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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’ RESPONSE TO  
PLAINTIFFS’ OBJECTIONS TO  
FINDINGS & RECOMMENDATION**

The Findings and Recommendation (“F&R”) correctly recommends the dismissal of 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.

**I. The F&R Correctly Finds That Plaintiffs Have Constitutional Basis To Challenge Consular Refusals Of Their Fiances’ Visas Under *Bustamante* Because Plaintiffs Have No Protected Interest To Marry In The United States.**

The F&R concludes that Plaintiffs cannot overcome the Doctrine of Consular Nonreviewability because they “do not possess a protected liberty interest to marry in the United States.” F&R at 13. Plaintiffs’ Objections simply echo their earlier pleadings and assert that Plaintiffs’ interest in marrying their fiances in the United States is itself protected. Pltfs’ Objections at 4. But Plaintiffs offer no authority on-point to support this proposition. Plaintiffs also argue that the statutory language establishing requirements K-1 petitions and K-1 visas at 8 U.S.C. § 1184(d)(1) should be “read together” accord a statutorily protected interest to marriage in the United States. Pltfs’ Objections at 12. But Plaintiffs reading belies the plain language of the statute and ignores this Circuit’s precedent recognizing the substantive difference between immigration-related petitions and visa applications. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305, 1308 (9th Cir. 1984).

First, Plaintiffs’ lengthy discussion of the potential difficulties they and their fiances might incur because they are unable to get married in the United States on a K-1 visa is beside

the point. Before the Court can balance the relative interests relating to a challenged statute, Plaintiffs must first establish a protected constitutional interest. Plaintiffs references to *Kleindienst v. Mandel*, 408 U.S. 374, 386 (1978), and *Mathews v. Eldridge*, 424 U.S. 319 (1976), are unavailing because the constitutional interests in free speech and property were clearly established, respectively, in those cases. Here, Plaintiffs provide no authority, nor are Defendants aware of any authority, that stands for the proposition that Plaintiffs’ “have a protected interest in a marriage ceremony in the United States and the opportunity to enjoy a shared residence as a married couple in this country.” Opp. at 8; *see also* Opp. at 5.

As the F&R notes, Plaintiffs’ reliance on *Zablocki v. Redhail*, 434 U.S. 374 (1978), is misplaced. In *Zablocki*, the Supreme Court found that “[u]nder the challenged statute, no Wisconsin resident in the affected class may marry in Wisconsin *or elsewhere* without a court order, and marriages contracted in violation of the statute are both void and punishable as a criminal offense.” 434 U.S. at 387 (emphasis added). Here, like in *Chiang v. Skeirik*, Plaintiffs can marry their fiancées in Vietnam, in a third country, or possibly in the United States by proxy. *See Chiang*, 582 F.3d 238, 242 (1st Cir. 2009).<sup>1</sup> While Plaintiffs allege that a life together in the United States is more burdensome after a marriage abroad than it is following admittance to the United States on a K-1 visa, these burdens are insufficient to create a constitutionally protected interest in marrying in the United States. Accordingly, there is no authority that supports Plaintiffs’ claims of a constitutional right or protected interest to marry in the United States.

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<sup>1</sup> Additionally, Plaintiffs’ assertion that they have a right to “enjoy a shared residence as a married couple in this country,” directly conflicts with the Ninth Circuit Court of Appeals’ refusal 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).

Second, Plaintiffs ask the Court to reinterpret the language of 8 U.S.C. § 1184(d)(1) to create a statutorily protected interest in the issuance of K-1 visas where no such mandate exists. If a statute does not mandate a particular outcome, there is no legitimate claim of entitlement and, hence, no liberty interest. *Valdez v. Rosenbaum*, 302 F.3d 1039, 1045 (9th Cir. 2002). In their Opposition, Plaintiffs' cited the statute in question as stating that "[the petition] shall be approved' in order for the parties ' . . . to conclude a valid marriage *in the United States* . . .". Opp. at 5, citing 8 U.S.C. § 1184(d)(1). However, in their Objections to the F&R, Plaintiffs now assert that:

Reference is made within the four corners of 8 U.S.C. § 1184(d)(1) to the mandatory visa issuance process by the consular officer, as well as the marriage in the United States. Because Congress combined reference to the visa process and the petition process into one paragraph, § 1184(d)(1), the requirements should be read together. Congress recognized the significance of marriage in the United States and has specifically provided Plaintiffs with the statutory right and the means to marry their fiancées at home instead of in a foreign country. This mandatory statutory language gives rise to a protected liberty interest in a marriage ceremony in the United States.

Pltfs' Objections at 12 (citations omitted). However, Plaintiffs continue to misread the statutory language to create a "mandatory visa issuance process." Three particular omissions by Plaintiffs demonstrate that the statute creates no constitutional right to marry in the United States. First, the statutory language relates only to USCIS's adjudication of K-1 petitions, and it says nothing about the obligation of a consular officer to issue a visa, except there must be an approved petition. *Id.*<sup>2</sup> Second, even USCIS's adjudication of K-1 petitions is not conditioned on a set of static eligibility criteria like in the parole cases. Rather, USCIS's adjudication of K-1 petitions is

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<sup>2</sup> There is no law that mandates the issuance of a K-1 visa. Rather, it is for each consular officer to determine "it appears to the consular officer . . . that such alien is ineligible to receive a visa . . . ." 8 U.S.C. § 1201(g).

premised on an exercise of USCIS's assessment as to whether "satisfactory evidence is submitted by the petitioner." *Id.* Finally, even if the approval of a K-1 petition was deemed to be mandatory based on the satisfaction of certain statutory criteria, such approval does not give rise to a right to have a marriage ceremony in the United States. Unlike the parole statutes considered by the Supreme Court, the statutory language cited by Plaintiffs here is different. Here, the statutory language cited by Plaintiffs as mandatory is not the ultimate benefit conferred by the statute. Rather, the statutory language is one of the eligibility criteria – that the petitioner and beneficiary "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." *Id.* Thus, any benefit arising from the statute in question does not allow petitioner to marry his fiancée in the United States, it merely allows them to go to the next step in the process – the forwarding of their approved petition to the consulate for further review. Accordingly, there is no statutory obligation that creates a constitutional right to marriage in the United States. Because there is no constitutional right or protected interest in marrying in the United States, the Court should dismiss Plaintiffs' challenge to consular officers' refusals of fiancée visas for lack of jurisdiction.

## **II. The F&R Correctly Finds Plaintiffs' Fail To State A Claim That The Department Of State And USCIS Unreasonably Delayed Action.**

Plaintiffs previously argued in general terms that "defendants may not unreasonably delay the process" regarding Defendants' processing of visa petitions and visa applications. Opp. at 15. Plaintiffs' FAC alleged unreasonable delay with regard the: (1) consulate's scheduling of visa interviews within a reasonable period of the National Visa Center's receipt of an approved K-1 petition from USCIS; (2) consulate's notification of the petitioner and beneficiary regarding a decision to return petitions to USCIS; (3) consulate's delivery of a returned petition to the

National Visa Center; (4) USCIS's notification regarding the consular recommendation; (5) and USCIS's further actions, if any, on the returned petitions. *See* FAC ¶¶ 170-175.

The F&R correctly found that Plaintiffs failed to show that the agency "failed to take a *discrete* action that it is *required to take*." F&R at 21, citing *See Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 63 (2004); *see also Luo v. Coultice*, 178 F. Supp. 2d 1135, 1140 (C.D. Cal. 2001) (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."). Similarly, there can be no claim under the Mandamus Act absent a clear duty to act. 8 U.S.C. § 1361.

Plaintiffs' Objections now argue for the first time that the result of Defendants' actions is that Plaintiffs "*will have waited* a total of over two years to marry." Pltfs' Objections at 13. The Court should disregard this argument because it is an improperly prospective claim that is wholly unrelated to the allegations in the FAC that challenge delays of discrete agency actions. Further, in contrast to Plaintiffs' newly conceived arguments, all actions on the K-1 petitions and applications, by both USCIS and the Department of State were completed in less than one year in the case of Austin Tran, and in thirteen months in the cases of Dinh and Dzu Tran. FAC ¶¶ 35, 38, 77-78, 119, 121-22; Exs. B, C, and D to Defendants' Motion to Dismiss.<sup>3</sup>

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<sup>3</sup> Plaintiffs' reliance on *Aslam v. Mukasey*, 531 F. Supp. 2d 736 (E.D. Va. 2008) and *Alkenani v. Barrows*, 356 F. Supp. 2d 652 (N.D. Tex. 2005), is similarly misplaced. Those cases address alleged adjudicatory delays for applications for adjustment to lawful permanent residence, which are filed within the United States. The *per se* unreasonableness findings in those cases based on two or three year delays conflict with the Supreme Court's finding that delayed agency action can only be compelled where such action is required by law. *See Norton*, 542 U.S. 55, 63 (2004).

Plaintiffs also improperly continue to rely on a policy position adopted by Congress that states:

[i]t 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 fiancées 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. At most, this policy provision reflects congressional preference regarding the timing of consular decisions following the receipt of all necessary documents from the applicant and USCIS. Here, the facts alleged by Plaintiffs support that in each case, the consulate issued a decision within thirty days of the fiancées' interviews, which marks the time at which all necessary documents are submitted in most cases. *See* FAC ¶¶ 44-45, 87-88, 126-27; 9 FAM § 41.81 PN3.4.<sup>4</sup> Accordingly, Plaintiffs' claims of agency delays should be dismissed for failure to state a claim.

### **III. The F&R Correctly Finds That USCIS's Regulation That Imposes A Four-Month Validity Period On K-1 Petitions Is Permissible As A Matter Of Law.**

Plaintiffs fail to state a claim that Defendants' regulation establishing a four-month validity period for K-1 petitions is *ultra vires* because the promulgation of the regulation was authorized by law, and is entitled to deference. *See Chevron U.S.A., Inc. v. Natural Res. Def.*

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<sup>4</sup> Furthermore, here each fiancée's 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* FAC. Accordingly, the satisfaction of the remedy sought by plaintiff should 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). While potentially capable of repetition, Plaintiffs' claims will not evade review because Plaintiffs may bring actions under the Administrative Procedure Act to challenge any future alleged unreasonable delays.

*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)).

Plaintiffs’ Objections to the F&R argue that the four-month validity period is impermissible because “[n]o statute permits a four-month limited validity period for the K-1 Petition . . . ,” and “in light of USCIS procedures for approval all other visa petitions for much longer periods of time.” Pltfs’ Objections at 16. But Congress has specifically authorized the Attorney General 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). As Plaintiffs note, Congress reiterated the discretionary authority to establish regulations specifically with regard to nonimmigrant admissions. 8 U.S.C. § 1184(a). Plaintiffs fail to note, however, that Congress also granted discretionary authority over regulations with regard to nonimmigrant petitions. *See* 8 U.S.C. § 1184(d). Accordingly, that Defendants have established different validity periods for different types of petitions is irrelevant to this Court’s determination of whether the four-month validity period for K-1 petitions is *ultra vires*.

Because the regulations in question were promulgated pursuant to statutory grants of authority, and where those regulations do not legislate beyond the statutory authority to “establish

such regulations . . . necessary for carrying out the [Attorney General's] authority . . . ,” Plaintiffs are unable to support their claim that the four-month validity period is *ultra vires*, and the Court should dismiss the claim. *See* 8 U.S.C. §§ 1103(a)(3), 1184(a), & 1184(d).

**CONCLUSION**

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

Dated this 3rd day of January, 2011

Respectfully submitted,

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