1). Second, if the petition is granted, a consular official in the country in which the alien fiancee resides must approve issuance of the visa. *Id*; 8 USC § 1201(a)(1).

To begin the application process, a United States citizen (petitioner) files with the USCIS a Petition for Alien Fiancee ("K-1 petition") on Form I-129F for his or her fiancee ("beneficiary" or "applicant"). 8 CFR § 214.2(k)(1); 22 CFR § 41.81(a)(1). When adjudicating a K-1 petition, the USCIS assesses whether: (1) the petitioner is a United States citizen; (2) the couple intends to marry within 90 days of the fiancee entering the United States; (3) the petitioner and fiancee are both free to marry and any previous marriages must have been legally terminated by divorce, death, or annulment; and (4) the petitioner and fiancee met each other, in person, at least once within two years of filing the petition. 8 USC § 1101(a)(15)(K)(i); 8 CFR §§ 214.2(k)(2) & (5). If the USCIS approves the K-1 petition, then it is valid for four months and "due to the passage of time may be revalidated" for another four months. 8 CFR § 214.2(k)(5).

The USCIS then sends the K-1 petition to the National Visa Center ("NVC"). 9 Foreign Affairs Manual ("FAM") 41.81 N3. After conducting appropriate criminal background checks, the NVC sends the K-1 petition to the embassy or consulate in the country where the fiancee resides. *Id*; 9 FAM 41.81 N4. The consulate then sends out an instruction package to the K-1 visa applicant. 9 FAM 41.81 N6.1, PN3.2. K-1 visa applicants are scheduled for an interview only when: "(1) the alien has reported that all of the necessary documents have been collected; and (2) the medical examination has been completed and the report is or will be available before the interview." 9 FAM 41.81 PN3.4. At the interview, the consular officer assesses the applicant's eligibility for the visa, including the bona fides of the fiancee relationship. 9 FAM 41.81 PN3.4; 9 FAM 41.81 N6.5. Congress has set a goal for the Department of State to process K-1 visa applications "within 30 days of the receipt of all necessary documents from the applicant and the [INS]." Foreign Relations Authorization Act, Pub. L. No. 107-228, Div. A, § 233, 116 Stat. 1373.

Based on the application, submitted documents, and visa interview, the consular officer either issues or refuses the K-1 visa. 22 CFR § 42.81. If the consular officer determines that the applicant is eligible for K-1 visa status pursuant to 22 CFR §§ 41.81(a), (d) and 41.101-122, a visa is issued for a period of six months for one entry. 9 FAM 41.81 PN3.6(b). If a consular officer determines that the relationship with the purported fiancee is not bona fide, then he or she returns the K-1 petition to the USCIS office, through the NVC, with a recommendation to revoke the petition. 9 FAM 41.81 N6.5. The USCIS does not reaffirm or reopen returned K-1 petitions and takes no further action on expired petitions. Defendants' Ex. A, USCIS web guidance,

"Fiance(e) Visas."[1] This action does not preclude petitioners from filing another K-1 petition. *Id*. However, a new K-1 petition costs $455 and a new visa costs $350. First Amended Complaint, ¶ 165.

II. <u>Plaintiffs' Allegations</u>

Each plaintiff alleges that he filed a K-1 petition for his fiancee residing in Vietnam which the USCIS approved for a period of four months. First Amended Complaint, ¶¶ 35, 40-41, 82-83, & 121-23. The NVC then issued letters noting that the petitions would be forwarded to the United States Consulate in Ho Chi Minh City, Vietnam. *Id*, ¶¶ 42, 84, & 124.

After interviewing the fiancees, the Consulate requested each of them to submit notarized statements and a detailed chronology regarding their relationship with and certain other biographical information concerning plaintiffs. *Id*, ¶¶ 43-44 85-87, & 125-26. After the fiancees submitted the additional documents, they received letters from the consular officers denying their requests for visas pursuant to 8 USC § 1201(g). *Id*, ¶¶ 45-46, 88-89, 127-28. In each case the consular officer found insufficient evidence of a bona fide fiancee relationship with plaintiffs. *Id*, ¶¶ 48, 51, 54, 58, 61, 64, 67, 92, 94, 97, 100, 103, 106, 109, 130, 133, 136, 139, & 142. The letters also stated that the Consulate was returning the K-1 petitions to the USCIS with the recommendation that they be revoked, that the revocation would result in the fiancees' ineligibility for a K-1 visa, and that the USCIS would contact plaintiffs who would have an opportunity to rebut the consular findings. *Id*, ¶¶ 46, 71, 89, 113, 128, & 146.

[1] (available at http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=640a3e4d77d73210VgnVCM100000082ca60aRCRD&vgnextchannel=640a3e4d77d73210VgnVCM100000082ca60aRCRD) (last visited Dec. 2, 2010).

The Consulate returned the K-1 petitions to the USCIS. *Id*, ¶¶ 72, 114. The USCIS then notified the plaintiffs that because the validity period of the K-1 petitions had expired pursuant to 8 CFR § 214.2(k)(5), no further action would be taken. Defendants' Exs. B, C, & D.

One plaintiff (Daniel Mai Dinh) has filed a new K-1 petition and paid a $455 filing fee. First Amended Complaint, ¶ 117.

III. Due Process Allegations (Second Claim)

The Second Claim alleges in part that plaintiffs' due process rights have been violated by the bad faith denial of the K-1 visas and subsequent returns of the K-1 petitions. *Id*, ¶¶ 161-65, 168. Defendants seek to dismiss the due process claim as barred by the Doctrine of Consular Nonreviewability. Plaintiffs respond that the court should reject that doctrine as anachronistic or, in the alternative, that their due process claim falls within its limited exception.

A. Doctrine of Consular Nonreviewability

The Doctrine of Consular Nonreviewability, also referred to as Consular Absolutism, is a judicial doctrine that bars courts from substituting their own judgment for that of consular officials to either grant or deny visas. *See, e.g., Bustamante v. Mukasey*, 531 F3d 1059, 1060 (9th Cir 2008) ("It has been consistently held that the consular official's decision to issue or withhold a visa is not subject to either administrative or judicial review.") (internal quotations and citations omitted); *Li Hing of Hong Kong, Inc. v. Levin*, 800 F2d 970, 970 (9th Cir 1986) ("The doctrine of nonreviewability of a consul's decision to grant or deny a visa stems from the Supreme Court's confirming that the legislative power of Congress over the admission of aliens is virtually complete."); *Ventura-Escamilla v. INS*, 647 F2d 28, 30 (9th Cir 1981) (holding that courts lack jurisdiction when "the relief sought is a review of the Consul's decision denying their

application for a visa"). By enacting the INA, Congress intended to confer upon consular officials the exclusive authority to issue or withhold visas. *Li Hing of Hong Kong, Inc.*, 800 F2d at 971. The exercise of this power is not subject to judicial review or intervention. *Kleindienst v. Mandel*, 408 US 753, 766 (1972). As explained by the Ninth Circuit:

> The scope of judicial review is necessarily limited by the recognition that the power to exclude or expel aliens, as a matter affecting international relations and national security, is vested in the Executive and Legislative branches of government . . . . As such, judicial intervention has been restricted to those matters the review of which has been authorized by treaty or statute, or is required by the paramount law of the Constitution.

Ventura-Escamilla, 647 F2d at 30 (internal quotations and citations omitted).

No statutory or other authority exists that authorizes judicial review of a consular officer's refusal of a visa. Rather, the INA confers upon consular officers the authority to issue or refuse to issue a visa and specifically exempts the exercise of this power from review by the Secretary of State. *See* 8 USC §§ 1104(a), 1201(a); *Ventura*, 647 F2d at 30.

B. Reexamination of the Doctrine

Plaintiffs argue that the time has arrived to reexamine and reject the Doctrine of Consular Nonreviewability. They point out that the doctrine has been highly criticized due to its roots in a racist policy. *See* Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 TEX. L. REV. 1615, 1620 (2000) (noting, "consular absolutism has been particularly striking and (not surprisingly) the object of persistent scholarly derision."); Charles J. Ogletree, Jr., *America's Schizophrenic Immigration Policy; Race, Class and Reason*, 41 B.C. L. REV. 755, 762 (2000); *Olsen v. Albright*, 990 F Supp 31 (DDC 1997) (outlining discriminatory practices in detail). Judicial review would no doubt curb any abuse by

consular officials in denying visas. *See Developments in the Law Immigration; Policy and the Rights of Aliens*, part 2 of 2, 96 HARV. L. REV. 1286, 1360-61 (1983) (describing the unfortunate consequences of the Doctrine, and the benefits of a system that places checks on autocratic power).

However, as plaintiffs acknowledge, regardless of the merits of their argument, this court is bound to follow the precedent of the Ninth Circuit and the Supreme Court and is not in a position to modify, reverse or establish a new standard for the doctrine.

C. Infringement of Constitutional Right

The Doctrine of Consular Nonreviewability has a limited exception "where the denial of a visa implicates the constitutional rights of American citizens." *Bustamante*, 531 F3d at 1061. A United States citizen who asserts a constitutional challenge to a visa denial is entitled to a limited judicial inquiry to determine if the reason given for the denial is facially legitimate and bona fide. *Id* at 1061-62.

Plaintiffs contend that they fall within this exception because they allege a denial of due process based on a protected liberty interest in their fundamental "right to marry" and "to have their fiancees join them in the United States so that they may marry." First Amended Complaint, ¶¶ 168, 176. Defendants acknowledge that the Supreme Court has recognized a liberty interest in freedom of personal choice in matters of marriage and family. *Moore v. City of E. Cleveland*, 431 US 494, 499 (1977). However, they contend that this right to marry applies only to infringements on the actual ability to establish or dissolve a marriage. *Zablocki v. Redhail*, 434 US 374, 387 n12 (1978). As noted by the First Circuit, "[t]here is no authority supporting the view that a United States citizen has a constitutional right to engage in a marriage ceremony in

the United States at which the foreign national is present." *Chiang v. Skeirik*, 582 F3d 238, 242 (1st Cir 2009). Even if a United States citizen has a constitutional right to marry a foreign national, he or she is still free to marry in a foreign country "or, possibly, in the United States by proxy." *Id*.

Although plaintiffs have submitted no contrary authority, they urge this court not to follow *Chiang*, but instead to comply with *Zablocki*. In *Zablocki*, the Supreme Court held that government regulations governing marriage must be reasonable and "not significantly interfere with decisions to enter into the marital relationship." *Zablocki*, 434 US at 386. By unreasonably denying plaintiffs' K-1 petitions and forcing United States citizens to marry in a foreign country, plaintiffs contend that defendants have placed such a "direct legal obstacle in the path of persons desiring to get married." *Id* at 387. The number of persons able and willing to attend the marriage ceremony outside the United States would be reduced due to cost and travel document restrictions.[2] After marrying, the citizen spouse would be required to file a new and different type of visa petition for the alien spouse (Form I-130 Petition for Alien Relative) which requires proof of a bona fide marriage and takes longer to process than a K-1 petition. That proof is made more difficult when a couple is forced to live apart for perhaps years rather than together in the United States or abroad. In order to live together with an alien spouse abroad, the citizen spouse would face the prospect of terminating his or her employment in the United States and finding comparable employment abroad.

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[2] Plaintiffs also point out that it may not be possible to marry in the country where the alien fiancee resides as, for example, where the citizen spouse is a refugee who cannot return to that country or where the country bans interreligious or interracial marriages. However, none of the plaintiffs allege that they cannot marry their fiancees in Vietnam or in the United States by proxy.

Even assuming that these factors would significantly strain a couple's relationship, this court is not persuaded that they significantly interfere with a decision to marry. Plaintiffs' situation is not akin to that imposed by the Wisconsin statute in *Zablocki* which barred a resident from marrying without court approval if that resident had a minor child subject to a support obligation. Marriages contracted in violation of the statute were deemed both void and punishable as a criminal offense. Although affirming the fundamental right to marry, the Court did "not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed." *Zablocki*, 434 US at 386. The Wisconsin statute was held to be unconstitutional because it did "interfere directly and substantially with the right to marry." *Id* at 387. Some persons would "be absolutely prevented from getting married" because they "either lack the financial means to meet their support obligations or cannot prove that their children will not become public charges" to obtain the necessary court order. *Id*. Others who could "satisfy the statute's requirements, will be sufficiently burdened by having to do so that they will in effect be coerced into forgoing their right to marry." *Id*.

Here, in contrast, plaintiffs do not allege or contend that a denial of a K-1 visa to their alien fiancees, even if unreasonable, will coerce them into not marrying. They acknowledge that they can still file another K-1 petition or marry the fiancee abroad. Marrying abroad may present logistical and financial disadvantages to the couple, as opposed to marrying in the United States, but those disadvantages do not rise to the level of preventing or significantly deterring marriage. *See Califano v. Jobst,* 434 US 47 (1977) (upholding sections of the Social Security Act providing

for termination of a dependent child's benefits upon marriage to an individual not entitled to benefits under the Act).

Plaintiffs also argue that Congress created a liberty interest in the right to marry in the United States by providing in 8 USC § 1184(d)(1) that K-1 visa petitions "shall be approved" once certain criteria are met. However, a complete reading of that statute belies plaintiffs' argument. The statutory language says nothing about the obligation of a consular officer to issue a K-1 visa. Instead, it refers only to the obligation of the USCIS to grant the K-1 petition after "satisfactory evidence is submitted by the petitioner." And even if a K-1 petition must be granted once such evidence is submitted, the only benefit conferred is the right to proceed to the second step in the process, namely to forward the approved petition to a consulate for further review. It does not require that the K-1 visa be approved and, absent that approval, no marriage can occur in the United States. Accordingly, the statute creates no constitutional right to marriage in the United States.

Because this court finds that plaintiffs have no protected liberty interest to marry in the United States, they have not met the threshold requirement necessary to allege a denial of due process. As a result, they do not fall within the limited exception to the Doctrine of Consular Nonreviewability.

The Second Claim alleges five separate denials of due process. Three of those allegations are clearly premised on denials of K-1 visas and, thus, fall within the scope of the Doctrine of Consular Nonreviewability. Paragraph 164 alleges that the State Department failed to provide a sufficient written basis to deny the visas and return the petitions, and paragraphs 162 and 163 allege that the State Department returned the petitions to DHS/USCIS based only on a suspicion

of, rather than substantial evidence of, fraud, misrepresentation or ineligibility. Paragraphs 161 and 165 do not directly contest the reasons for denying the K-1 visas, but instead challenge the State Department's failure to provide a reasonable period for plaintiffs and their fiancees to rebut the consular findings before returning the petitions to DHS/USCIS and the failure of the State Department and DHS/USCIS/CSC to provide any mechanism to rebut the consular findings. These allegations challenge the process followed, rather than the ultimate decision, by defendants and arguably fall outside the scope of the Doctrine of Consular Nonreviewability. Nevertheless, any due process claim first requires plaintiffs to identify some constitutionally protected interest. Because they do not possess a protected liberty interest to marry in the United States, all due process allegations of the Second Claim should be dismissed for lack of standing.

IV. Return Procedures (Second Claim)

The Second Claim also alleges that the return procedures of the State Department and the USCIS after denial of the K-1 visas by the consular officers violate the APA. First Amended Complaint, ¶¶ 166-67. In particular, plaintiffs claim that they were not given a reasonable time to rebut the consular findings before return of the petitions to the USCIS or any opportunity to rebut the consular decisions after return of the K-1 petitions to the USCIS. *Id*, ¶¶ 161, 165.

A. Elements of APA Claim

The APA provides a right to judicial review of all "final agency actions for which there is no other adequate remedy in a court." 5 USC § 704. With certain exceptions, the court can set aside final agency action only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 USC § 706(2)(A). A plaintiff has standing to raise a claim under the APA if "his injury has been caused by the conduct of which he complains and that it is

redressable by the remedy he seeks." *Idaho Conservation League v. Mumma*, 956 F2d 1508, 1517 (9th Cir 1992) (citations omitted).

"The APA authorizes suit by '[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of the relevant statute.'" *Norton v. Southern Utah Wilderness Alliance*, 542 US 55, 61, (2004); 5 USC § 702. "[A]gency action is defined . . . to include 'the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.'" *Id* at 62. In order for an action to be final, and thus reviewable pursuant to the APA, the action must: (1) "mark the 'consummation' of the agency's decision-making process," and (2) the action "must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett v. Spear*, 520 US 154, 178 (1997). Claims alleging an agency's "failure to regulate" "must be based upon a clearly imposed duty to take some discrete action." *Western Watersheds Project v. Matejko*, 468 F3d 1099, 1110 (9th Cir 2006). Defendants seek dismissal of this APA claim based on the lack of any clearly imposed duty or final agency action.

B. Duty to Act

As the source of a legal duty to provide an opportunity to rebut consular decisions, plaintiffs rely on 22 CFR § 42.81(e) which provides as follows:

> If a visa is refused, and the applicant within one year from the date of refusal adduces further evidence tending to overcome the ground of ineligibility on which the refusal was based, the case shall be considered. In such circumstance, an additional application fee shall not be required.

Plaintiffs allege that each denial letter given to their fiancees advised that the petition was being returned to the USCIS with a recommendation that it be revoked and that the USCIS would

contact plaintiffs who then would have an opportunity to rebut the consular findings. First Amended Complaint, ¶¶ 46, 89, 128. They also have submitted the denial letters which state in relevant part as follows:

> Your case has been administratively closed. Consular officers apply a reasonable person standard when evaluating the bona fides of claimed relationship (9 FAM 42.43 n2.2(3)). In the present case, ** These facts as ascertained by consular officers would convince a reasonable person that the claimed relationship is a sham entered into solely for immigration purposes and to evade immigration laws. Therefore, pursuant to 9 FAM 41.81 N6.5, the reviewing officer has decided that the petition should be returned to the [USCIS] with the recommendation that it be revoked. The case will next be reviewed by the Immigrant Visa Chief, upon concurrence of the Immigrant Visa Chief with the reviewing officer's decision, the case will be returned to USCIS for review and possible revocation. When USCIS receives the returned petition, they will contact the petitioner, who will have an opportunity to rebut consular findings concerning this case. If USCIS revokes the petition, beneficiary will become ineligible for a visa under section 212(a)(5) (C)(1) of the Act . . .

Response in Opposition to Motion to Dismiss (docket #21), Ex. A.

However, by delaying action on the returned K-1 petitions and reasoning that they have expired by the time they reach the USCIS, the USCIS does not review the returned K-1 petitions or provide plaintiffs an opportunity to rebut the consular findings. First Amended Complaint, ¶¶ 28-29. Plaintiffs argue that this alleged action is contrary to the mandatory reconsideration process in 22 CFR § 42.81(e) and, thus, they state a claim under the APA. *See Davila v. Holder*, 2010 WL 1264670 *6 (ND Cal 2010) (declining to dismiss a Petition for Writ of Mandamus based on a consulate's alleged failure to comply with 22 CRF § 42.81(e) with respect to a nonimmigrant visa).

Defendants respond that plaintiffs mistakenly rely on 22 CFR § 42.81(e) which applies to immigrant, not nonimmigrant, visas. Plaintiffs' fiancees applied for nonimmigrant visas. 8 USC

§ 1101(a)(15)(K) ("The term 'immigrant' means every alien except an alien who is within one of the following classes of nonimmigrant aliens – . . . is the fiancee or fiancé of a citizen of the United States . . . who seeks to enter the United States solely to conclude a valid marriage with the petitioner within ninety days after admission.). The procedures for refusing a nonimmigrant visa are set forth in 22 CFR § 41.121 which does not provide such a mandatory reconsideration process. Instead, it provides that: "When the consular official knows or has reason to believe a visa applicant is ineligible and refuses the issuance of a visa, he or she must inform the alien of the ground(s) of ineligibility . . . and whether there is, in law or regulations, a mechanism (such as a waiver) to overcome the refusal." 22 CFR § 41.121(b)(1). The next subsection describes the review process as follows:

> Nonimmigrant refusals must be reviewed, in accordance with guidance by the Secretary of State, by consular supervisors, or a designated alternate, to ensure compliance with laws and procedures. If the ground(s) of ineligibility upon which the visa was refused cannot be overcome by the presentation of additional evidence, the refusal must be reviewed without delay; that is, on the day of the refusal or as soon as it is administratively possible. If the ground(s) of ineligibility may be overcome by the presentation of additional evidence, and the applicant has indicated the intention to submit such evidence, a review of the refusal may be deferred for not more than 120 days.

22 CFR § 41.121(c).

Absent from these regulations is any language that requires any opportunity by the applicants to rebut the refusals. Defendants read this regulation as only affording applicants the opportunity to produce additional evidence when the refusal letter indicates that they may be able to overcome the refusal, which the denial letters issued to plaintiffs' fiancees did not. According to defendants, the consular officers failed to follow 22 CFR § 41.121 and mistakenly gave erroneous advice in the denial letters to plaintiffs' fiancees.

However, defendants' position is contrary to the State Department's regulations and manual. The K-1 visa is a "hybrid between an immigrant and non-immigrant visa, one which contemplates that the alien will eventually obtain permanent residence in this country." *Friedberger v. Schultz*, 616 F Supp 1315, 1318 (ED Pa 1985). This hybrid status is recognized by 22 CFR § 41.81(d) which provides that: "The consular officer, insofar as is practicable, must determine the eligibility of an alien to receive a nonimmigrant visa under paragraphs (a), (b), or (c) of this section as if the alien were an applicant for an immigrant visa, except" for the vaccination and labor certification requirements. Paragraph (a) sets forth the criteria for an alien fiancee applying for a K-1 visa. Accordingly, the alien fiancee applicant for a K-1 visa must take a medical examination, 8 CFR §§ 41.108(a)(1), which is a normal requirement for an immigrant visa. *See* 8 CFR § 42.66(a). In addition, the State Department's FAM requires that K-1 visas "must be processed and issued only at immigrant visa (IV) issuing posts." 9 FAM 41.81 N3(a). It also requires that the K-1 "applicant must undergo the standard immigrant visa (IV) medical examination by a panel physician." 9 FAM 41.81 N4(a)(1). It further requires the K-1 applicant to complete both the DS-156 application form for a nonimmigrant visa and the DS-230 application form for an immigrant visa. 9 FAM 41.81 PN3.2(1). Upon receipt of those completed forms, the "consular officer should initiate clearance procedures," including "the security clearance procedures used in immigrant visa (IV) cases" if the applicant has resided for more than six months in another country. 9 FAM 41.81 PN3.3(a). The consular officer "must direct the interview to determine eligibility as if the alien were applying for an immigrant visa (IV) in the immediate relative category." 9 FAM 41.81 PN 3.4(b). The FAM acknowledges that

"[e]ven though a finace(e) is treated in most respects like an immigrant, posts do not give a fiance(e) the information regarding Social Security registration." 9 FAM 41.81 PN7.

Since the State Department processes a K-1 visa as an immigrant visa, it is not surprising that the consular officers issue denial letters to the alien fiancees applying for K-1 visas that incorporate the review procedures applicable to immigrant visas. Contrary to defendants' characterization, the denial letters may not be mistaken, but may instead accurately describe the intended review procedure for denial of a K-1 visa. Although the consular decisions regarding visa eligibility are not subject to judicial review, actions relating to review and revocation of the K-1 petitions by the USCIS are potentially subject to both administrative and judicial review. After the State Department returns the K-1 petitions to the USCIS with a recommendation to revoke, the USCIS does nothing and simply lets the K-1 petitions expire automatically. As plaintiffs argue, this procedure denies them any opportunity to rebut the recommended revocation and allows the USCIS to evade its review obligation.

Plaintiffs rely on *Patel v. Reno*, 134 F3d 929 (9th Cir 1997), to support their contention of a legal duty to allow a rebuttal. In *Patel*, the court found when an APA claim "challenges the authority of the consul to take or fail to take an action as opposed to a decision taken within the consul's discretion, jurisdiction exists." *Id* at 931-32. The court found that jurisdiction existed because the consulate had failed to take an action on the petitions by holding them in abeyance. Although the K-1 petitions at issue here are not being held in abeyance, the USCIS does not review the recommendation by the consular officer. Instead, it simply lets the returned petitions from the State Department expire without offering any opportunity by the petitioners to rebut the

State Department's recommendation. This is equivalent to a failure by the USCIS to take a required action on the K-1 petitions.

After further discovery and development of the facts, plaintiffs' allegations may be proven incorrect. Instead of processing K-1 visas as immigrant visas with the prescribed mandatory review procedure of 22 CFR § 42.81(e), defendants may be correct that the State Department should process them as nonimmigrant visas with only the review allowed by 22 CFR § 41.121(c). However, that determination cannot be made at this juncture. Assuming the truth of plaintiffs' allegations in the context of various regulations and provisions of the FAM, 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.

C. Final Agency Action

Defendants also argue that the decision by a consular officer to return a K-1 petition to the USCIS is not a final agency action because it determines no rights or obligations and has no legal consequences for plaintiffs or their fiancees. *See Bennett v. Spear*, 520 US 154, 178 (1997). Instead, the return of visa petitions to the USCIS involves only a recommendation from the consular officer. *See* 9 FAM 41.81 N6.5.

However, 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). By doing so, it deprives plaintiffs from contesting the recommendation by the consular officer to revoke the petition. The consular recommendation in effect operates as a

final action. The denial letter states that the case has been administratively closed with no further action being taken and no opportunity for review or rebuttal. When recommendations are returned, the USCIS allows the petitions to "remain expired" and neither reaffirms nor reopens them. As a result, the K-1 petitions are effectively denied, and the fiancees 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. Thus, the recommendation by a consular officer can and should be construed as a "final action" sufficient to support an APA claim.

Accordingly, defendants' motion to dismiss the portion of the Second Claim premised on a violation of the APA by the State Department "by failing to provide a reasonable period during which a petitioner and beneficiary may rebut consular findings before the petition is return to DHS/USCIS" and by the State Department and DHS/USICS/CSC "by failing to provide any mechanism for rebutting consular findings" (First Amended Complaint, ¶¶ 161 & 165) should be denied.

V. <u>Unreasonable Delay (Third Claim)</u>

The Third Claim alleges unlawful delays by the State Department in scheduling K-1 visa interviews, issuing final decisions on visa applications, and notifying the USCIS of the decision to return K-1 petitions. First Amended Complaint, ¶¶ 170-72. It also alleges unlawful delays by the USCIS in issuing notices regarding returned petitions to petitioners, delivering potentially reaffirmed petitions to the State Department, and issuing potential denials of visa petitions following the return. *Id*, ¶¶ 170-73. Defendants move to dismiss the Third Claim as moot because agency action has been taken on the petitions and no deadlines are required by law.

The APA provides relief for a failure to act by empowering the district court to compel an

agency to perform a ministerial or nondiscretionary duty if the agency unlawfully withheld or unreasonably delayed in acting on a duty. *Norton*, 542 US at 63-65; *see* 5 USC § 555(b) ("With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude the matters presented to it."). To invoke jurisdiction under the APA, a "petitioner must show: (1) an agency had a nondiscretionary duty to act and (2) the agency unreasonably delayed in acting on that duty." *Gelfer v. Chertoff*, 2007 WL 902382 at *1 (ND Cal, March 22, 2007), citing *Norton*, 542 US at 63-65 (2004). "Once a petitioner has proven a right to relief under the circumstances, it is the reviewing court's duty to 'compel agency action unlawfully withheld or unreasonably delayed.'" *Id*, quoting 5 USC § 706(1).

As to the non-discretionary duty to act, plaintiffs must assert that the agency "failed to take a *discrete* action that it is *required to take*." *Norton*, 542 US at 64 (emphasis in original). Further, "a delay cannot be unreasonable with respect to an action that is not required." *Id* at 63 n1. "[F]or a claim of unreasonable delay to survive, the agency must have a statutory duty in the first place." *San Francisco Baykeeper v. Whitman*, 297 F3d 877, 885-86 (9th Cir 2002); *see also Wilderness Society v. Tyrrel*, 819 F3d 813, 818 (9th Cir 1990) (declining to read a procedural requirement into a statute "unless such procedural requirements are explicitly enumerated in the pertinent statutes or otherwise necessary to address constitutional concerns").

Plaintiffs argue that defendants have failed to act in accordance with Congress's grant of preferential treatment to visa applicants who are spouses and fiancees of United States citizens. Plaintiffs cite no statute that sets deadlines for scheduling interviews, returning petitions, delivery of potentially reaffirmed petitions, or issuing potential denials. Instead, as the source of a legal

duty to act, they point to Public Law 107-228, 116 Stat. 1373, which provides as follows: "It shall be the policy of the Department to process each visa application from an alien classified as . . . a K-1 nonimmigrant within 30 days of the receipt of all necessary documents from the applicant and the Immigration and Naturalization Service."

Policy provisions generally do not create a cause of action or any judicially enforceable right. *See Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 US 439, 455 (1988) (declining to create a cause of action from a policy statement in the American Indian Religious Freedom Act). Thus, this public law imposes no legal duty to act as to any of plaintiffs' alleged deadlines.

Even if a duty to act could be read into this public law, plaintiffs have not alleged facts that there has been an unreasonable delay. The public law only addresses the processing of K-1 visa applications within 30 days of receipt of the necessary documents. It does not provide deadlines for scheduling interviews, returning petitions, or noticing plaintiffs. In any event, the allegations reveal that plaintiffs' K-1 petitions were processed and that decisions on the K-1 visa applications were made within 30 days of receipt of all the necessary paperwork. First Amended Complaint, ¶¶ 44-45, 87-88, 126-27. Thus, the Third Claim should be dismissed for failure to state a claim.

VI. <u>Four-Month Validity Period (First Claim)</u>

Part of the First Claim challenges the USCIS's four-month validity period for K-1 petitions as exceeding the agency's statutory authority. First Amended Complaint, ¶¶ 156-57. Defendants argue that plaintiffs fail to state a claim as a matter of law because this regulation is

entitled to deference under *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 US 837, 842-45 (1984),

Under *Chevron*, courts consider first "whether Congress has directly spoken to the precise question at issue." *Id* at 842. "If Congress has done so, the inquiry is at an end; the court 'must give effect to the unambiguously expressed intent of Congress.'" *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 US 120, 132 (2000), quoting *Chevron*, 467 US at 843. If, after conducting such an analysis, the court concludes that Congress has not addressed the issue, it "must respect the agency's construction of the statute so long as it is permissible." *Id* at 130, citing *INS v. Aguirre-Aguirre*, 526 US 415, 424 (1999). If a statute is ambiguous, and if the implementing agency's construction is reasonable, the court must accept the agency's construction of the statute, even if that reading differs from what the court believes is the best statutory interpretation. *Chevron*, 467 US at 843-44 n11.

Congress generally authorizes the USCIS to regulate admission of nonimmigrants. 8 USC § 1184(a) ("The admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the Attorney General may by regulations prescribe."). Other statutes set out certain procedures and criteria for issuing K-1 visas, but do not specifically address the precise question at issue, namely the validity period of a K-1 petition. 8 USC §§ 1101(a)(15)(K)(i), 1184(d).[3] Congress also authorized the DHS Secretary to "establish such

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[3] 8 USC § 1184(d) provides: "A visa shall not be issued under the provisions of section 1101(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

(continued...)

regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter." 8 USC § 1103(a)(3). Thus, the question becomes whether the USCIS's regulation authorizing a four-month validity period for the K-1 petition is a permissible construction of the governing statutes.

In support of their argument that the four-month validity period is beyond the scope of the USCIS's delegated authority, plaintiffs point to *Naghai v. INS*, 219 F3d 1166 (10th Cir 2000). At issue in that case was an INS regulation, 33 CFR § 336.9(b), establishing a 120-day time period for filing a petition in district court for review of a denial of naturalization. *Nagahi* held that broad grants of authority to regulate found at 8 USC §§ 1103(a)(3) and 1443(a) did "not extend to creating limits upon judicial review." *Nagahi*, 219 F3d at 1170. Accordingly, it invalidated the regulation because the INS was not given the authority to regulate the scope of judicial power.

However, unlike *Nagahi*, the regulation at issue here does not encroach upon judicial power or authority. Instead, it sets a time limit relating only to the administrative process. As *Nagahi* recognized in a footnote, an agency may properly establish time limits relating to administrative claims, rather than judicial claims. *Id* at 117 n3, citing *District Lodge 64, Int'l*

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[3](...continued)
within 2 years before the date of filing the petition, have a bona fide intention to 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 alien's arrival, except that the Secretary of Homeland Security in his discretion may waive the requirement that the parties have previously met in person. In the event the marriage with the petitioner does not occur within three months after the admission of the said alien and minor children, they shall be required to depart from the United States and upon failure to do so shall be removed in accordance with sections 1229a and 1231 of this title."

Ass'n of Machinists and Aerospace Workers, AFL-CIO v. NLRB, 949 F2d 441, 444-45 (DC Cir 1991) and *United Mine Workers of Am. v. Kleppe*, 561 F2d 1258, 1260-62 (7th Cir 1977).

By setting a time limit on the validity of a K-1 petition, the USCIS arguably promotes the Congressional intent to resolve such petitions quickly to enable citizens to marry their alien fiancees. This is consistent with the 90-day requirement for marriage upon entry in the United States. The lack of any expiration date would allow K-1 petitions to linger, contrary to the policy of a speedy resolution of determining the existence of a bona fide relationship.

Because the USCIS regulation that imposes a four-month validity period on K-1 petitions is permissible as a matter of law, defendants' motion to dismiss this portion of the First Claim (First Amended Complaint, ¶ 156) should be granted.

VII. Use of P6C1 Markers (First Claim)

The other part of the First Claim challenges 9 FAM 40.63 N10.1 as unlawful and in excess of the agency's statutory authority. First Amended Complaint, ¶ 159. The provision in question provides that a consular officer who finds a misrepresentation with regard to the K-1 visa application "must return the petition to the appropriate USCIS office. If the petition is revoked, the materiality of the misrepresentation is established." 9 FAM 40.63 N10.1. Plaintiffs allege that "[t]he State Department engages in an unlawful practice by placing a marker, called a 'P6C1' marker, or 'quasi-refusal' in a visa beneficiary's record," which, as a function of 9 FAM 40.63 N10.1, results in a "permanent misrepresentation bar to any future immigration possibility" if the USCIS revokes the petition. First Amended Complaint, ¶ 158.

Defendants argue that plaintiffs fail to state a claim under the APA based on use of the P6C1 marker for two reasons. First, they assert that plaintiffs lack standing because they have

suffered no injury as yet. Second, they assert that the P6C1 marker is not a final agency action. These arguments are interrelated and ignore the irrefutable consequences of the provision at issue.

Plaintiffs allege that upon determining that the fiancee is ineligible to receive a K-1 visa, the consular officer places a P6C1 marker in the fiancee's record and returns the petition to the USCIS with a recommendation to revoke. When the petition is revoked, then "the materiality of the misrepresentation is established." FAM 40.63 N10.1. Such a misrepresentation operates as a permanent bar to admission, subject only to a limited discretionary waiver:

> Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission in the United States or other benefit provided under this Act is inadmissible.

8 USC § 1182(a)(6)(C)(i).

The State Department confirms this sanction by including the following warning in its denial letters: "If USCIS revokes the petition, beneficiary will become ineligible for a visa under section 212(a)(6)(C)(i) of the Act." Response in Opposition to Motion to Dismiss, Ex. A. Defendants attempt to sidestep this result by contending that the USCIS does not actually revoke K-1 petitions, but simply allows them to expire. However, as discussed above, this is merely a matter of semantics. The nonaction by the USCIS is equivalent to an implied revocation of the petitions. As a result of this implied revocation, the alien fiancee is permanently barred from admission, which is a clear and certain legal consequence flowing directly from the use of the P6C1 marker.

Plaintiffs do not allege that they have actually tested whether defendants will bar their fiancees from being admitted into the United States as a result of the P6C1 marker. In that sense, their injury is anticipatory. However, plaintiffs should not be 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). They and this court can and should presume that defendants will enforce the law as written and not admit the alien fiancees due to the material misrepresentation. *See International Brotherhood of Teamsters v. United States*, 431 US 324, 365-66 (1977) ("When a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture, he is as much a victim of discrimination as is he who goes through the motions of submitting an application.").

Plaintiffs may ultimately be proven wrong as to the existence and application of the alleged policy concerning the P6C1 marker. However, at this juncture, their allegations are sufficient to support a claim under the APA to challenge this policy. Therefore, defendants' motion to dismiss this part of the First Claim (First Amended Complaint, ¶ 158) should be denied.

VIII. Relief (Fourth Claim)

Although defendants seek to dismiss all claims, they do not specifically address the Fourth Claim. That claim does not allege a separate basis for liability against defendants, but simply requests declaratory and mandamus relief as a result of the conduct alleged in the prior claims. Since portions of the other claims should not be dismissed, the relief requested in the Fourth Claim specific to those remaining claims should not be dismissed.

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RECOMMENDATION

For the reasons set forth above, defendants' Motion to Dismiss (docket # 16) should be GRANTED in part as to:

The First Claim challenging 8 CFR § 214.2(k)(5) (four-month validity period);

The allegations of the Second Claim alleging a denial of due process and violations of the APA by the State Department for denying K-1 visas and returning K-1 petitions to the USCIS;

The Third Claim alleging unreasonable delay; and

The allegations of the Fourth Claim seeking relief related to the above;

and DENIED in part as to:

The First Claim challenging 9 FAM 40.63 N10.1 (use of the P6C1 marker);

The allegations of the Second Claim based on a violation of the APA by the State Department by failing to provide a reasonable period to rebut consular findings and a failure by the State Department and DHS/USCIS/CSC to provide an opportunity to rebut consular findings; and

The allegations of the Fourth Claim seeking relief related to the above.

SCHEDULING ORDER

The Findings and Recommendation will be referred to a district judge. Objections, if any, are due December 20, 2010. If no objections are filed, then the Findings and Recommendation will go under advisement on that date.

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If objections are filed, then a response is due within 14 days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will go under advisement.

DATED this 3rd day of December, 2010.

s/ Janice M. Stewart___________
Janice M. Stewart
United States Magistrate Judge