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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.

**DEFENDANTS’ OBJECTIONS TO
FINDINGS AND RECOMMENDATION**

I. Introduction

Plaintiffs' First Amended Complaint ("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' ("USCIS") procedures for returning previously approved K-1 petitions to USCIS following a consular officer's refusal to issue a K-1 visa. Defendants filed a motion to dismiss Plaintiffs' FAC in its entirety pursuant to Federal Rules of Civil Procedures 12(b)(1) and 12(b)(6). Following a November 18, 2010, hearing on Defendants' motion, Magistrate Judge Stewart issued Findings and Recommendation (Doc. No. 29) (F&R), dated Dec. 3, 2010.

The F&R recommends that Defendants' motion to dismiss be granted as to Plaintiffs' claims: (1) that USCIS's regulations establishing a four-month validity period for K-1 petitions are ultra vires; (2) "alleging a denial of due process and violations of the Administrative Procedure Act ("APA") by the State Department for denying K-1 visas and returning K-1 petition to the USCIS"; (3) alleging unreasonably delay in the processing of K-1 petitions and K-1 visas; and (4) seeking relief under the Mandamus Act and Declaratory Judgment Act related to the above. F&R at 28. Defendants concur with these findings.

The F&R also recommends that Defendants' motion to dismiss be denied as to Plaintiffs' claims: (1) challenging the Department of State's use of a "P6C1 marker" to identify consular officer's concerns about material misrepresentation; (2) alleging that the Department of State and USCIS violated the APA "by failing to provide a reasonable period to rebut consular findings," and failing to "provide an opportunity to rebut consular findings"; and (3) seeking relief under the Mandamus Act and Declaratory Judgment Act related to the above. F&R at 28. Defendants

respectfully submit their objections to these findings.¹

II. Defendants Object To The Recommendation That The Court Has Jurisdiction Over Plaintiffs' Allegations That USCIS And The Department of State Failed To Provide An Opportunity And A Reasonable Period To Rebut Consular Findings

In order to state a claim under the APA, Plaintiffs must demonstrate that the actions they seek to compel are legally required. *See Norton v. Southern Utah Wilderness Alliance* (“*SUWA*”), 542 U.S. 55, 63 (2004) (emphasis in original); *see also W. Watersheds Project v. Matejko*, 468 F.3d 1099, 1110 (9th Cir. 2006) (claims alleging an agency’s “failure to regulate” “must be based upon a clearly imposed duty to take some discrete action.”). Here, Plaintiffs seek to compel Defendants to allow them the opportunity to rebut: (1) consular officers’ decisions to refuse to issue K-1 visas, and (2) consular officers’ decisions to return K-1 petitions to USCIS with a recommendation that they be revoked.

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

¹ Defendants maintain that there is no jurisdiction under Mandamus because 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). Similarly, 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 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).

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). The F&R eliminates this distinction and gives an overbroad application to the refusal notices issued by the Department of State to Plaintiffs. Those notices simply informed Plaintiffs that the consular officer refused to issue a K-1 visa, **and** that “the reviewing officer has decided that the petition should be returned to the [USCIS] with the recommendation that it be revoked. . . .” F&R at 15 (emphasis added). The notices also stated that “[w]hen USCIS receives the returned petition, they will contact the petitioner, who will have an opportunity to rebut consular findings concerning this case.” *Id.* Based on this language, the F&R finds that “. . . the denial letters . . . may describe the intended review procedure for denial of a K-1 visa.” *Id.* The F&R concludes that “[a]ssuming the truth of plaintiffs’ allegations in the context of various regulations and provisions of the FAM, plaintiffs allege a duty based on 22 C.F.R. § 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.” *Id.* at 19.² But these notices do not create a procedural right to rebut a consular refusal. Indeed, 22 C.F.R. § 42.81(e) applies only to the rebuttal of the denial of immigrant visas. It does not apply to the denial of non-immigrant visas or to the return of visa petitions to USCIS.

² Plaintiffs argued that 22 C.F.R. § 42.81(e) imposes a duty on Defendants to reconsider consular refusals of K-1 visas. *Opp.* at 12. Defendants argued 22 C.F.R. § 42.81(e) was not applicable to K-1 non-immigrant visas, and that the proper regulation to apply to the Department of State’s consideration of evidence rebutting K-1 visa refusals is 22 C.F.R. § 41.121(c), which makes the Department of State’s consideration of rebuttal evidence permissive. *Reply in Support of Defendants’ Motion to Dismiss* at 10-12.

A. Plaintiffs Fail To State A Claim Regarding The Opportunity To Rebut Consular Officers' Visa Refusals.

Contrary to the F&R, Plaintiffs state no claim as a matter of law that the Department of State or USCIS are legally required to allow Plaintiffs to rebut consular decisions to refuse to issue K-1 visas. First, the Department of State has no independent duty to consider additional evidence rebutting the refusal of K-1 visas. Contrary to the F&R, this Court can determine whether 22 C.F.R. § 42.81(e) or 22 C.F.R. § 41.121(c) should apply to the instant cases. Plaintiffs' arguments about how K-1 visas are processed are irrelevant in light of clear statutory language identifying K-1 visas as non-immigrant visas and duly promulgated Department of State regulations that identify K-1 visas as non-immigrant visas. *See* 8 U.S.C. § 1101(a)(15)(K); 22 C.F.R. § 41.81.³ Where Plaintiffs raise no challenge to the definition of K-1 visas as non-immigrant visas by Congress and the Department of State, the application of a wholly different regulation section to the treatment of K-1 visas is without merit.⁴ Accordingly, the Court should

³ 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.

⁴ In fact, applying the immigrant visa rebuttal regulations to K-1 visas would create an absurd result. Under 8 C.F.R. § 42.81(e), a visa applicant can submit additional evidence within one year of the date of refusal. However, pursuant to 8 C.F.R. § 214.2(k)(5), the K-1 petition would expire before the end of that one-year period. In contrast, under 8 C.F.R. § 41.121(c), the Department of State can defer review of the refusal of a non-immigrant for only four months. 8

find that 22 C.F.R. § 41.121(c) applies, and conclude that Plaintiffs fail to state a claim because Defendants are not legally required to consider evidence rebutting consular decisions in non-immigrant visa cases.

Second, USCIS has no independent duty to consider additional evidence rebutting the refusal of K-1 visas. Neither 22 C.F.R. §§ 41.121(c) nor 42.81(e) apply to USCIS. Additionally, USCIS has no authority over visa issuance. *See Patel v. Reno*, 134 F.3d 929, 933 (9th Cir. 1997) (“it is uncontested that only the State Department consular officers have the power to issue visas.”). Accordingly, the Court should find that there is no requirement that USCIS consider evidence rebutting consular officers’ decisions to refuse K-1 visas.

Finally, no Plaintiff can allege that Defendants have a duty to consider evidence rebutting a K-1 visa refusal where they fail to allege “the intention to submit such evidence” *See* 22 C.F.R. §§ 41.121(c) and 42.81(e). Here, Plaintiffs’ FAC fails to allege that any Plaintiff “indicated the intention to submit such evidence.” The F&R overlooks this omission. Because Plaintiffs do not allege that they indicated the intention to submit rebuttal evidence, Plaintiffs’ allegations regarding their inability to rebut consular decisions to refuse to issue visas must be dismissed for failing to state a claim.

B. Plaintiffs Fail To State A Claim Regarding The Opportunity To Rebut Consular Revocation Recommendations.

Plaintiffs also state no claim as a matter of law that the Department of State or USCIS are legally required to allow Plaintiffs to rebut consular recommendations that USCIS revoke K-1 petitions.

C.F.R. § 41.121(c).

First, the Department of State is not legally required to allow Plaintiffs to rebut consular recommendations that USCIS revoke K-1 petitions. Contrary to the F&R, there is no statutory or regulatory authority that requires the Department of State to consider arguments rebutting the decisions of consular officers to return K-1 petitions to USCIS with revocation recommendations. *See* 22 C.F.R. §§ 41.121(c) & 42.81(e) (discussing procedures for submitting evidence rebutting consular decisions denying visas – not recommendation the revocation of visa petitions). Moreover, consular recommendations to return K-1 petitions to USCIS are not final agency actions. The F&R mistakenly finds that as a result of USCIS’s determinations that returned K-1 petitions have expired, “the K-1 petitions are effectively denied, and the fiances are denied K-1 visas.” F&R at 19. Rather, because K-1 visas are denied or refused before consular officers return K-1 petitions to USCIS, the consular officer’s recommendation carries with it no determination of rights or obligations, and such recommendation carries no legal consequences. *See Bennet v. Spear*, 520 U.S. 154, 178 (1997). Accordingly, Plaintiffs’ allegations that the Department of State is required to allow them to rebut consular recommendations that USCIS revoke K-1 petitions should be dismissed for failing to state a claim.

Second, USCIS is not legally required to allow Plaintiffs to rebut consular recommendations that USCIS revoke K-1 petitions. The F&R improperly finds that USCIS has a duty to require such rebuttal pursuant to 22 C.F.R. § 42.81(e), and that USCIS “denied [Plaintiffs] any opportunity to rebut the recommended revocation and allows the USCIS to evade its review obligation” when it determines that returned petitions have expired. F&R at 19, 20.

As noted above, neither this regulation nor 22 C.F.R. § 41.121 apply to USCIS or to returned visa petitions. Moreover, other courts have recognized that there is:

[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). Finally, the F&R improperly equates USCIS inaction with final agency action because it is the “same as an implied revocation.” F&R at 20. However, unlike authority that provides for the revocation of immigrant visas petitions, there is no authority regarding the revocation of K-1 petitions. *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). Without revocation authority, USCIS’s actions cannot be deemed to be implicit revocation. Accordingly, Plaintiffs’ allegations that USCIS is required to allow them to rebut consular revocation recommendations should also be dismissed for failing to state a claim.

III. Defendants Object To The Recommendation That The Court Has Jurisdiction Over Plaintiffs’ Allegations That Defendant Department of State’s Use of a P6C1 Marker Is Unlawful And In Excess of the Agency’s Statutory Authority.

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 F&R aptly points out that “Plaintiffs do not allege that they have actually tested whether defendants will bar their fiancées from being admitted into the United States as a result of the P6C1 marker.” F&R at 27. However, the F&R finds that Plaintiffs state a claim because there should be a presumption that Defendants will enforce “the law as written and not admit the alien fiancées due to the material misrepresentation.” *Id.*

Contrary to the F&R, however, the law as written only results in a consular finding of material misrepresentation “if the petition is revoked.” 9 FAM § 40.63 N.10.1. Here, the F&R finds that “[t]he nonaction by the USICS is equivalent to an implied revocation of the petitions. As a result of this implied revocation, the alien fiancée is permanently barred from admission . . .” F&R at 26. But, there is no authority that supports the F&R’s finding that USCIS’s allowing K-1 petition to expire is treated by USCIS or the Department of State as an “implied revocation.” Such result would be particularly problematic and contrary to law where USCIS’s regulations that allow revocation of immigrant visa petitions have specific notice requirements that do not comport with the concept of implicit revocation. 8 C.F.R. §§ 205.2(b) & (c). Accordingly, this Court should dismiss that the portion of Plaintiffs’ first claim regarding the Department of State’s use of the P6C1 marker for lack of standing.

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CONCLUSION

For the foregoing reasons, the Findings and Report should be reversed in part, and Defendants' motion to dismiss Plaintiffs' FAC should be granted in its entirety.

Dated this 20th day of December, 2010

Respectfully submitted,

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