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10 **UNITED STATES DISTRICT COURT**
11 **SOUTHERN DISTRICT OF CALIFORNIA**

12 RASHA MUZAHM ALWAN AL
13 SALIHI,

14 Plaintiff,

15 v.

16 ANTONY J. BLINKEN, Secretary of
17 State, et al.,

18 Defendants.

Case No. 23cv0718 MMA AHG

DEFENDANTS’ MOTION TO DISMISS
Fed. R. Civ. P. 12(b)(1), (b)(6)

DATE: October 23, 2023

TIME: 2:30 p.m.

CTRM: 3C

NO ORAL ARGUMENT REQUESTED

Hon. Michael M. Anello

19 **MOTION**

20 Defendants move this Court to dismiss Plaintiff’s First Amended Complaint against
21 all Defendants for lack of subject matter jurisdiction, under Fed. R. Civ. P. 12(b)(1), and for
22 failure to state a claim, under Fed. R. Civ. P. 12(b)(6).
23

24 **MEMORANDUM OF POINTS AND AUTHORITIES**

25 **I**

26 **INTRODUCTION**

27 Plaintiff requests that this Court order Defendants to adjudicate her “family
28 reunification application,” which appears to refer to her Form I-730, Refugee/Asylee

1 Relative Petition (I-730) and the travel eligibility determination necessary for travel to the
2 United States. On July 6, 2023, U.S. Citizenship and Immigration Services (USCIS)
3 adjudicated the I-730, so the First Amended Complaint (FAC) is moot as to Defendants
4 Mayorkas and Jaddou. *See* Fed. R. Civ. P. 12(b)(1).

5 Plaintiff complains of delay, but the Department of State (DOS) has only just recently
6 begun determining whether the I-730 beneficiary is eligible to travel to the United States.
7 The National Visa Center (NVC) shipped the file to the U.S. Embassy in Ankara, Turkey,
8 on August 29, 2023, two weeks after receiving it from USCIS. Plaintiff has therefore failed
9 to make a plausible claim for relief against the DOS. *See* Fed. R. Civ. P. 12(b)(6).

10 II

11 FACTUAL BACKGROUND¹

12 Plaintiff was admitted to the United States as a refugee from Iraq in August 2017.
13 [FAC at ¶¶ 1, 13, 14, 16.] Her husband’s refugee application was denied. [*Id.* at ¶ 14.] On
14 October 3, 2017, Plaintiff filed an I-730 petition with USCIS on behalf of her husband. [*Id.*
15 at ¶ 43.] In April 2021, USCIS issued a Notice of Intent to Deny (NOID) the I-730. [*Id.* at
16 ¶ 45.] On July 9, 2021, Plaintiff responded to the NOID. [*Id.* at ¶ 52.]

17 On April 19, 2023, Plaintiff filed this lawsuit, asking the Court to compel
18 “Defendants” to take the “necessary actions to adjudicate Plaintiff’s I-730 Petition.” [ECF
19 Doc. No. 1 (Complaint) at Prayer for Relief.] On July 6, 2023, USCIS issued a Notice of
20 Approval for Plaintiff’s I-730. [FAC at ¶ 58.] On July 13, 2023, the undersigned emailed
21 Plaintiff’s counsel, proposing voluntary dismissal of the case, but Plaintiff’s counsel
22 declined. On July 31, 2023, Defendants filed their motion to dismiss. [ECF Doc. No. 16.]
23 On August 15, 2023, the NVC received Plaintiff’s approved I-730. *See* Declaration of
24 Rebecca Austin, Assistant Director of the National Visa Center (Austin Decl.)² at ¶ 4. Two

25 _____
26 ¹ The facts taken from the First Amended Complaint are presumed true for purposes
27 of this motion only.

28 ² When considering a motion to dismiss pursuant to Rule 12(b)(1), the district court
may review evidence outside the pleadings to resolve factual disputes concerning the
existence of jurisdiction without converting the motion to one for summary judgment. *See*,

1 weeks later, on August 29, 2023, the NVC shipped Plaintiff’s I-730 petition and
 2 accompanying documentation to the Embassy in Ankara. *Id.* at ¶ 3.

3 On August 21, 2023, Plaintiff filed her FAC, more broadly seeking adjudication of
 4 her “family reunification application.” [ECF Doc. No. 17.] Defendants now seek dismissal
 5 of the FAC.

6 III

7 PROCEDURAL BACKGROUND

8 Within two years of admission to the United States, refugees may file an I-730
 9 petition with USCIS on behalf of a spouse. *See* 8 U.S.C. § 1157(c)(2)³; 8 C.F.R. § 207.7. If
 10 approved by USCIS, an I-730 petition confers upon the beneficiary the “same admission
 11 status as such refugee,” 8 U.S.C. § 1157(c)(2), entitling the beneficiary to “following-to-
 12 join benefits” as a derivative of the principal refugee. 8 C.F.R. §§ 207.7(a), (f).

13 USCIS has exclusive responsibility for adjudicating I-730 petitions. *See* 8 U.S.C.
 14 § 1157(c), 8 C.F.R. §§ 207.7(d), (f), (g); 9 FAM 203.5-1(b)(1)⁴ (“[I-730] petitions are filed
 15 with and adjudicated by USCIS”), 203.5-2(a)(1) (“As a matter of law, authority to
 16 adjudicate and process refugee . . . applications, including Form I-730 follow-to-join
 17 derivatives of . . . refugees, rests exclusively with DHS.”). When the spouse of a refugee
 18 resides outside the United States and the I-730 petition is approved, USCIS notifies the
 19

20 *e.g., Land v. Dollar*, 330 U.S. 731, 735 n.4 (1947) (“when a question of the District Court’s
 21 jurisdiction is raised . . . the court may inquire by affidavits or otherwise, into the facts as
 22 they exist.”); *Biotechs Research Corp. v. Heckler*, 710 F.2d 1375, 1379 (9th Cir. 1983)
 (consideration of material outside the pleadings did not convert a Rule 12(b)(1) motion into
 23 one for summary judgment).

24 ³ The statute references the Attorney General as having responsibility, but on March
 1, 2003, the Department of Homeland Security (DHS) and its USCIS assumed responsibility
 25 for the processing of refugees formerly held by DOJ’s Immigration and Naturalization
 Service (INS). *See* 6 U.S.C. § 271(b)(3). Accordingly, the authority formerly vested in the
 26 Attorney General is now vested in the Secretary of Homeland Security. *See* 6 U.S.C.
 27 § 551(d).

28 ⁴ The Foreign Affairs Manual (FAM) refers to I-730 petitions as either “V92s” for
 asylees and “V93s” for refugees. *See* 9 FAM 203.6-1.

1 petitioner of the approval. *See* 8 C.F.R § 207.7(f)(2). USCIS sends the approved request to
2 the DOS for transmission overseas to the USCIS field office, U.S. Embassy, or U.S.
3 Consulate having jurisdiction over the area in which the refugee’s spouse is located. *Id.*

4 In countries where USCIS does not maintain a presence,⁵ such as in this case, USCIS
5 relies on DOS consular officers to determine whether beneficiaries of an approved I-730
6 petition are eligible to travel to the United States. *See* 9 FAM 203.5-2(b)(3)(b); 9 FAM
7 203.5-2(a)(6). Once the case is abroad, the DOS can assess the beneficiary’s travel
8 eligibility.

9 Determining travel eligibility involves several steps, including an interview of the
10 beneficiary by a consular officer to confirm identity, to confirm that the required qualifying
11 relationship continues to exist, and to determine whether the beneficiary is subject to a
12 statutory bar for the benefit. *See* 9 FAM 203.5-4; 203.5-4(A); 203.6-2(d). Additional steps
13 that must be completed include background checks (*see* 8 U.S.C. § 1105; 9 FAM 203.6-
14 8(a)(1)(b); 203.6-9(a)(5)), medical examinations (*see* 8 U.S.C. § 1182(a)(1); 9 FAM 203.5-
15 4(B)(e)(2)(d); 203.6-4(b)(2)(a)(1)), resettlement assurances from refugee resettlement
16 agencies (*see* 9 FAM 203.6-10(c)(1)), and travel arrangements through the United Nations
17 International Organization for Migration (*see* 9 FAM 203.6-10(d)).

18 If the beneficiary is approved to travel, a boarding foil is issued. *See* 9 FAM 203.5-
19 1(b)(3); 203.6-8(b). A boarding foil “facilitate[s] the boarding of beneficiaries by airlines
20 flying to the United States.” 9 FAM 203.6-8(b)(2)(a). The beneficiary is also given a sealed
21 “travel packet” that contains certain documents needed to obtain admission to the United
22 State at a port of entry. *See* 9 FAM 203.6-8(b)(3).

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25 ⁵ USCIS has eight international field offices co-located at various Department of State
26 Posts. *See* 9 FAM 203.5-2(b)(3). Those field offices are located in Beijing, Guangzhou, San
27 Salvador, Havana, Guatemala City, New Delhi, Nairobi, and Mexico City. *See*
28 <https://www.uscis.gov/about-us/find-a-uscis-office/international-immigration-offices> (last
viewed August 31, 2023).

IV

ARGUMENT

A. Claims Against Defendants Mayorkas and Jaddou are Moot

A federal court lacks subject matter jurisdiction when a case is moot because the case or controversy requirement of Article III of the Constitution is not satisfied. *See Deakins v. Monaghan*, 484 U.S. 193, 199 (1988); *Ruiz v. City of Santa Maria*, 160 F.3d 543, 548-49 (9th Cir. 1998). An action is generally moot “when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.” *Ruiz*, 160 F.3d at 549 (quoting *Lee v. Schmidt-Wenzel*, 766 F.2d 1387, 1389 (9th Cir. 1985)). “The basic question in determining mootness is whether there is a present controversy as to which effective relief can be granted.” *Id.* (quoting *Northwest Env. Defense Center v. Gordon*, 849 F.2d 1241, 1244 (9th Cir. 1988)).

Plaintiff seeks an order directing “Defendants” to adjudicate Plaintiff’s “family reunification application.” *See* FAC, at Prayer for Relief. Plaintiff attempts to conflate the separate processes of USCIS and the DOS into one “application.” But, as explained above, there are two separate decisions, namely USCIS’s adjudication of the I-730 petition and DOS’s determination of travel eligibility. There is no relief for the Court to grant, as to Defendants Mayorkas and Jaddou, because USCIS has already adjudicated the I-730 petition. *See United States v. Hovsepien*, 359 F.3d 1144, 1161 (9th Cir. 2004) (“because the requested relief was INS action and the INS had acted definitively in the plaintiffs’ favor by the time the case reached us (the applicants had become citizens), mootness was the only possible conclusion we could draw”). The Court therefore lacks subject matter jurisdiction over Plaintiff’s claims against Defendants Mayorkas and Jaddou, because there is no live case or controversy remaining. *See Powell v. McCormack*, 395 U.S. 486, 496 (1969); *see also Murphy v. Hunt*, 455 U.S. 478, 481 (1982). Similarly, there is no claim of delay against the DOS as the assigned Embassy is in the process of receiving the case file.

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1 B. Plaintiff Fails to State a Claim Against Defendants Blinken and Bitter

2 Plaintiff fails to state a claim upon which relief may be granted against Secretary
3 Blinken and Director Bitter due to the “absence of sufficient facts to support a cognizable
4 legal theory.” *Mendiondo v. Centinela Hosp. Medical Center*, 521 F.3d 1097, 1104 (9th Cir.
5 2008).

6 Plaintiff acknowledges that the travel eligibility determination is completed by the
7 DOS but makes no allegations as to any delay on their part. [FAC at ¶¶ 34-42.] Indeed, there
8 has been no delay as the NVC physically shipped the case to the U.S. Embassy in Ankara
9 approximately one week ago. Plaintiff fails to plead any facts about what the DOS has done
10 or failed to do. *See* FAC. There are no allegations regarding the DOS, much less “well-
11 pleaded factual allegations” that “plausibly give rise to an entitlement to relief” under
12 Plaintiff’s claims. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Thus, as to Defendants
13 Blinken and Bitter, the Complaint fails to plead “factual content that allows the court to
14 draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* at
15 678. Thus, the claims against Defendants Blinken and Bitter must be dismissed. *See* Fed.
16 R. Civ. P. 12(b)(6).

17 1. There is No Duty to Schedule a Consular Interview within a Particular Time

18 Plaintiffs’ APA claim is based on the fact that Plaintiff’s husband has not been issued
19 a travel document. *See* FAC at ¶¶ 66-68. The U.S. Embassy in Ankara is in the process of
20 receiving the case that was recently shipped to them. There is no statutory or regulatory
21 timeframe for completing this process, there is no standard against which the Court can
22 measure whether the agency has acted “within a reasonable time” or “unreasonably delayed
23 adjudication.” 5 U.S.C. § 555(b); 5 U.S.C. § 706(1). Likewise, Plaintiff cannot prevail on
24 any mandamus claim, *see* FAC at ¶¶ 70-72, because she cannot show that her claim is “clear
25 and certain” and that the DOS has a duty that “is nondiscretionary, ministerial, and so
26 plainly prescribed as to be free from doubt . . .” *Kildare v. Saenz*, 325 F.3d 1078, 1084 (9th
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1 Cir. 2003) (quoting *Patel v. Reno*, 134 F.3d 929, 931 (9th Cir. 1998)).⁶ Thus, Plaintiffs have
2 failed to allege viable claims under the APA or the Mandamus Act.

3 2. There Has Been no Scheduling Delay

4 Alternatively, there has been no delay in the processing of Plaintiff's husband's travel
5 document and thus Plaintiff cannot show that the travel eligibility determination has been
6 "unreasonably delayed." USCIS approved the I-730 petition on July 6, 2023, USCIS sent
7 the case to the NVC on August 15, 2023, and the NVC shipped a hard copy of the file to
8 the U.S. Embassy in Ankara on August 29, 2023. Because there has been no delay, it has
9 not been unreasonable, and there is no basis for an APA or mandamus claim.

10 If there had been some appreciable delay here, the Court would likely apply the six
11 "TRAC factors" set forth in *Telecommunications Research and Action Center v. FCC*, 750
12 F.2d 70 (D.C. Cir. 1984), in determining whether it is reasonable:

13 (1) the time agencies take to make decisions must be governed by a rule of
14 reason; (2) where Congress has provided a timetable ... [it] may supply content
15 for this rule of reason; (3) delays that might be reasonable in the sphere of
16 economic regulation are less tolerable when human health and welfare are at
17 stake; (4) ... the effect of expediting delayed action on agency activities of a
18 higher or competing priority; (5) ... the nature and extent of the interests
19 prejudiced by delay; and (6) the court need not find any impropriety lurking
behind agency lassitude in order to hold that agency action is unreasonably
delayed.

20 *Id.* at 80 (citations omitted). *See also Brower v. Evans*, 257 F.3d 1058, 1068 (9th Cir. 2001)
21 (quoting *Independence Mining Co. v. Babbitt*, 105 F.3d 502, 507 n.7 (9th Cir. 1997)). In
22 addition, "the reasonableness of administrative delays also must be judged in light of the
23 resources that Congress has supplied to the agency, as well as the impact of the delays on

24 ⁶ For the same reasons that Plaintiff's APA claim must be dismissed, so too would be
25 any mandamus claim. *See Fed. R. Civ. P. 12(b)(6); Cheng v. Baran*, No. 17-2001 RSWL
26 (KSx), 2017 WL 3326451, at *8 (C.D. Cal. Aug. 3, 2017) ("As the Ninth Circuit has
27 recognized, mandamus relief and relief under the APA are in essence the same, and it has
28 elected to analyze [a mandamus] claim under the APA where there is an adequate remedy
under the APA.") (internal quotation marks omitted) (quoting *R.T. Vanderbilt Co. v.*
Babbitt, 133 F.3d 1061, 1065 (9th Cir. 1997)).

1 the applicants’ interests.” *Fraga v. Singh*, 607 F. Supp. 517, 521 (D. Or. 1985). Indeed, this
2 Court recently dismissed a mandamus claim from applicants waiting some months for their
3 immigrant visa interviews to be scheduled at the U.S. Embassy in Ankara after finding that
4 the delay was reasonable. *See Borzouei v. Bitter*, Case No. 22-cv-872-MMA (KSC), 2022
5 WL 17682659 (S.D. Cal. Dec. 14, 2022), *appeal pending*.

6 Plaintiff argues that USCIS may, at some point in the future, have to resolve
7 “questions that come up during the security and background process.” *See* FAC at ¶ 36. She
8 also alleges that the DOS may, at a future time, decide to “return” the petition to USCIS for
9 reconsideration. *Id.* at 37. These allegations of potential future events that could involve the
10 need for additional USCIS action, do not raise a right to relief above speculation and thus
11 also fail to state a claim against USCIS. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544,
12 557 (2007).

13 Plaintiff also alleges that “Defendants’ delay in adjudicating Plaintiff’s application
14 constitutes a deprivation of [her] protected interest without due process,” thus violating her
15 “procedural due process rights.” FAC at ¶¶ 74, 76. This argument fails, because USCIS has
16 completed its adjudication of the I-730 petition, and the DOS only recently began the
17 process of determining whether Plaintiff’s husband is eligible to travel here. Even assuming
18 *arguendo* that Plaintiff has a life, liberty, or property interest in a “family’s right to
19 reunification” under the Refugee Act, the FAC does not allege any facts suggesting that the
20 DOS deprived her of that interest without sufficient process.

21 V

22 CONCLUSION

23 For the foregoing reasons, Defendants respectfully ask the Court to dismiss Plaintiff’s
24 First Amended Complaint against USCIS and the Department of State for lack of subject
25 matter jurisdiction as there is no effective relief that this Court can grant. Plaintiff’s claims

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1 against Defendants should also be dismissed for failing to state a claim upon which relief
2 may be granted.

3 DATED: September 5, 2023

Respectfully submitted,

4 ANDREW R. HADEN
5 Acting United States Attorney

6 *s/ Caroline C. Prime*
7 CAROLINE C. PRIME
8 Assistant U.S. Attorney

9 Attorneys for Defendants
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DECLARATION OF REBECCA AUSTIN

I, Rebecca Austin, hereby declare under penalty of perjury:

1. I am employed by the U.S. Department of State as the Assistant Director of the National Visa Center (NVC), which is part of the Visa Services Directorate within the Bureau of Consular Affairs. In my capacity as Assistant Director, I am authorized to search the electronic Consular Consolidated Database (CCD) of the U.S. Department of State, Bureau of Consular Affairs, for visa records and the records of the NVC. The following declaration is based on information acquired in my official capacity in the performance of my official functions.
2. The mission of NVC is to improve efficiency of worldwide consular operations by reducing clerical burdens on U.S. embassies and consulates abroad. Accordingly, the NVC performs clerical processing for all approved immigrant visa petitions approved by U.S. Citizenship and Immigration Services (“USCIS”), including, collecting and reviewing fees and documents required by law to process immigrant visa applications.
3. When NVC receives an approved I-730 Refugee/Asylee Relative Petition and its accompanying documentation from USCIS, it creates a case in its records system and assigns the petition a case number. NVC then physically mails the petition to the overseas consular post with jurisdiction over the case on a biweekly shipment cycle subject to post capacity. These follow-to-join applications are not visas.
4. The NVC received the approved I-730 petition, receipt number LIN1800650888, filed by Rasha Muzahem Alwan al Salihi on behalf of her husband Naser Sameer Naji from USCIS on August 15, 2023. Baghdad I-730 cases are assigned to Abu Dhabi, United Arab Emirates; Ankara, Turkey; or Doha, Qatar. This is due to limitations in consular processing out of Baghdad as a result of a December 2019 attack on the embassy compound that continues to present staffing and security constraints. This case has been assigned to Ankara, Turkey with the case number ANK2023737006. NVC shipped out the I-730 petition and accompanying documentation to the embassy in Ankara on August 29, 2023.

I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct to the best of my knowledge.

Date: August 30, 2023



Rebecca Austin
Assistant Director