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**UNITED STATES DISTRICT COURT
DISTRICT OF OREGON**

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

Civil Case No. CV 10-724-ST

vs.

JANET NAPOLITANO, Secretary,
Department of Homeland Security; **ALEJANDRO
MAYORKAS**, Director, United States Citizenship
and Immigration Services (“USCIS”); **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;
and **JOHN AND JANE DOE U.S. CONSULAR
OFFICERS** 1 through 1,000,
Defendants.

**MEMORANDUM IN SUPPORT OF
DEFENDANTS’ MOTION TO DISMISS**

Request for Oral Argument

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Defendants submit the following Memorandum in Support of their Motion to Dismiss Plaintiffs' First Amended Complaint ("FAC") for lack of subject matter jurisdiction and failure to state a claim pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Plaintiffs' FAC challenges decisions by consular officers to refuse to issue Plaintiffs' fiances K-1 fiancée visas and the Department of State's and U.S. Citizenship and Immigration Services's ("USCIS") processing of decisions to return previously approved K-1 petitions to USCIS following a consular officer's refusal to issue a K-1 visa. This Court should dismiss the FAC in its entirety pursuant to Federal Rules of Civil Procedures 12(b)(1) and 12(b)(6).

First, Plaintiffs' challenges to decisions by consular officers regarding visa issuance should be dismissed because those consular decisions are immune from judicial review under the doctrine of consular nonreviewability. Although there is a narrow exception to this doctrine when a visa refusal implicates the constitutional rights of U.S. citizens, Plaintiffs lack standing to raise due process claims on behalf of their alleged fiances, and Plaintiffs' unsupported allegations of "bad faith" are insufficient to support the Court allowing even limited review of whether the consular refusals in this case were facially legitimate and bona fide. Moreover, Plaintiffs cannot circumvent the doctrine of consular nonreviewability by classifying their claims as a challenge to the visa petition return process.

Second, Plaintiffs' challenges to alleged improper practices regarding visa issuance by the Department of State and the handling of petition returns by the Department of State and USCIS should be dismissed. The actions that Plaintiffs seek to compel under the Administrative Procedure Act ("APA") are not final agency actions, nor are they required by law. The actions in question are therefore not subject to judicial review pursuant to the terms of the APA. Third,

Plaintiffs' allegations that Defendants failed to take certain actions regarding the visa application and petition return process within a certain amount of time are moot because those actions are complete.

Fourth, the Court should dismiss Plaintiffs' challenge to USCIS's regulations that establish a four-month validity for K-1 petitions. The regulations are not ultra vires because Congress specifically granted Defendants authority to promulgate such regulations. Moreover, Plaintiffs cannot show that the regulations are unreasonable because the regulations mirror Congressional intent and should be afforded *Chevron* deference. Finally, the Court should dismiss Plaintiffs' challenge to the Department of State's practice of placing notations of potential fraud in its files through use of the "P6C1" code because such action is not a reviewable final agency action, and no Plaintiff can demonstrate injury resulting from such a practice.

I. STATUTORY AND REGULATORY BACKGROUND

A. The K Visa

In 1970, Congress created a new nonimmigrant visa, designated K-1, to alien fiancées of U.S. citizens to enter the United States to marry their U.S. citizen fiancées within ninety days. *See* 8 U.S.C. § 1101(a)(15)(K)(i). Before the K-1 visa, an American would have to marry his or her spouse in a foreign country and then petition the spouse to immigrate to the United States. With the advent of the K-1, Congress leveled the playing field between fiancées and spouses of U.S. citizens, such that fiancées could now enter the United States as expeditiously as a spouse. H.R. Rep. No. 91-851 (1970), *reprinted in* 1970 U.S.C.C.A.N. 2750, 2753.

Unlike other nonimmigrant visas, Congress did not permit aliens seeking to be classified in K-1 status to simply apply for the visa at a consular office or embassy abroad. Rather,

Congress created a two-step process whereby the U.S. citizen is required to file a petition and obtain the approval of the Secretary of Homeland Security prior to the beneficiary applying for a nonimmigrant visa abroad. *See* 8 U.S.C. §1184(d)(1). The separate petition requirement for this nonimmigrant visa was created by Congress to “provide[] safeguards against abuse . . . by requiring . . . that before classification under the new subparagraph (K), the alien fiance must be the subject of a petition approved by the Attorney General after he is satisfied as to the bona fides of the parties and their ability legally to conclude the marriage.” 1970 U.S.C.C.A.N. at 2757. The Congressional Record indicates that the Department of State favored the proposal because “a petition requirement would provide a useful safeguard against attempt fraudulent use of the classification.” *Id.* at 2758. On April 10, 1970, the Immigration and Naturalization Service promulgated regulations relating to the filing and approval of the petition required by Section 214(d) of the Immigration and Nationality Act (“INA”). Miscellaneous Amendments to Chapter, 35 Fed. Reg. 5,958, 5,958 (April 30, 1970).

B. The K Petition and Visa Application Process

To begin the application process, a U.S. citizen fiancée files a Petition for Alien Fiancée (“K-1 petition”) on Form I-129F for his or her fiancée with USCIS. 8 C.F.R. § 214.2(k)(1); 22 C.F.R. § 41.81(a)(1). When adjudicating a K-1 petition, United States Citizenship and Immigration Services (“USCIS”) assesses – solely on the documents submitted by petitioner – whether: (1) the petitioner is a U.S. citizen; (2) the couple intends to marry within 90 days of the fiancée entering the United States; (3) the petitioner and fiancée are both free to marry and any previous marriages must have been legally terminated by divorce, death, or annulment; and (4) the petitioner and fiancée met each other, in person, at least once within 2 years of filing the

petition. 8 U.S.C. § 1101(a)(15)(K)(i); 8 C.F.R. §§ 214.2(k)(2) & (5). If USCIS determines to approve the K-1 petition, it is valid for four months. 8 C.F.R. § 214.2(k)(5).¹

USCIS then sends the K-1 petition to the National Visa Center (“NVC”). *See* U.S. Dept. of State, 9 Foreign Affairs Manual (“FAM”) § 41.81 N3. The NVC conducts appropriate criminal background checks and sends the petition to the embassy or consulate in the country where the fiancée resides. *Id.*; 9 FAM § 41.81 N4. Upon receipt of the approval notice from the NVC, the consulate sends out an instruction package to the K-1 visa applicant.² 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 alien’s eligibility for the visa, including the bona fides of the fiancée relationship. 9 FAM § 41.81 PN3.4; 9 FAM § 41.81

¹ 8 C.F.R. § 214.2(k)(5) was promulgated in 1970. *See* Miscellaneous Amendments to Chapter, 35 Fed. Reg. 12,268, 12,268 (July 31, 1970).

The approval of a petition under this paragraph shall be valid for a period of 4 months. A petition which has expired due to the passage of time may be revalidated by a district director or an American consular officer for a period of 4 months from the date of revalidation upon a finding that the petitioner and beneficiary are free to marry and intend to marry each other within 90 days of the beneficiary’s entry into the United States.

8 C.F.R. § 214.2(k)(5).

² There is a substantive difference between a visa petition and an actual visa. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305, 1308 (9th Cir. 1984) (It is important to note that a visa petition is not the same thing as a visa. An approved visa petition is merely a preliminary step in the visa application process. 1A Gordon & Rosenfeld, Immigration Law and Procedure § 3.5(j). It does not guarantee that a visa will be issued, nor does it grant the alien any right to remain in the United States.); *see also United States v. Garcia*, 875 F.2d 257 (9th Cir. 1989).

N6.5.³ 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 Immigration and Naturalization Service.” Foreign Relations Authorization Act, Pub. L. No. 107-228, Div. A, § 233, 116 Stat. 1373.⁴

Based on the application, submitted documents, and visa interview, the consular officer either issues or refuses the visa. 22 C.F.R. § 42.81. If the consular officer determines that the applicant is eligible for K-1 visa status pursuant to 22 C.F.R. §§ 41.81(a), (d) and 41.101-41.122, the officer will issue a visa valid for a period of six months for one entry. 9 FAM § 41.81 PN3.6(b). If the consular officer determines that the applicant for a K-1 visa is ineligible for the visa, the consular officer can refuse to issue the visa. In such cases, the consular officer is required to inform the applicant of the reason for the refusal and whether there is a mechanism to overcome the refusal. 22 C.F.R. § 41.121(b)(1). A refusal is subject to mandatory review by the principal consular officer. 22 C.F.R. § 41.121(c). One ground for visa refusal is found at 8 U.S.C. § 1201(g), which provides, in part, that “[n]o visa or other documentation shall be issued to an alien if — (1) it appears to the consular officer, from statements in the application, or in the

³ If the consular post has not issued a K1 visa prior to the expiration of the four-month validity of the I-129F petition, the consular officer may revalidate the petition for an additional four-month period. *See* 8 C.F.R. §214.2(k)(5) & 9 FAM 41.81 PN6.

⁴ The full provision states:

It shall be the policy of the Department to process each visa application from an alien classified as an immediate relative or as a K-1 nonimmigrant within 30 days of the receipt of all necessary documents from the applicant and the Immigration and Naturalization Service. . . .

Foreign Relations Authorization Act, Pub. L. No. 107-228, Div. A, § 233, 116 Stat. 1373.

papers submitted therewith, that such alien is ineligible to receive a visa or such other documentation under section 212, or any other provision of law.”

If a consular officer determines that the relationship on which the K-1 petition is based is not bona fide, the consular officer must return the petition to the appropriate USCIS office, through the NVC, with a memorandum providing the specific facts supporting that conclusion. 9 FAM § 41.81 N6.5. Although the Department of State refers to its return of K-1 petitions to USCIS in terms of “revocation,” FAC ¶¶ 46, 89, 128, only immigrant visa petitions may be revoked by USCIS. *See* 8 U.S.C. § 1155; 8 C.F.R. § 205.2. K-1 petitions are petitions for nonimmigrant visas. *See* 8 U.S.C. § 1101(a)(15)(K). USCIS will not reaffirm or reopen returned petitions, and will take no further adjudicatory action on expired petitions. *See* Exhibit A, USCIS web guidance, “Fiance(e) Visas,” (available at <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=640a3e4d77d73210VgnVCM100000082ca60aRCRD&vgnnextchannel=640a3e4d77d73210VgnVCM100000082ca60aRCRD>) (last visited Oct. 12, 2010). Such action does not preclude petitioners from filing another petition. *Id.*

II. PLAINTIFFS’ ALLEGATIONS

A. Overview of Plaintiffs’ First Amended Complaint

On August 26, 2010, Plaintiffs filed their FAC seeking review of alleged contradictory and unlawful practices by USCIS and the Department of State under the INA, federal question jurisdiction under 28 U.S.C. § 1331, the APA, the Mandamus Act, and the Declaratory Judgment Act (“DJA”).⁵ Plaintiffs are each the U.S. citizen petitioner of an alleged fiancée for a K-1

⁵ To the extent that Plaintiffs claim jurisdiction on the basis of the Declaratory Judgment Act, 28 U.S.C. § 2201, that statute does not provide an independent basis for subject matter jurisdiction; it only creates a particular kind of remedy available in actions where the district

nonimmigrant visa. In their complaint, Plaintiffs essentially challenge three aspects of the K-1 petition and visa application process.

First, Plaintiffs appear to challenge consular decisions denying their fiancée's visas and returning the underlying petitions to USCIS. Discussing the consular officer's reasons for denying the K-1 visas, each Plaintiff alleges that "the denial bases . . . evaded the spirit of due process, evidenced a lack of diligence, revealed a willful rendering of substandard performance, and revealed a wanton abuse of power unbefitting of our civilized nation whose Declaration of Independence shunned the autocratic concept of absolute power vested in any one pair of hands. As such, the denial was issued in bad faith." FAC ¶¶ 68, 110, 143. Plaintiffs allege APA and due process violations regarding: (1) the opportunity to rebut consular findings before a petition is returned USCIS; (2) consular decisions to return K-1 petitions to USCIS based on the consular officers' suspicions of fraud, misrepresentation, or ineligibility; (3) consular officers' failures to provide "sufficient written notice supported by the legal and factual basis for the denial and petition return that is not conclusive, speculative, equivocal or irrelevant;" and (4) both consular officers' and USCIS's failure to provide a mechanism for rebutting consular findings. FAC ¶¶ 161-65.

Second, Plaintiffs allege that both the Department of State and USCIS have unlawfully withheld or unreasonably delayed action. Plaintiffs allege that the Department of State failed: (1) to schedule consular interviews within a reasonable period from the date the National Visa

court already has jurisdiction to entertain a suit. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671-72 (1950); *Jarrett v. Roser*, 426 F.2d 213, 216 (9th Cir. 1970). Thus, to be eligible for declaratory relief, Plaintiff must first establish jurisdiction under an independent basis. *Skelly Oil Co.*, 339 U.S. at 671-672. As discussed below, Plaintiffs have failed to otherwise establish jurisdiction; accordingly, the DJA is not applicable.

Center (“NVC”) received K-1 petitions from USCIS; (2) to notify K-1 petitioners and their beneficiaries of the decision to issue the visa or return the petition to USCIS within a reasonable period of time following the visa interview; (3) to issue K-1 visas or return K-1 visa petitions to USCIS within “a reasonable period not to exceed 30 days from the receipt of all necessary documents from the petitioner and beneficiary,” and to deliver the returned K-1 petition to the NVC within such period; and (4) to issue K-1 visas within a reasonable time period following possible reaffirmation by USCIS. FAC ¶¶ 170-72. Plaintiffs allege that USCIS failed: (1) to issue “a notice” to petitioner “within a reasonable period of time not to exceed 30 days from receipt of the returned petition from the State Department,” that provides a petitioner with the legal and factual basis for the consular recommendation that is not “conclusive, speculative, equivocal or irrelevant;” (2) to deliver any reaffirmed K-1 petitions to the Department of State within a reasonable period of time; (3) to issue decisions denying previously approved K-1 petitions within a reasonable period of time – including advising petitions of their appeal right to the USCIS Administrative Appeals Office. FAC ¶¶ 173-75

Finally, Plaintiffs challenge the validity of: (1) USCIS’s regulation that provides a four-month validity period for K-1 petitions as ultra vires; and (2) the Department of State’s alleged practice of placing a “P6C1” marker on a visa beneficiary’s consular record when a consular officer recommends the revocation of a petition because any subsequent revocation would result in a ground of inadmissibility. FAC ¶ 156-59.

B. Plaintiff Dzu Cong Tran

On August 24, 2009, plaintiff Dzu Cong Tran (“Dzu Tran”), a naturalized U.S. citizen, filed a Form I-129F, petition for fiancée, on behalf of Trinh Thi Tuyet Pham (“Ms. Pham”), his

alleged fiancée. FAC ¶¶ 35, 38. USCIS approved the petition on October 27, 2009, with a validity from October 27, 2009 to February 26, 2010. FAC ¶ 41. On November 4, 2009, the NVC issued a letter noting that petition would be forwarded to the U.S. consulate in Ho Chi Minh City, Vietnam. FAC ¶ 42.

On March 9, 2010, the U.S. consulate notified Ms. Pham that it was ready to begin processing the visa, and she was scheduled for an interview on April 14, 2010. FAC ¶ 43. Following the interview with a U.S. consular officer, Ms. Pham was given a letter requesting that on May 12, 2010, she submit a notarized statement and detailed chronology regarding the relationship and certain other biographical information from Plaintiff Dzu Tran. FAC ¶ 44. After the additional documents were submitted, Ms. Pham received a letter denying her request for a visa pursuant to 8 U.S.C. § 1201(g). FAC ¶ 46. The consular officer found that:

- (1) photographs submitted as evidence of the relationship indicated that plaintiff Dzu Tran and Ms. Pham had only spent four or five days together;
- (2) no evidence was submitted regarding an engagement celebration, which contradicts local social and cultural norms, and has been established as one of the key elements of a sham relationship to evade U.S. immigration laws;
- (3) it did not appear that the claimed relationship was ongoing, in part, because Plaintiff Dzu Tran has not returned to visit Ms. Pham since September 2008;
- (4) Ms. Pham was unaware of basic facts regarding plaintiff Dzu Tran's occupation, livelihood and/or worklife, including that Ms. Pham did not know the name of Plaintiff Dzu Tran's company;
- (5) Ms. Pham was unable to provide basic facts regarding the claimed planned marriage in the U.S., she was unaware of the requirement to marry within 90 days of admission to the U.S., and that it appeared that the "relationship is a sham or that [Ms. Pham] has no actual intent to marry within 90 days of admission to the U.S. (or both)."

See FAC ¶¶ 48, 51, 54, 58, 61, 64, 67.

The letter also indicated that the U.S. consulate was returning the petition to USCIS with the recommendation that it be revoked, that revocation would result in Ms. Pham's ineligibility for a visa under 8 U.S.C. § 1182(a)(6)(C)(i), and that USCIS would contact Plaintiff Dzu Tran who would have an opportunity to rebut consular findings concerning the case. FAC ¶¶ 46, 71.

The U.S. consulate returned the visa petition to USCIS on July 31, 2010.⁶ USCIS notified plaintiff Dzu Tran on October 1, 2010, that because the validity period of the visa petition expired pursuant to 8 C.F.R. § 214.2(k)(5), "all USCIS action on this petition is concluded as of the date of this notice." See Exhibit B.

C. Plaintiff Daniel Mai Dinh

On May 8, 2009, Plaintiff Daniel Mai Dinh, a U.S. citizen by birth, filed a Form I-129F, petition for fiancée, on behalf of Vinh Ngoc Vu ("Ms. Vu"), his alleged fiancée. FAC ¶¶ 77, 78, 82. USCIS approved the petition on August 25, 2009, with a validity from August 25, 2009 to December 24, 2009. FAC ¶ 83. On August 31, 2009, the NVC issued a letter noting that petition would be forwarded to the U.S. consulate in Ho Chi Minh City, Vietnam. FAC ¶ 84.

Thereafter, the U.S. consulate notified Ms. Vu that it was ready to begin processing the visa, and she was scheduled for an interview on November 25, 2009. FAC ¶ 85. Following the interview with a U.S. consular officer, Ms. Vu was given a letter requesting that on December

⁶ Plaintiffs allege that a May 19, 2010, response by the consulate to a congressional inquiry was in bad faith and made false and misleading statements because it indicated that "the petition has been returned to [USCIS] where the petition was filed for further examination and possible revocation." FAC ¶ 72. However, Plaintiffs' own recounting of the letter undermines this assertion because, "[t]he letter stated that it could take several months for the petition to be received by USCIS, and that the case was now closed in their office." *Id.*

23, 2009, she submit a notarized statement containing a detailed chronology of the relationship from Plaintiff Dinh. FAC ¶ 87. After the additional documents were submitted, Ms. Vu received a letter denying her request for a visa pursuant to 8 U.S.C. § 1201(g). FAC ¶ 88-89.

The consular officer found that:

- (1) photographs submitted as evidence of the relationship indicated that Plaintiff Dinh and Ms. Vu had only spent three or four days together;
- (2) no evidence was submitted regarding an engagement celebration, which contradicts local social and cultural norms, and has been established as one of the key elements of a sham relationship to evade U.S. immigration laws;
- (3) Plaintiff Dinh's and Ms. Vu's chronologies of the claimed relationship contradicted each other regarding when they were introduced;
- (4) Ms. Vu was unable to provide basic facts regarding the claimed planned marriage in the United States, including the names of guests or the approximate costs, and that it appeared that the "relationship is a sham or that [Ms. Vu] has no actual intent to marry within 90 das of admission to the U.S.";
- (5) Ms. Vu's account of basic facts regarding the claimed relationship were not credible, including her inability to provide basic details (hotel, destination, duration, approximate costs) of the claimed planned honeymoon;
- (6) Ms. Vu was unaware of the requirement to marry within 90 days of admission to the U.S.;
- (7) Ms. Vu was unaware of basic facts regarding Plaintiff Dinh, including his current boss or where he worked previous to his current job.

See FAC ¶¶ 92, 94, 97, 100, 103, 106, 109.

The letter also indicated that the U.S. consulate was returning the petition to USCIS with the recommendation that it be revoked, that revocation would result in Ms. Vu's ineligibility for a visa under 8 U.S.C. § 1182(a)(6)(C)(i), and that USCIS would contact Plaintiff Dinh who

would have an opportunity to rebut consular findings concerning the case. FAC ¶¶ 89, 113.

The U.S. consulate returned the visa petition to USCIS. FAC ¶ 114. USCIS subsequently notified Plaintiff Dinh on June 24, 2010, that because the validity period of the visa petition expired pursuant to 8 C.F.R. § 214.2(k)(5), “all USCIS action on this petition is concluded as of the date of this notice.” *See* Exhibit C.

D. Plaintiff Austin Peter Tran

On October 13, 2009, plaintiff Austin Peter Tran (“Austin Tran”), a U.S. citizen by birth, filed a Form I-129F, petition for fiancée, on behalf of Mai Thanh Nguyen (“Ms. Nguyen”), his alleged fiancée. FAC ¶¶ 119, 121-122. USCIS approved the petition on March 19, 2010, with a validity from March 19, 2010 to July 18, 2010. FAC ¶ 123. The NVC thereafter issued a letter noting that petition would be forwarded to the U.S. consulate in Ho Chi Minh City, Vietnam. FAC ¶ 124.

Thereafter, the U.S. consulate notified Ms. Nguyen that it was ready to begin processing the visa, and she was scheduled for an interview on July 14, 2010. FAC ¶ 125. Following the interview with a U.S. consular officer, Ms. Nguyen was given a letter requesting that on August 11, 2010, she submit a notarized statement containing a detailed chronology of the relationship from Plaintiff Austin Tran. FAC ¶ 126. After the additional documents were submitted, Ms. Nguyen received a letter denying her request for a visa pursuant to 8 U.S.C. § 1201(g). FAC ¶ 127-28. The consular officer found that:

- (1) photographs submitted as evidence of the relationship indicated that Plaintiff Austin Tran and Ms. Nguyen had only spent four or five days together;

- (2) Ms. Nguyen's chronology of the claimed relationship was not credible, including her inability to recall the day when Plaintiff Austin Tran proposed to her;
- (3) Ms. Nguyen was unaware of basic facts regarding Plaintiff Austin Tran's occupation, livelihood, and/or worklife, including that Ms. Nguyen did not know with whom plaintiff Austin Tran resided;
- (4) Ms. Nguyen's account of basic facts regarding the claimed relationship were not credible, including her inability to provide basic details (hotel, destination, duration, approximate costs) of the claimed planned honeymoon;
- (5) Ms. Nguyen's statements were not credible and indicated an attempt to cut off a line of inquiry, including Ms. Nguyen's statement in a notarized affidavit that she had never been the derivative in a different spousal or familial visa petition, when in fact she was the derivative of an I-130 immigrant relative petition filed by her paternal aunt.

See FAC ¶¶ 130, 133, 136, 139, 142

The letter also indicated that the U.S. consulate was returning the petition to USCIS with the recommendation that it be revoked, that revocation would result in Ms. Vu's ineligibility for a visa under 8 U.S.C. § 1182(a)(6)(C)(i), and that USCIS would contact Plaintiff Austin Tran who would have an opportunity to rebut consular findings concerning the case. FAC ¶¶ 128, 146.

The U.S. consulate returned the visa petition to USCIS, and USCIS subsequently notified Plaintiff Austin Tran on October 1, 2010, that because the validity period of the visa petition expired pursuant to 8 C.F.R. § 214.2(k)(5), "all USCIS action on this petition is concluded as of the date of this notice." See Exhibit D.

III. Standards of Review

A. Dismissal Under Fed. R. Civ. P. 12(b)(1)

Plaintiffs have the burden of establishing the jurisdiction of this Court. *See Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989) (noting that a federal court is presumed to lack subject matter jurisdiction until the contrary affirmatively appears). A motion to dismiss under Rule 12(b)(1) tests the subject matter jurisdiction of the court. *See, e.g., Savage v. Glendale Union High School*, 343 F.3d 1036, 1039-40 (9th Cir. 2003), *cert. denied*, 541 U.S. 1009 (2004). A jurisdictional challenge under Rule 12(b)(1) may be made either on the face of the pleadings or by presenting extrinsic evidence. *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003). Even where a plaintiff's pleadings are technically sufficient to establish some basis of jurisdiction, a Rule 12(b)(1) motion may allege that there is an actual lack of jurisdiction. *See, e.g., Thornhill Publ'g Co. v. Gen. Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979); *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987). Where a suit is brought by a plaintiff without Article III standing, it should be dismissed under Rule 12(b)(1). *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 109-10 (1998); *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1140 (9th Cir. 2003).

B. Dismissal Under Fed. R. Civ. P. 12(b)(6)

Pursuant to Fed. R. Civ. P. 12(b)(6), a complaint must be dismissed for failure to state a claim upon which relief can be granted. A motion to dismiss under Rule 12(b)(6) "tests the legal sufficiency of a claim." *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal may be based on the lack of a cognizable legal theory or if a plaintiff fails to plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 569

(2007); *Balistreri v. Pacifica Police Dep't.*, 901 F.2d 696, 699 (9th Cir. 1988). When assessing a 12(b)(6) motion based on the facts, allegations of material fact are taken as true and construed in the light most favorable to the non-moving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). However, the Court need not accept as true pleadings that are no more than legal conclusions or the “formulaic recitation of the elements” of a cause of action. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1940. “Determining whether a complaint states a plausible claim for relief . . . [is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Id.* at 1950.

IV. ARGUMENT

A. This Court Should Dismiss Plaintiffs’ Challenges To The Denial Of Their Fiances’ K-1 Visas And Related Due Process Claims For Lack of Subject Matter Jurisdiction And Failure To State A Claim.

1. Consular Decisions On Visa Applications Are Immune From Review.

The Ninth Circuit has consistently affirmed the doctrine of consular nonreviewability as a bar against courts substituting their own judgment for that of consular officials either to grant or deny visas. *See, e.g., Bustamante v. Mukasey*, 531 F.3d 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 F.2d 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 F.2d 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 F.2d at 971. The exercise of this power is not subject to judicial review or intervention. *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972); *Li Hing of Hong Kong, Inc.*, 800 F.2d at 971.

In holding that courts have no jurisdiction to review consular visa denials, the Ninth Circuit explained:

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, 647 F.2d at 30 (internal quotations and citations omitted); *Capistrano v. Department of State*, 267 Fed. Appx. 593, 594 (9th Cir. 2008).

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 U.S.C. §§ 1104(a), 1201(a); *Ventura*, 647 F.2d at 30. The legislative history establishes that before the enactment of the INA, Congress considered and rejected the suggestion that the consular officer's decision be administratively or judicially reviewable:

Consular decisions – Although many suggestions were made to the committee with a view toward creating in the Department of State a semijudicial board, similar to the Board of Immigration Appeals, with jurisdiction to review consular decisions pertaining to the granting or refusals of visas, the committee does not feel that such body should be created by legislative enactment, nor that the power, duties and functions conferred upon consular officers by the instant bill should be made subject to review by the Secretary of State

Ventura, 647 F.2d at 30-31, citing H. Rep. No. 82-1365, *reprinted at* 1952 U.S.C.C.A.N. 1653, 1688 (1952).

The doctrine of consular nonreviewability has withstood efforts to distinguish or overcome it on many grounds, including allegations that a consular visa decision was erroneous, contrary to law, or arbitrary and capricious. Courts have held that a consular officer's visa determination is not subject to review, even if: (1) the officer allegedly failed to follow Department regulations, *Burrafato v. Department of State*, 523 F.2d 554, 556 (2d Cir. 1975); (2) the applicant challenges the validity of the regulations on which the decision was based, *Ventura*, 647 F.2d at 30 (9th Cir. 1981); (3) the decision was alleged to have been based on a factual or legal error or was contrary to the INA, *Centeno v. Shultz*, 817 F.2d 1212, 1213 (5th Cir. 1987); *Loza-Bedoya v. INS*, 410 F.2d 343 (9th Cir. 1969); *Grullon v. Kissinger*, 417 F. Supp. 337 (E.D.N.Y. 1976), *aff'd without op.*, 559 F.2d 1203 (2d Cir. 1977); (4) the applicant claims the decision is reviewable under the APA, *Romero v. Consulate of Barranquilla*, 860 F. Supp. 319, 322, 324 (E.D. Va. 1994); *Haitian Refugee Center v. Baker*, 953 F.2d 1498, 1507 (11th Cir. 1992); or (5) the applicant challenges the reasonableness of the determination, *U.S. ex rel. London v. Phelps*, 22 F.2d 288, 290 (2d Cir. 1927); *Hermina Sague v. United States*, 416 F. Supp. 217, 220-21 (D.P.R. 1976).

Further, the “characteriz[ation] of the complaint as one challenging the process followed by the consulate rather than its ultimate decision does not exempt the case from th[e] well-settled doctrine” of consular nonreviewability. *Capistrano*, 267 Fed. Appx. at 594. The Ninth Circuit explained that “[a]t its core, the relief sought . . . would require the [] consulate to revisit its decision denying the visa applications.” *Id.*; *see also Wong v. Leavitt*, No. 07-cv-2019, 2008 WL

2774448, *2 (E.D. Cal. Jun. 27, 2008) (dismissing case on consular nonreviewability grounds where plaintiffs argued that they challenged only the process, not the Consulate's decision).

Accordingly, Plaintiffs' invitation for this Court to interfere with the visa-issuing process must fail. Their complaint should be dismissed for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1).

2. Plaintiffs Lack Standing and Fail to State a Claim That Would Allow Limited Review of the Consular Decision Under *Bustamante*.

In *Bustamante*, the Ninth Circuit noted "a limited exception to the doctrine [of consular nonreviewability] where the denial of a visa implicates the constitutional rights of American citizens." 531 F.3d at 1061. In *Bustamante*, the Ninth Circuit looked to *Mandel* for guidance in reviewing an allegation of a due process violation arising out of the denial of an alien's visa on grounds the consulate had reason to believe the alien was a drug trafficker. *Bustamante*, 531 F.3d at 1061. Specifically, Ms. Bustamante asserted she had a protected liberty interest in her marriage that gave rise to a right to constitutionally adequate procedures in the adjudication of her husband's visa application. *Id.* at 1062.

Plaintiffs appear to challenge the denial of their fiancées' visas on two grounds. First, each plaintiff alleges that the bases for the denials "evaded the spirit of due process," and that the denials were "issued in bad faith." FAC ¶¶ 68, 110, 143. Second, plaintiffs allege APA and due process violations regarding the process of consular decisions and allege that: (1) Plaintiffs are improperly denied an opportunity to rebut consular findings to deny visas and to return petition to USCIS; (2) consular officers lack sufficient reasons to return K-1 petitions to USCIS; and (3) the notice given by consular officers for denying visa and returning visa petitions to USCIS is insufficient. FAC ¶¶ 161-65. Plaintiffs' efforts to challenge the denial of their fiancées visas

should fail because: (1) Plaintiffs lack constitutional standing, and (2) Plaintiffs fail to state a claim to allow even the limited review discussed in *Bustamante*.

a. Plaintiffs Lack Standing To Raise Their Due Process Claims Because There Is No Fundamental Right To Have A Marriage Ceremony In The United States.

In order to have standing to bring suit, a plaintiff has the burden of establishing: “(1) an ‘injury in fact’ that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury must be fairly traceable to the challenged action of the defendant; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 46 (1976) (citations omitted); *Central Delta Water Agency v. United States*, 306 F.3d 938, 947 (9th Cir. 2002).

As a threshold requirement to any due process claim, every plaintiff must show that he has a protected liberty interest. See *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972) (“[t]he requirement of procedural due process apply only to the deprivation of interests encompassed by the [Due Process Clause’s] protection of liberty and property”); *Nunez v. City of Los Angeles*, 147 F.3d 867, 871 (9th Cir. 1998) (due process claimant “must, as a threshold matter, show government deprivation of life, liberty, or property”). To have a protectable property or liberty interest in a benefit, “a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.” *Roth*, 408 U.S. at 577; *Roberts v. Spaulding*, 783 F.2d 867, 870 (9th Cir. 1986) (“A mere expectation of receiving a benefit is not enough to create a protected interest”).

Additionally, a statutory grant of a procedural right cannot itself give rise to a liberty interest.

See Ohio Adult Parole Authority v. Woodard, 523 U.S. 272, 280 n.2 (1998); *Olim v. Wakinekona*, 461 U.S. 238, 250 (1983) (an “expectation of receiving process is not, without more, a liberty interest protected by the Due Process Clause”); *FDIC v. Henderson*, 940 F.2d 465, 475 (9th Cir. 1991) (“[A] substantive property right cannot exist exclusively by virtue of a procedural right”).

Here, Plaintiffs allege that they have a protected interest in “the right to marry,” and “to have their fiances join them in the United States so that they may marry.” FAC ¶¶ 168, 176. 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 U.S. 494, 499 (1977) (plurality opinion). However, the Supreme Court’s rulings regarding a “right to marriage” focus on infringements to the actual ability to establish or dissolve a marriage. *See Zablocki v. Redhail*, 434 U.S. 374, 387 n.12 (1978) (distinguishing a case that did not interfere with the freedom to marry because “Social Security provisions placed no direct legal obstacle in the path of persons desiring to get married, and . . . there was no evidence that the laws significantly discouraged, let alone made ‘practically impossible,’ any marriages.”).

“There 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 F.3d 238, 242 (1st Cir. 2009) (dismissing challenge to a consular decision denying a K-1 visa for lack of standing, and finding that the petitioner there was free to marry his fiancée “in China, in a third country, or possibly, in the United States by proxy.”). In an analogous decision, the Ninth Circuit Court of Appeals has refused to recognize a “right to family unity” to reside in the United States “simply because other members of their

family are citizens or lawful permanent residents.” *De Mercado v. Mukasey*, 566 F.3d 810, 816 (9th Cir. 2009); *cf. Bustamante, et al. v. Mukasey et al.*, 531 F.3d 1059, 1062 (9th Cir. 2008) (recognizing that a U.S. citizen *spouse* would have standing to challenge a consular officer’s denial of her Mexican husband’s visa, but not addressing the issue of fiancée petitions) (citations omitted) (emphasis added).

Accordingly, because Plaintiffs and their fiancées have not entered into a marital relationship that gives rise to standing, and because Defendants’ actions do not infringe on Plaintiffs’ ability to marry their fiancées elsewhere, the Court should dismiss Plaintiffs’ due process claims for lack of standing. *See Lujan*, 504 U.S. at 560-61.

b. Alternatively, Plaintiffs’ Unsupported Allegations of Bad Faith Are Insufficient To State A Claim – The Consular Officers’ K-1 Visa Refusals Were Facially Legitimate and Bona Fide.

Even if the Court finds that Plaintiffs have standing to attack the decisions denying their fiancées’ visas pursuant to alleged due process violations, the Court should dismiss those claims for failing to state a claim. Where a valid due process claim regarding a consular officer’s denial of a visa is alleged, the Ninth Circuit has held that “[a]s long as the reason given is facially legitimate and bona fide the decision will not be disturbed.” *Bustamante*, 531 F.3d at 1062.

In *Bustamante*, the Ninth Circuit held that a limited exception to consular non-reviewability exists where an immigrant visa denial implicates a U.S. citizen’s constitutional rights. *Id.* at 1061. Ruling in the Bustamantes’ favor, the Ninth Circuit looked to *Kleindienst*, 408 U.S. at 753, for guidance, and found that when a U.S. citizen spouse raises a constitutional challenge to a visa denial, then that party is entitled to a limited judicial inquiry regarding the

reason for the denial. *Bustamante*, 531 F.3d at 1061-62. So long as the reason given for the visa denial is facially legitimate and bona fide, the Court continued, the decision stands. *Id.* at 1062.

Here, Plaintiffs fail to state a claim because the consular officers had facially legitimate reasons to deny the fiancées' K-1 visas. In each decision, the consular officers denied the visas pursuant to 8 U.S.C. § 1201(g), because it appeared to them that the fiancées were not eligible to receive K-1 visas. FAC ¶¶ 46, 88-89, 127-28. Department of State regulations provide that an officer can deny a petition under 8 U.S.C. §§ 1182(a) or 1201(g). *See* 22 C.F.R. § 42.81(a). As such, the consular officers were authorized to deny the K-1 visas. Thus, because the consular officers denied the fiancées' K-1 visas in accordance with 22 C.F.R. § 42.81(a), the decisions were facially legitimate. *See Bustamante*, 531 F.3d at 1062; *see also Din v. Clinton*, No. 10-0533, 2010 WL 2560492 at * 3 (N.D. Cal. June 22, 2010) (denial of visa petition under 8 U.S.C. § 1182 "is a facially legitimate reason").

Moreover, Plaintiffs fail to allege facts, as opposed to conclusory allegations, that the consular officers acted in bad faith. *See* FAC ¶¶ 45-76, 88-118, 127-46. The complaint is silent regarding factual allegations of bias, gross misconduct, or other actions by the consular officers that might support the allegation of bad faith. Absent such factual allegations, Plaintiffs cannot show that the consular officers' refusals were in bad faith and not bona fide. *See Amer. Acad. of Religion v. Napolitano*, 573 F.3d 115, 137 (2d Cir. 2009) (holding that a consular officer's facially legitimate decision was non-reviewable "in the absence of a well-supported allegation of bad faith, which would render the decision not bona fide"); *Bustamante*, 531 F.3d at 1062-63 ("[i]t is not enough to allege that the consular official's information was incorrect. . . . the allegation that the Consulate was mistaken about [the alien's] involvement with drug trafficking,

and offered to make a deal with [the alien] in the basis of this mistaken belief, fails to state a claim upon which relief could be granted."); *see also Din*, 2010 WL 2560492 at * 4, citing *Iqbal*, 129 S. Ct. at 1949 (“while the facts that Din has pled may be ‘consistent’ with a finding of bad faith; they do not cross the line from possibility to plausibility of entitlement to relief.”).

Finally, even if the Court finds that Plaintiffs may pursue their claims challenging the decisions of the consular officers, the Court should dismiss Defendants Clinton, Jacobs, and Bennett from this action. These individuals were improperly named because “it is uncontested that only the State Department consular officers have the power to issue visas.” *See Patel v. Reno*, 134 F.3d 929, 933 (9th Cir. 1997). Not even the Secretary of State has the power to review a consular officials’ visa decision. *Id.*, citing *Li Hing of Hong Kong, Inc.*, 800 F.2d at 971. Because Defendants Clinton, Jacobs, and Bennet are not consular officers, they should be dismissed.

B. This Court Should Dismiss Plaintiffs’ Challenges To Alleged Improper Agency Actions In The Second Claim For Relief Because Plaintiffs Seek to Compel Actions That Are Not Required By Law And Are Not Final.

The APA, by its terms, provides a right to judicial review of all “final agency actions for which there is no other adequate remedy in a court.” 5 U.S.C. § 704.⁷ 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 U.S.C. § 706(2)(A). Standing to raise a

⁷ The Ninth Circuit has “recognized that mandamus relief and relief under the APA are ‘in essence’ the same,” and “as a result,” has elected “analyze the [mandamus] claim under the APA where there is an adequate remedy under the APA.” *R.T. Vanderbilt Co. v. Babbitt*, 113 F.3d 1061, 1065 (9th Cir. 1997). When analyzed on its own, mandamus relief is an extraordinary remedy, and “exists when a plaintiff has a clear right to relief, a defendant has a clear duty to act and no other adequate remedy is available.” *Piledrivers’ Local Union No. 2375 v. Smith*, 695 F.2d 390, 392 (9th Cir. 1982).

claim under the APA exists “only if the plaintiff can show that 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 F.2d 1508, 1517 (9th Cir. 1992) (citations omitted). 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 U.S. 154, 178 (1997).

The APA also allows courts to compel agency action that is unlawfully withheld or unreasonably delayed. *See* 5 U.S.C. § 706(1). However, “the only agency action that can be compelled under the APA is action legally *required*.” *See Norton v. Southern Utah Wilderness Alliance (“SUWA”)*, 542 U.S. 55, 63 (2004) (emphasis in original); *see also San Francisco Baykeeper v. Whitman*, 297 F.3d 877, 885-86 (9th Cir. 2002) (finding there could be no “unreasonable delay” under the APA where EPA did not have a present statutory duty to act). Claims alleging an agency’s “failure to regulate” “must be based upon a clearly imposed duty to take some discrete action.” *W. Watersheds Project v. Matejko*, 468 F.3d 1099, 1110 (9th Cir. 2006).

First, Plaintiffs claim that they should have the opportunity to rebut consular decisions to return K-1 petition to USCIS, and that the standards used by the Department of State when deciding to return K-1 petitions were improper. FAC ¶¶ 161-64. However, Plaintiffs provide no authority requiring that K-1 petitioners and their fiancées have the opportunity to rebut a consular officer’s decision to return a petition to USCIS. FAC ¶ 161. Because such actions are not subject to a clearly imposed duty to act, the APA does not provide a basis of jurisdiction. *See W.*

Watersheds Project, 468 F.3d at 1110. Moreover, a consular officer's decision to return a K-1 petition to USCIS is not a final agency action because it determines no rights or obligations, and there are no legal consequences for petitioners or their fiancées as a result of the decision to return a K-1 petition to USCIS. *See Bennett*, 520 U.S. at 178. Rather the consular return of visa petitions involve only *recommendations* from the consular officer. *See* 9 FAM § 41.81 N6.5. Further, where USCIS has ultimately determined not to take any further action on the K-1 petition returns, and to let them expire in accordance with 8 C.F.R. § 214.2(k)(5), *see* exhs. B, C, & D, then Plaintiffs cannot demonstrate that their alleged injuries stem from allegations of improper conduct regarding the process of returning K-1 petitions to USCIS. *See Idaho Conservation League*, 956 F.2d at 1517.

Second, Plaintiffs allege that the Department of State fails to provide notice denying visa petitions that is "not conclusive, speculative, equivocal or irrelevant," and claim that the Department of State and USCIS must provide mechanisms for Plaintiffs' fiancées to rebut consular decisions refusing their visas. FAC ¶¶ 164-65.⁸ Plaintiffs can demonstrate no requirement that USCIS provide a mechanism for rebutting consular findings because USCIS has no authority over a consular officer's decision regarding visa issuance. FAM ¶ 165; *see Patel*, 134 F.3d at 93 ("[I]t is uncontested that only the State Department consular officers have the power to issue visas."). Plaintiffs can demonstrate no requirement that the Department of State provide mechanisms to rebut consular findings because, as the Ninth Circuit found in *Ventura*,

⁸ These allegations cut against the heart of the doctrine of consular nonreviewability, addressed above. However, even if the Court finds that plaintiffs' claims under the APA are not precluded by the doctrine of consular nonreviewability, plaintiffs claims are still subject to dismissal, as discussed here.

Congress considered and rejected the suggestion that consular officer's decisions be administratively or judicially reviewable. *Ventura*, 647 F.2d at 30-31 citing H. Rep. No. 82-1365, 1952 U.S.C.C.A.N. 1688.⁹ Moreover, petitioners whose fiancées are denied K-1 visas are not precluded from filing new K-1 petitions with new evidence that might convince a consular officer to issue the K-1 visas. *See* Exhs. A, B, C, & D. Finally, Plaintiffs can demonstrate no requirement that a consular officer's notice denying visa issuance be "not conclusive, speculative, equivocal or irrelevant." FAC ¶ 164. A consular officer's refusal to issue a visa is legally valid if "it appears to the consular officer . . . that such alien is ineligible to receive a visa" 8 U.S.C. § 1201(g); 22 C.F.R. 41.121(a) ("refusal must be on legal grounds," which include 8 U.S.C. § 1201(g)). Thus, by the nature of the discretionary authority granted the consular officer by statute, the refusal of a visa could involve a number of factors that do not amount to "substantial evidence."¹⁰ Accordingly, where Plaintiffs cannot show that the actions that they seek to compel are required by law, and where those actions are not final, Plaintiffs' claims are subject to dismissal. *See W. Watersheds Project*, 468 F.3d at 1110.

⁹ The limited circumstances which allow the presentation of additional evidence pursuant 22 C.F.R. § 41.121(c) are not applicable to this case. Such process is available only when the ground of ineligibility may be overcome by additional evidence, and requires that an applicant indicate the intention to submit such evidence. 22 C.F.R. § 41.121(c). Neither factor is present here.

¹⁰ Plaintiffs allegation that there is a prohibition on determinations that are "conclusive, speculative, equivocal or irrelevant," appears to derive from a Department of State cable that provides policy guidance to consular officers regarding K-1 petition returns. The guidance is irrelevant here because it does not recommend extension of the standard that Plaintiffs cite to consular decisions regarding visa issuance. *See* February 2004, Cable from the Secretary of State to all diplomatic and consular posts, SOP 61: Guidelines and Changes for Returning DHS/USCIS Approved IV and NIV Petitions, available at http://travel.state.gov/visa/laws/telegrams/telegrams_1388.html (last visited Oct. 9, 2010).

C. This Court Should Dismiss Plaintiffs' Allegations Of Alleged Unreasonable Delays By The Department of State And USCIS As Moot And Because The Deadlines For The Actions Plaintiffs Seek To Compel Are Not Required By Law.

Plaintiffs' third claim for relief alleges unlawful delays by the Department of State regarding: the scheduling of K-1 visa interviews, the issuance of final decisions on visa applications, and the notification of the decision to return K-1 petitions to USCIS. FAC ¶¶ 170-172. The complaint also alleges delays by USCIS regarding: issuance of notices regarding returned petitions to petitioners, delivery of potentially reaffirmed petitions to the Department of State, and issuance of potential denials of visa petitions following return. FAC ¶¶ 170-173.

The Court should dismiss these allegations because each of the alleged delays involves agency action that has already been completed. In order to have standing to bring suit, a plaintiff has the burden of establishing: "(1) an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury must be fairly traceable to the challenged action of the defendant; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *See Lujan*, 504 U.S. at 560-61; *Central Delta Water Agency*, 306 F.3d at 947. The satisfaction of the remedy sought by a plaintiff may remove an issue from the "case or controversy" requirement of Article III of the Constitution, and result in the dismissal of the claim as moot. *See Thomas v. Anchorage Equal Rights Commission*, 220 F.3d 1124 (9th Cir. 2000); *Cooney v. Edwards*, 971 F.2d 345, 346 (9th Cir. 1992).

Here, each fiancées' visa interview has been scheduled and held, final consular decisions on the visas have been issued, the K-1 petitions have been returned to USCIS, and USCIS has determined that it will take no further action on the K-1 petitions because they are no longer valid

pursuant to 8 C.F.R. § 214.2(k)(5). *See* exhs. B, C, & D. Accordingly, Plaintiffs can receive no relief through a favorable decision by this Court, and the claims alleged in their third claim for relief are moot. *See Thomas*, 220 F.3d at 1124.

Additionally, review of the delays alleged by Plaintiffs is not appropriate because the deadlines for the actions plaintiffs seek to compel are not required by law. The APA allows courts to compel agency action that is unlawfully withheld or unreasonably delayed. *See* 5 U.S.C. § 706(1). However, “the only agency action that can be compelled under the APA is action legally *required*.” *See SUWA*, 542 U.S. at 63 (emphasis in original); *see also San Francisco Baykeeper*, 297 F.3d at 885-86.

Plaintiffs claims appear to revolve around one particular statutory provision that only serves as a statement of policy, and is inapplicable to the actions the plaintiffs seek to compel. Plaintiffs allege that the intent of Congress is “that United States citizens be given preferential treatment in terms of accelerated adjudication.” *See, e.g.*, FAC ¶ 170, citing Pub. L. 107-222, Div. A, § 223, 116 Stat. 1373. The actual language of that note provides that:

It shall be the policy of the Department of State to process immigrant visa applications of immediate relatives of United States citizens and nonimmigrant K-1 visa applications of fiances of United States citizens within 30 days of the receipt of all necessary documents from the applicant and the Immigration and Naturalization Service.

Pub. L. 107-222, Div. A, § 223, 116 Stat. 1373.

Asked to interpret the enforceability of a similar statutory provision that began with “[i]t shall be the policy of,” the Supreme Court has found that such language does not “create a cause of action or any judicially enforceable individual rights.” *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 455 (1988) (discussing enforceability of policy provision in the

American Indian Religious Freedom Act (“AIRFA”)); *see also Henderson v. Terhune*, 379 F.3d 709, 715 (9th Cir. 2004) (stating that “AIRFA is simply a policy statement that is judicially unenforceable”); *Winnemem Wintu Tribe v. U.S. Dept. of Interior*, No. CIV. 2:09-cv-01072, -- F. Supp. 2d ----, 2010 WL 2824941, *20 (E.D. Cal. July 16, 2010).

Thus, contrary to Plaintiffs’ allegations, the provision in question is an unenforceable policy statement that relates only to the Department of State, only the processing of nonimmigrant K-1 visa applications – not petitions – and only applies when all necessary documents have been received from both the applicant and the INS. The allegations in Plaintiffs’ third claim for relief relate, in part, to the processing of K-1 petition returns. FAC ¶¶ 171-75. Even if the provision in question were enforceable, it does not require Defendants to take the actions identified by plaintiffs in the time specified by Plaintiffs. In fact, courts have found:

[no] statutory language obligating the INS to approve or reject petitions returned by consulate official If the INS has no obligation to act on the returned petition at all, it certainly has no obligation to act within a certain period of time.

Luo v. Coultice, 178 F. Supp. 2d 1135, 1140 (C.D. Cal. 2001).

Similarly, Plaintiffs’ allegations regarding alleged delays of the scheduling of interviews after petitions are received at the NVC ignore the requirement that the thirty-day objective runs from the receipt of all necessary documents – which does not occur until the visa interview or thereafter in most cases. *See* FAC ¶ 170; 9 FAM § 41.81 PN3.4. Finally, Plaintiffs fail to state a claim with regard to consular officer’s alleged failure to issue a decision within thirty-days of receiving all necessary documents because plaintiffs’ allegations reflect that consular determinations were actually made within that time period. FAC ¶¶ 44-45, 87-88, 126-27.

Accordingly, this court should dismiss the claims in Plaintiffs’ third cause of action.

D. The Regulation Establishing A Four-Month Validity Period For K-1 Petitions Is Entitled To *Chevron* Deference, And Is Not Ultra Vires.

This Court should dismiss Plaintiffs’ challenge to ultra vires nature of USCIS’s four-month validity period for K-1 petitions – a regulations that was first promulgated in 1970. The regulation is entitled to *Chevron* deference, and Plaintiffs therefore fail to state a claim as a matter of law. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 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 Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) (quoting *Chevron*, 467 U.S. at 843). If, after conducting such an analysis, the court concludes that Congress has not addressed the issue, the court “must respect the agency’s construction of the statute so long as it is permissible.” *Id.* at 130 (citing *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999)). If a statute is ambiguous, and if the implementing agency’s construction is reasonable, *Chevron* requires a federal court to accept the agency’s construction of the statute, even if the agency’s reading differs from what the court believes is the best statutory interpretation. *Chevron*, 467 U.S. at 843-844, n.11. Here, Congress has not spoken on the precise question at issue – the validity period of a K-1 petition. *See* 8 U.S.C. § 1101(a)(15)(K)(i); 1184(d). The question then turns to whether the agency’s construction of the statute is permissible. *Id.*

Because USCIS’s regulations are permissible as a matter of law, the Court should dismiss Plaintiffs’ claims. Congress has provided that “[t]he 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 proscribe.” 8 U.S.C. § 1184(a). Additional statutory authority exists to “establish such regulations . . . ; and perform other acts as he deems necessary for carrying out his authority under the provisions of this chapter.” 8 U.S.C. § 1103(a)(3).

Although Congress has provided no specific authority limiting the validity period of approved visa petitions,¹¹ Congress has set ninety-day time limit for the alien fiancée of a U.S. citizen admitted to the United States on a K-1 visa marry their U.S. citizen fiancée. *See* 8 U.S.C. § 1101(a)(15)(K)(i). However, in those cases where K-1 petitions are returned to USCIS, USCIS lacks the authority to revoke the petitions. Although Congress has provided authority to revoke certain approved immigrant visa petitions, K-1 petitions are nonimmigrant petitions not subject to revocation authority. *See* 8 U.S.C. § 1155 (providing authority to revoke immigrant visa petitions approved under 8 U.S.C. § 1154); 8 C.F.R. § 205.2 (same). In fact, there is no authority regarding the revocation of K-1 petitions.

Accordingly, absent the four-month validity period established for K-1 petitions, petitions returned to USCIS would remain approved, and fiancées could attempt to return to the consulate months or years later to seek a visa. Such a result does not agree with Congress’s express intent to have immigrant fiancées, who are in bona fide relationships, formalize their marriages quickly. Because the four-month validity period for K-1 petitions mirrors Congress’s intent to allow U.S. citizens and their fiancées to remain together while ensuring that they have a bona fide attempt to

¹¹ As previously discussed, there is also no authority regarding action on visa petitions upon their return to USCIS. *See Luo v. Coultime*, 178 F. Supp. 2d 1135, 1140 (C.D. Cal. 2001).

formalize their relationship, the Court should dismiss Plaintiffs' claim that USCIS's regulations are ultra vires.¹²

F. This Court Should Dismiss Plaintiffs' Challenge To The Department of State's Use of P6C1 Markers Because They, Nor Their Fiances, Have Been Injured, And The Use of the Marker Is Not A Final Agency Action.

As part of Plaintiffs' first claim for relief, plaintiffs allege that 9 FAM § 40.63 N10.1 "must be declared 'not in accordance with law' under 5 U.S.C. § 706(2)(A), and in excess of the agency's 'statutory jurisdiction, authority' or 'statutory right' within the meaning of 5 U.S.C. § 706(2)(C). FAC ¶ 159. The policy in question provides that were a consular officer find what they believe to be misrepresentation with regard to a family-based immigrant visa petition, the consular officer "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 N.10.1. 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 N.10.1, results in a "permanent misrepresentation bar to any future immigration possibility," if USCIS revokes the petition. FAC ¶ 158.

The Court should dismiss Plaintiffs' claims because use of the P6C1 marker is not a final agency action. By Plaintiffs' own words, a consular officer's use of a P6C1 marker is not a final agency action, it is merely a notation in a beneficiary's visa record. FAC ¶ 158. Absent the

¹² Further, the reasonableness of the regulation is supported by the fact that the regulations in question do not serve as an absolute bar, and the four-month validity period may be extended by the Department of State or USCIS. *See* 8 C.F.R. § 214.2(k)(5). Here, it appears that the petitions of Plaintiffs Dzu Tran and Austin Tran were implicitly revalidated to allow for adjudication of their K-1 visa applications. USCIS has already adjudicated the K-1 petitions once, and unlike the Department of State, which had yet to act, USCIS's application of the regulation allow visa petitions to expire where no further actions will be taken.

revocation of the underlying petition, the notation has no effect. *See, e.g.*, 9 FAM § 40.63 N10.1. Accordingly, the Court lacks jurisdiction to review a consular officer's use of the P6C1 marker because use of the marker serves an administrative function, determines no rights or obligations, and there are no legal consequences for petitioners or their fiancées as a result of any use of the P6C1 marker. *See Bennett*, 520 U.S. at 178.

The Court should also dismiss Plaintiffs' claims for lack of standing. The policy in question specifically discusses immigrant visa petitions and the revocation thereof. However, the K-1 petitions at issue in the present case are nonimmigrant visa petitions, and USCIS lacks the authority to revoke such petitions. Accordingly, even if USCIS had the authority to revoke the K-1 petitions at issue, where USCIS has determined not to take any further action on the K-1 petition returns, and to let them expire in accordance with 8 C.F.R. § 214.2(k)(5), exhs. B, C, & D, then Plaintiffs cannot demonstrate that their alleged injuries stem from allegations of improper conduct regarding the implementation and application of 9 FAM § 40.63 N10.1. *See Idaho Conservation League*, 956 F.2d at 1517.

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CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss should be granted.

Dated this 12th day of October, 2010

Respectfully submitted,

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