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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

RASHA MUZAHEM ALWAN AL SALIHI, Plaintiff, v. ANTONY J. BLINKEN, Secretary of State, et al., Defendants.	Case No. 23cv0718 MMA AHG REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS DATE: October 23, 2023 TIME: 2:30 p.m. CTRM: 3C NO ORAL ARGUMENT REQUESTED Hon. Michael M. Anello

Plaintiff argues that the follow-to-join refugee admissions procedures "must" be viewed as a single process and any delay of one defendant agency charged to the other. U.S. Citizenship and Immigration Services (USCIS) has adjudicated the I-730 here to the extent permissible under the statute and regulations and there is no relief the Court can provide as to them. The Department of State (DOS) will make the recently initiated travel eligibility determination but there has been no delay by DOS and there is no relief for the Court grant. Plaintiff's attempt to conflate these separate determinations and different agencies' authorities into one, is flawed and contrary to statute and regulation.

I. Plaintiff's Claims Against USCIS are Moot

Plaintiff seeks court intervention in the scheduling of the DOS consular officer's travel eligibility determination, and relies on the flawed premise that USCIS retains authority over the process beyond the adjudication of the I-730. *See* ECF Doc. No. 23 (Opposition) at 6, 9, 19 (the follow-to-join refugee admissions process "must" be viewed as a single process and delay of one defendant agency should be charged to the other); Opposition at 16-17 (USCIS has a "duty to ensure prompt processing by consular officers acting 'as agents of USCIS'"). Yet, there is clear statutory and regulatory framework that specifies how a follow-to-join refugee applicant is admitted to the United States. *See* ECF Doc. No. 20 (Defendants' Motion) at 3-4.

By regulation, once USCIS adjudicates the I-730, it "will notify the [principal] refugee of [the] approval" and "will send the approved request to the Department of State for transmission to the U.S. Embassy or Consulate having jurisdiction over the area in which the refugee's spouse or child is located." 8 C.F.R. § 207.7(f)(2). Plaintiff acknowledges that USCIS notified her that approval of the I-730 completed USCIS action on the matter. *See* ECF Doc. No. 17 (First Amended Complaint) at ¶ 59. Contrary to Plaintiff's allegations, USCIS is not authorized to oversee DOS's travel eligibility determination, or Customs and Border Protection's (CBP's) decision whether to admit Plaintiff's husband once he applies for admission.[1] As USCIS has completed its discrete role in adjudicating the I-730, it is not capable of providing the relief that Plaintiff now seeks.

Plaintiff cites to *Doe v. Risch*, 398 F. Supp. 3d 647 (N.D. Cal. 2019),[2] to argue that USCIS's role is not complete once the I-730 is adjudicated, but there was no discussion in

[1] Plaintiff argues that Defendants "misrepresent" the relief she seeks by ignoring terms she uses that are not found in the statute or regulations. Opposition at 15. She refers to a "conditional approval" of the I-730 and the "final approval" (apparently) of travel eligibility and (perhaps) of the CBP admissions process. *Id.* Plaintiff makes no mention of CBP in her First Amended Complaint, and there is no relief CBP could provide until Plaintiff's spouse applies for admission at a Port of Entry.

[2] Plaintiff incorrectly refers to this Northern District of California case as one "within this district." Opposition at 23.

that decision of mootness as to USCIS; and delay had been alleged against the DOS as the consular officer had already interviewed the applicant. Opposition at 15-16. Plaintiff also asserts that USCIS should be liable for "ongoing delays," citing to the distinguishable *Weday v. Mayorkas*, No. 2:21-cv-01595-RSM-JRC, 2022 WL 1143227, at *4 (W.D. Wash. Mar. 22, 2022). Opposition at 17. That case involved an I-730 petition that had been approved by USCIS and had been awaiting the scheduling of an interview by the DOS for 22 months at the time of the decision. *Weday*, 2022 WL 1143227 at *1-2. The decision did not discuss whether the claims were moot as to USCIS. Rather, the magistrate judge generally recommended that the defendants' motion to dismiss be denied, because it was premature to use TRAC factor analysis to decide whether the nearly two-year delay in interview scheduling was unreasonable. *Id.* at *5. Plaintiff also cites to the inapposite, *Hong Wong v. Chertoff*, 550 F.Supp.2d 1253, 1259 (W.D. Wash. 2008), in which USCIS had not yet adjudicated an application for lawful permanent residence because it was waiting for the results of an FBI background check.

USCIS has no statutory or regulatory authority to determine travel eligibility in this case as USCIS has no presence in Ankara, Turkey. Plaintiff fails to assert what USCIS can do with respect to any remaining steps before Plaintiff's husband can arrive in the United States. Thus, Plaintiff's claims against USCIS must be dismissed as moot.

II. No Exception to Mootness Applies

Plaintiff argues that the voluntary cessation and capable of repetition yet evading review exceptions to mootness apply. Opposition at 17-19. She appears to allege that USCIS's approval of the I-730 was pretextual and that the consular officer may now find him ineligible for a travel document and return the petition to USCIS for a lengthy re-adjudication. *Id.*

The voluntary cessation principle applies only if there is "reasonable expectation that the *wrong* will be repeated." *Public Utilities Comm'n of State of Cal. v. FERC*, 100 F.3d 1451, 1460 (9th Cir. 1996) (emphasis added). Voluntary cessation does not apply here because, as discussed above, USCIS has adjudicated the petition. Despite Plaintiff's

allegations, USCIS does not control the travel eligibility determination that the consular officer will undertake. For the case to be returned to USCIS, the consular officer would have to make an independent finding that the applicant is ineligible for travel with a detailed memo explaining why. *See* 9 FAM 203.5-2(6) ("If you uncover information during case processing that suggests USCIS should not have approved a Form I-730 petition, you should return the case via the NVC to the appropriate USCIS office for further action, following the guidance in 9 FAM 203.6-9 and 9 FAM 203.6-11 for reporting information that calls into question whether the beneficiary is eligible for derivative refugee or asylum status."); 9 FAM 203.6-9(e)(1)(a) ("Any case returned to USCIS must be accompanied by a detailed memo explaining the reasons why the beneficiary was not found eligible for travel and why USCIS should reopen the Form I-730 adjudication and issue a Notice of Intent to Deny (NOID) in the case.").

The possibility of a consular return is not only speculative, it would involve consideration of new evidence or testimony that has not yet surfaced. *See* 9 FAM 203.6-9(e)(1)(a)(i) ("The justification must focus on the factual elements of the case that have direct bearing on why the beneficiary's testimony and evidence calls into question whether the petitioner has established the required criteria for approval of the Form I-730 petition by a preponderance of the evidence."). Plaintiff's speculation that the consular official may find that her husband is ineligible to travel and return the petition to USCIS for reconsideration does not explain what relief the Court can provide as to USCIS. *See* Opposition at 18-19.

The capable-of-repetition exception is met when "(1) the duration of the challenged action is too short to allow full litigation before it ceases or expires, and (2) there is a reasonable expectation that the plaintiffs will be subjected to the challenged action again." *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1018 (9th Cir. 2012). "The plaintiff has the burden of showing that the exception applies." *Department of Fish and Game v. Federal Subsistence Board*, 62 F.4th 1177, 1181 (9th Cir. 2023). Plaintiff's claim fails because it is based on speculation that the consular officer will return the petition to USCIS.

See Willaims v. Alioto, 549 F.2d 136, 144 (9th Cir. 1977) ("A mere speculative possibility of repetition is not sufficient."). Even if a consular return were to happen here, after the consular officer provides a basis, USCIS would make a new decision based on new facts that were not previously before it.

III. Plaintiff Fails to State a Claim against DOS

Plaintiff argues that the delay by USCIS in adjudicating the I-730 should be charged to the DOS. Opposition at 19. However, the Administrative Procedure Act (APA) does not provide for collective agency review and Plaintiff has failed to plead any legal duty that DOS has violated under the APA. The APA provides a limited waiver of sovereign immunity to review "*agency* action unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1) (emphasis added), and imposes a requirement for an "agency" to act within a reasonable time. *See* 5 U.S.C. § 555(b) ("each agency shall proceed to conclude a matter presented to it"). The APA defines an "agency" as "each authority of the Government of the United States." 5 U.S.C. § 551(a)(1). And an "'agency action' includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof." 5 U.S.C. § 551(a)(13).

In other cases involving separate adjudications by USCIS and the DOS, courts have refused to impute USCIS's delay onto DOS. *See Throw v. Mayorkas*, 3:22-cv-5699-DGE, 2023 WL 2787222, at *4 (W.D. Wash. Apr. 5, 2023) ("courts facing similar claims have focused on the earliest point at which the State Department could have scheduled the visa interview . . . [this] Court will not impute USCIS's delay to the State Department"); *Alshawy v. USCIS*, No. CV 21-2206 (FYP), 2022 WL 970883, at *6 (D.D.C. Mar. 30, 2022) ("the relevant period of delay is approximately eighteen months — a period calculated from the earliest possible time that the Embassy could have scheduled the interview"); *Poursohi v. Blinken*, No. 21-CV-01960-TSH, 2021 WL 5331446, at *5-6 (N.D. Cal. Nov. 16, 2021) (calculating relevant period of delay from time application was "documentarily complete" and therefore ready to be scheduled for a consular interview).

Plaintiff tries to compare this situation to the processing of Special Immigrant Visa (SIV) applications for Afghan and Iraqi nationals who have aided the U.S. government, citing *Afghan & Iraqi Allies v. Pompeo*, Civil No. 18-cv-01388 (TSC), 2019 WL 367841, at *8 (D.D.C. Jan. 30, 2019). Opposition at 19. SIV applications involve a multi-step process, which starts with DOS determining whether the applicant provided the appropriate service to the United States, after which USCIS adjudicates an I-360 petition, after which DOS conducts a consular interview and then either issues or refuses the visa application. *Afghan & Iraqi Allies*, 2019 WL 367841, at *3. The decision does not address mootness as to one agency and is distinguishable because USCIS's adjudication of the I-360 is sandwiched between the DOS's initial finding of eligibility and its subsequent adjudication of the visa application. Plaintiff relies on *Risch,* 398 F. Supp. 3d at 659, to argue that "the Court must examine the full duration of Ms. Al Salihi's wait: measured from the time she submitted the I-730 petition in October 2017 until her husband is admitted to the United States." Opposition at 20. Yet, the court in *Risch* was assessing delay by DOS and did not explain why it congregated the time since the petition was filed.

As the regulations and FAM detail, the two agencies have distinct and separate responsibilities with respect to the series of follow-to-join processes. Conflation of the processes prevents Plaintiff's generalized claim from being "clear and certain" as to what duty the DOS has at this time that "is nondiscretionary, ministerial, and so plainly prescribed as to be free from doubt . . ." *Kildare v. Saenz*, 325 F.3d 1078, 1084 (9th Cir. 2003) (quoting *Patel v. Reno*, 134 F.3d 929, 931 (9th Cir. 1998)).

Plaintiff also argues that it would be premature for the court to conduct a *TRAC* factor analysis. *See Telecommunications Research and Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984). Opposition at 21. Aside from the fact that courts in this district routinely apply *TRAC* factors to decide Fed. R. Civ. P. 12(b) motions, Plaintiff has alleged no delay by DOS, so there is no delay to assess.

Even so, there is no statutory or regulatory timeframe for the adjudication of an I-730 or the DOS's subsequent scheduling of a travel eligibility determination interview. Plaintiff

argues that courts in the Northern District of California have "looked to" 8 U.S.C. § 1571(b) to find a desired 180-day timeframe for adjudication of immigration benefits. Opposition at 21-22. Courts in this district have found that § 1571 does not apply to consular officials at the DOS, *see El Centro Reg'l Med. Ctr.*, 2021 WL 3141205 at *4, and is "non-binding legislative dicta." *Mohsenzadeh v. Kelly*, 276 F. Supp. 3d 1007 (S.D. Cal. 2017); *Yang v. Cal. Dep't of Social Servs.*, 183 F.3d 953, 959-62 (9th Cir. 1999). Further, the timing of the travel eligibility determination is not entirely within DOS's control as it involves not only an interview of the beneficiary by the consular officer in Ankara, but background checks, medical examinations, resettlement assurances from refugee resettlement agencies, and travel arrangements through the United Nations International Organization for Migration. *See* Defendants' Motion at 4. DOS cannot control how quickly organizations who are not government entities can provide assurances and arrangements.[3]

Plaintiff opposes the use of facts in Defendants' declaration that specify the dates the adjudicated I-730 was received by the NVC and forwarded to Ankara to decide the 12(b)(6) motion. Opposition at 14. Plaintiff concedes, however, that USCIS informed her that it approved the I-730 on July 6, 2023, and forwarded it to the NVC. *See* First Amended Complaint at ¶ 58. The Court need not rely on the declaration to find that the Embassy in Ankara has only recently received the file.

Lastly, Plaintiff's due process claim also fails. USCIS has approved her I-730, and the consular officer will make a travel eligibility determination regarding her husband. Plaintiff has no claim that DOS has deprived her of a protected interest without sufficient process.

[3] With the recent approval of the I-730, there is no live controversy, and as the administrative line for the travel eligibility determination progresses, any attempt to force line jumping could threaten national security or arbitrary haste upon non-parties.

For these reasons and those already explained in their motion to dismiss, Defendants respectfully ask the Court to dismiss Plaintiff's First Amended Complaint as there is no effective relief that this Court can grant, and Plaintiff has failed to state a claim.

DATED: October 16, 2023

Respectfully submitted,

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