IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BARAK CHACOTY, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**CIVIL NO. 1:14-764-KBJ**
	)	
JOHN KERRY, et al.,	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' MEMORANDUM OF LAW
IN SUPPORT OF THEIR MOTION TO DISMISS

Plaintiffs challenge under the Administrative Procedure Act (APA) the Department of State's (the Department) denial of their applications for Consular Reports of Birth Abroad (CRBA) on behalf of their minor children born overseas or cancellation of their previously-issued CRBAs, except Plaintiff Kenton Manning who advances his own claim to United States citizenship and Plaintiffs Kayla and Chana Sitzman who are adults challenging the cancellation of their CRBAs. *See* Second Amend. Compl., ECF No. 13.[1] Defendants move to dismiss Plaintiffs' complaint on jurisdictional grounds under Rule 12(b)(1) and for failure to state a claim under Rule 12(b)(6).

Plaintiffs fail to state a claim under the APA because Congress expressly provided another remedy under the Immigration and Nationality Act of 1952 (INA) for any person denied

[1] Plaintiffs include sixteen parents who challenge the denial of their children's CRBA applications, along with one adult who challenges the denial of a United States passport application, and two adults who challenge the cancellation of their CRBAs. These individuals are improperly joined because they do not assert a right to relief arising out of the same transaction, occurrence, or series of transactions or occurrences with facts common to all of them. *See* Fed. R. Civ. P. 20(a)(1)(A)-(B).

a right or privilege as a national of the United States. *See* 8 U.S.C. § 1503. Because Plaintiffs seek review of the Department's denial of claims to United States citizenship, they must challenge the Department's decisions under the appropriate review provisions of the INA and may not proceed under the APA. *See Hassan v. Holder*, 793 F. Supp. 2d 440, 445-46 (D.D.C. 2011).

Even if the Court allows Plaintiffs to proceed with their APA claims despite the alternative adequate remedy under 8 U.S.C. § 1503, Plaintiffs' complaint has additional defects mandating dismissal. Five of the Plaintiffs, Ittai and Nachama Shulem, Yahoshua and Hadasa Mayerson, and Kenton Manning, allege that the Department issued final decisions in their cases more than six years before filing their first complaint in this case, and under the six-year statute of limitations these five Plaintiffs must be dismissed from this lawsuit on jurisdictional grounds. *See* 28 U.S.C. § 2401. The remaining Plaintiffs' claims must be dismissed for failure to allege any facts showing that one of their United States citizen parents has a residence in the United States before their birth, as required for eligibility for CRBAs and United States passports. *See* 8 U.S.C. § 1401(c) (INA 301(c)). Moreover, even if the Court were to consider Plaintiffs' claims under the APA, Plaintiffs fail to show as a matter of law that the Department's interpretation of the statutory residence requirement is unreasonable, *see* 5 U.S.C. § 706(a)(2), and on this basis, all of their claims must be dismissed under Rule 12(b)(6).[2]

STATUTORY AND REGULATORY BACKGROUND

There are only two sources of citizenship, by birth and through naturalization. *See Miller v. Albright*, 523 U.S. 420, 423 (1998). Citizenship by birth can be acquired by being born in the United States. *See* U.S. Const. Amend. 14, § 1. If a person is born outside the United States, he

[2] Plaintiffs are also improperly joined in this lawsuit because they fail to meet the requirements under Rule 20, and their cases should be severed.

or she can only acquire citizenship at birth as provided by Congress. *See* U.S. Const. Art. I, § 8, cl. 4; *Miller*, 523 U.S. at 423-24. Under the INA, a person born outside the United States and its outlying possessions is a citizen and national of the United States if both of the person's parents are citizens of the United States, are married to each other at the time of the person's birth, and if one of the United States citizen parents "has had a residence in the United States or one of its outlying possessions, prior to the birth of such person." Public Law No. 82-414, 66 Stat. 163, § 301(a)(3) (June 27, 1952) (codified at 8 U.S.C. § 1401(c)); *see also* 7 *Foreign Affairs Manual* (FAM) § 1133.3-1(a)(2).[3] The INA further defines the term "residence" as "the place of general abode," which means a person's "principal, actual dwelling place in fact, without regard to intent." Public Law No. 82-414, § 101(a)(33) (8 U.S.C. § 1101(a)(33)). Congress has granted the Secretary of State (the Secretary) authority to determine the nationality of persons outside the United States, and to perform acts necessary for carrying out such authority, including issuing regulations. *Id.* § 104(a) (8 U.S.C. § 1104(a)).

The Department has historically interpreted the concept of a parent's "residence" in the United States for purposes of the child's acquisition of citizenship by birth abroad to mean the parent's "principal dwelling place," which excludes the parent's temporary presence in or visits to the United States. *See* 7 FAM § 1134.3-1(a)-(b) (last amended April 1, 1998). On January 12, 2012, the Department sent an unclassified cable to all consular officers elaborating the Department's long-established interpretation of the statutory term "residence" under INA 301(c) (8 U.S.C. § 1401(c)). *See* Dep't of State Cable, *Citizenship: Guidance for Determining Acquisition of U.S. Citizenship by Children Born Abroad to Two U.S. Citizens Parents Under INA 301(c)*, 12 State 3735, ¶ 1 (Jan. 12, 2012) ("This guidance does not constitute in any respect a change in interpretation.") (Exhibit A). The Department issued the guidance "in recognition of

[3] Available at: http://www.state.gov/m/a/dir/regs/

the fact that the concept of residence is inherently more complex than the more literal concept of physical presence." *Id*. Because the statute distinguishes between physical presence and residence, *see* 8 U.S.C. §§ 1401(c), (g), the cable reminded consular officers that the two concepts should not be confused, *see* Dep't of State Cable, 12 State 3735, ¶ 7. The cable confirmed that a significant distinction between the two concepts turns on the manner in which a person spends time in the United States. *Id*. ¶ 8. "The time spent in a 'residence' is time spent in that one particular place, not time spent in the United States overall." *Id*. In recognition that the statute does not contemplate the person's intent when determining residence, *see* 8 U.S.C. § 1101(a)(33), the cable advised consular officers that "[r]esidence is not a state of mind that travels with a person," *see* Dep't of State Cable, 12 State 3735, ¶ 2. Thus, the cable re-affirmed the Department's position that residence is not determined solely by the length of time a person spends in a place, but necessarily implicates "the nature and quality of the person's connection to the place," which requires consular officers to apply a "fact-specific test" to the circumstances in each application for a CRBA or passport. *Id*. The Department's instructions were subsequently incorporated into the *Foreign Affairs Manual*. *See* 7 FAM § 1133.5.

The Secretary has delegated to consular officers the authority to make nationality determinations applicable to persons outside the United States. *See* 61 Fed. Reg. 43,311; 43,311-12 (Dep't of State) (Aug. 22, 1996) (22 C.F.R. § 50.2). Consular officers determine claims to United States citizenship made by persons outside the United States based on applications for a passport or for a CRBA. *See* 22 C.F.R. §§ 50.2, 50.7(a). Consular officers may require an applicant to provide any evidence deemed necessary to establish that the person is a United States citizen. 22 C.F.R. § 51.45. An applicant seeking a CRBA under INA 301(c) must provide, among other things, evidence that is sufficient to permit a consular officer to determine

whether at least one of the applicant's parents meets the statutory requirement that he or she had a residence in the United States before the applicant's birth. *See* 8 U.S.C. § 1401(c); 7 FAM §§ 1133.5(b), 1133.6(b)(5). The applicant for a CRBA has the burden of proving that the intended recipient meets all of the statutory requirements for United States citizenship. *See* 22 C.F.R. § 51.40.

If the person born overseas meets the statutory requirements for citizenship under INA 301(c), including the requirement that one of his or her parents had a residence in the United States, the consular officer may issue a CRBA to the person's parent or legal guardian. *See* 22 C.F.R. § 50.7(a). A CRBA does not "grant" citizenship, but simply constitutes certification that a person acquired citizenship at birth. *See* 22 U.S.C. § 2705; *Hizam v. Kerry*, 747 F.3d 102, 107 (2d Cir. 2014).

The Department is authorized by statute to cancel any CRBA "if it appears that such document was illegally, fraudulently, or erroneously obtained, or was created through illegality or fraud[.]" 8 U.S.C. § 1504(a); 64 Fed. Reg. at 19,714 (Dep't of State) (April 22, 1999) (22 C.F.R. § 50.7(d)). Before cancelling a CRBA, the Department must provide written notice of the cancellation along with procedures for seeking a post-cancellation hearing. *Id*. Upon the request of an aggrieved party for a hearing, the Department names a hearing officer to conduct a hearing on the record and to make findings of fact and recommendations regarding the cancelled CRBA. *See* 22 C.F.R. §§ 51.71(a), 51.72; ECF No. 2-1. The person requesting the hearing may appear in person, or with or by his or her designated attorney, and may testify, present witnesses, and offer evidence challenging the Department's cancellation of the CRBA. *See* 22 C.F.R. § 51.71(b)-(c). After reviewing the hearing record and the hearing officer's findings of fact and recommendations, the Deputy Assistant Secretary for Passport Services in the Bureau of

Consular Affairs will decide whether to uphold or overturn the Department's cancellation of the CRBA. *See* 22 C.F.R. § 51.74; ECF No. 2-2.

An aggrieved party may challenge the Department's citizenship determination through a declaratory judgment action in district court. *See Hizam*, 747 F.3d at 108. The INA provides that if any person within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or official upon the ground that the person is not a national of the United States, the aggrieved person may institute an action for declaratory judgment for a determination that the person is a national of the United States. *See* Public Law No. 82-414, § 360(a) (8 U.S.C. § 1503(a)).[4]

FACTS AND COURSE OF PROCEEDINGS

As alleged in the second amended complaint, the Plaintiffs in this case include sixteen United States citizens currently overseas with addresses in the consular districts of the United States Consulate General Jerusalem or the United States Embassy Tel Aviv, who allege that their minor children born overseas are entitled to CRBAs because they acquired United States citizenship at birth; two adult Israeli citizens who claim United States citizenship at birth and challenge the cancellation of their CRBAs; and one Canadian citizen with an address in Canada who advances a citizenship claim on his own behalf and challenges the denial of his passport application. *See* Second Amend. Compl. ¶¶ 1, 2-20, 29-30, 41-42.

[4] Although 8 U.S.C. § 1503(a) appears to limit relief to persons within the United States, the Supreme Court has held that a declaratory judgment action under 8 U.S.C. § 1503(a) is available to any person outside the United States who alleges the denial of a right or privilege as a United States citizen. *See Rusk v. Cort*, 369 U.S. 367, 379 (1962), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977); *Kahane v. Sec'y of State*, 700 F. Supp. 1162, 1165 (D.D.C. 1988). Thus, any person outside the United States denied a CRBA may bring a declaratory judgment action under 8 U.S.C. § 1503(a) seeking a *de novo* judicial determination of whether the person is a United States citizen. *See Kahane*, 700 F. Supp. at 1165.

A. Plaintiff Manning

Manning is a citizen and resident of Canada who alleges an unarticulated right to United States citizenship. *Id*. ¶¶ 20, 41-42. Manning alleges he received a final decision from the Department on July 3, 2006, denying his claim for citizenship under INA 301(c). *Id*. ¶ 41. Manning asserts that the Department sent him a letter on May 24, 2007, that affirmed its decision to deny his claim to United States citizenship. *Id*. ¶ 42.

B. The Plaintiffs in Israel

All of the United States citizen Plaintiff parents submitted applications for CRBAs on behalf of their minor children. The United States Consulate General in Jerusalem or the United States Embassy in Tel Aviv denied the applications because in each application the United States citizen parent failed to provide sufficient evidence showing that he or she had a residence in the United States, as required by INA 301(c). *Id*. ¶¶ 2-19, 30, 43-44. The Plaintiff parents do not make any factual allegations in their complaint regarding their activities or purported residences in the United States before the birth of their children overseas. *Id*. The only factual allegations that Plaintiffs make regarding their activities in the United States relate to the defects that the Department found in two applications for CRBAs. Plaintiffs Barak and Adagelske Chacoty allege that the Department denied their applications because they did not provide evidence showing that "the United States was ever the place of general abode." *Id*. ¶ 45. Plaintiff Issachar Spector alleges that the Department denied his application because he failed to show that either he or his wife had a "'residence' in the United States prior to the child's birth." *Id*. ¶ 46.

C. The Sitzman Plaintiffs

Kayla and Chana Sitzman obtained CRBAs from the United States Consulate in Jerusalem when they were minors, but the Department subsequently cancelled the CRBAs

because their parents failed to establish that either of them had a residence in the United States before they were born, as required under INA 301(c). *Id*. ¶ 47. After the Department cancelled the Sitzmans' CRBAs, the Sitzmans challenged the decision by requesting a hearing, which was conducted by a hearing officer on May 11, 2011. ECF No. 2-1 at 1. During the hearing, the parties submitted uncontested evidence that Mrs. Sitzman was in the United States from July 31, 1974 until September 11, 1974; from April 4, 1982 until May 3, 1982; and for approximately ten days in February 1990. *Id*. During these visits to the United States, Mrs. Sitzman stayed with relatives where she participated in family activities and chores, but did not contribute to household finances. *Id*. Although she always intended to return to Israel, she had her mail stopped in Israel during her stay in the United States in 1974. *Id*.

Based on Mrs. Sitzman's three visits to the United States, the hearing officer made a finding that she had a residence in the United States as required under INA 301(c). *Id*. at 5. The hearing officer drew the distinction between residence and domicile, noting that the latter common law concept involves an intent requirement. *Id*. at 4. Because the INA defines a residence as the person's principal actual dwelling place without regard to intent, the hearing officer reasoned that a person's residence or abode in the United States can be any place where she stays during her visit to the United States. *Id*. The hearing officer also opined that some consular missions determined that the "residence" requirement is satisfied if the person was ever physically present in the United States. *Id*. As such, the hearing officer recommended that it would be unfair to apply a purportedly new interpretation of the residence requirement as a basis for revoking an approved CRBA. *Id*.

After reviewing the hearing record, the Deputy Assistant Secretary for Passport Services rejected the hearing officer's recommendation and upheld the Department's cancellation of the

Sitzmans' CRBAs. *See* Second Amend. Compl. ¶ 49; ECF Nos. 2-2. The Deputy Assistant Secretary reviewed the undisputed facts relating to Mrs. Sitzman's time in the United States, and concluded that her three visits to the United States did not demonstrate that she had a residence in the United States, as required under INA 301(c). ECF No. 2-2 at 1. The Deputy Assistant Secretary acknowledged that the Consulate General originally approved the CRBAs, but noted that the original approval was based on an erroneous interpretation of the term "residence" under the statute. *Id*. The fundamental error in the Consulate General's original approval and the hearing officer's analysis was to conflate the concepts of having a residence and physical presence. *Id*. The Deputy Assistant Secretary specifically found that "the Hearing Officer's Finding of Fact, Memorandum and Recommendation is based on flawed reasoning, an incorrect understanding and interpretation of INA 301(c), and a failure to properly apply Department policy to the evidence." *Id*. at 3.

Looking to the statutory language of 8 U.S.C. § 1401(c), the Deputy Assistant Secretary noted that Congress did not use the concept of "physical presence," as it had done in other sections of the INA, but chose to mandate that at least one of the person's United States citizen parents demonstrate having had a "residence" in the United States for purposes of establishing the citizenship of the child born overseas. *Id*. at 2. The Deputy Assistant Secretary reasoned that the residence requirement is more demanding than mere physical presence because Congress defined residence as the person's abode or "principal actual dwelling place in fact, without regard to intent," which "takes into account the nature and quality of the person's connection to the place." *Id*. Because "physical presence" in the United States is not enough to establish that a person had a residence, the Deputy Assistant Secretary concluded that residence cannot be determined solely by the length of time spent in a place and must depend on "much more than an

address or a place one visits on vacation." *Id*. Moreover, Congress specifically stripped the definition of residence of an intent requirement, which led the Deputy Assistant Secretary to conclude that "[r]esidence is not a state of mind but a state of affairs to be demonstrated by objective facts" that "requires a close examination, on a case-by-case basis, of the facts related to one's stay in the United States[.]" *Id*.

Bearing in mind the statutory distinction between "residence" and "physical presence," the Deputy Assistant Secretary determined that Mrs. Sitzman never had a residence in the United States before the birth of her children overseas. *Id*. The undisputed facts showed that Mrs. Sitzman visited the United States three times before the birth of her children in Jerusalem, but these visits were vacations to see family and attend family events. *Id*. Mrs. Sitzman's sojourns to the United States constituted physical presence, but the Deputy Assistant Secretary determined that the visits did not establish that Mrs. Sitzman had a "principal, actual dwelling place" in the United States for purposes of meeting the statutory definition of residence. *Id*. Thus, the Deputy Assistant Secretary did not adopt the hearing officer's determination and reaffirmed the Department's cancellation of the CRBAs. *Id*. at 3.

D. The Plaintiffs' Civil Action

On May 2, 2014, Plaintiffs filed a complaint with this Court challenging the Department's various decisions relating to Plaintiffs' applications for CRBAs and passports. *See* Compl., ECF No. 1. Plaintiffs subsequently filed two amended complaints. On August 20, 2014, Plaintiffs filed their second amended complaint seeking review of the Department's decisions under the APA. *See* Second Amend. Compl., ECF No. 13, ¶ 72. Plaintiffs allege that the Department's various decisions denying their applications for CRBAs and passports, for cancelling the Sitzmans' CBRAs, and for denying Plaintiff Manning's application for a passport,

were arbitrary and capricious and founded on a misapplication of law. *Id*. ¶¶ 70, 72. Plaintiffs seek an order compelling the Department to issue CRBAs to all Plaintiffs. ECF No. 13 at 31.

ARGUMENT

As a threshold matter, Plaintiffs fail to state a claim under the APA because Congress expressly provided an alternative adequate remedy under the INA for any person denied a right or privilege as a national of the United States. *See* 8 U.S.C. § 1503. Because Plaintiffs seek review of the Department's denial of Plaintiffs' claims to rights or privileges to United States citizenship, they must challenge the Department's decisions under the INA's review provisions and may not proceed under the APA. *See Hassan v. Holder*, 793 F. Supp. 2d 440, 445-46 (D.D.C. 2011).[5]

A. Alternative Adequate Remedy Under 8 U.S.C. § 1503

The APA provides a general cause of action to "person[s] suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute," 5 U.S.C. § 702, but judicial review is only available where "there is no other adequate remedy in a court," 5 U.S.C. § 704. The limitation on judicial review shows that "Congress did not intend the general grant of review in the APA to duplicate existing procedures for review of agency action." *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988). In determining if an adequate remedy exists, the D.C. Circuit focuses on whether a statute provides an independent cause of action or an alternative review procedure, *see Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 945 (D.C. Cir. 2004), which exists where a statute affords an opportunity for *de novo* district court review, *see Garcia v. Vilsack*, 563 F.3d 519, 522 (D.C. Cir. 2009). Where an adequate remedy is available, the plaintiff lacks a cause of action under the

[5] Plaintiffs are also improperly joined in this lawsuit because they fail to meet the requirements under Rule 20, and their cases should be severed.

APA to challenge an agency's alleged error. *See Washington Legal Foundation v. Alexander*, 984 F.2d 483, 486 (D.C. Cir. 1993); *see also Sierra Club v. Jackson*, 648 F.3d 848, 854 (D.C. Cir. 2011) (plaintiff's failure to allege a proper cause of action under the judicial review provisions of the APA warrants dismissal of the complaint for failure to state a claim).

Plaintiffs seek relief under the APA based on the Department's alleged refusal "to follow and correctly apply federal law" and for "wrongfully applying the unfounded and unsubstantiated updates to the FAM." Second Amend. Compl. ¶ 72. But Plaintiffs' claims under the APA must fail because they have another adequate remedy under 8 U.S.C. § 1503, which provides for a *de novo* judicial determination of whether Plaintiffs are United States citizens. *See Kahane*, 700 F. Supp. at 1165. It is established law in this circuit that no APA claim may lie "where a statute affords an opportunity for *de novo* district court review" of the contested agency action. *See Garcia*, 563 F.3d at 522 (citation omitted). The express right of action for *de novo* review under the INA mandates that Plaintiffs pursue this statutory remedy as an alternative to the default APA review. *See Washington Legal Foundation*, 984 F.2d at 486 (plaintiff is required to pursue an implied statutory remedy). Thus, Plaintiffs' APA claims must be dismissed for failure to state a cause of action under the APA. *See Hassan*, 793 F. Supp. 2d at 445-46.[6]

Although Plaintiffs frame their challenge under the APA, the D.C. Circuit rejected a similar claim under the Mandamus Act in *Cartier v. Sec'y of State*, 506 F.2d 191, 198-99 (D.C. Cir. 1974), based on the existence of an alternative remedy under 8 U.S.C. § 1503(a). The plaintiff in *Cartier* sought to compel legacy INS to return his certificate of naturalization based

[6] The D.C. Circuit has also held that the APA excludes from its waiver of sovereign immunity claims for which an adequate remedy is available elsewhere. *See Transohio Savings Bank v. OTS*, 967 F.2d 598, 607 (D.C. Cir. 1993). Because Plaintiffs have an adequate remedy under 8 U.S.C. § 1503, the Court may also dismiss their APA claims for want of a waiver of sovereign immunity. *See Nat'l Wrestling Coaches*, 366 F.3d at 947.

on his claim to United States citizenship, but the D.C. Circuit held that the plaintiff was required to proceed under a declaratory judgment action pursuant to Section 1503(a), which would provide him, if successful, with a declaration of United States citizenship. *See Cartier*, 506 F.2d at 199. Plaintiffs in this case make a similar request to compel agency action, *see* ECF No. 13 at 31, and like the plaintiff in *Cartier*, their claims are appropriately addressed through the INA's *de novo* review provision for a determination of United States citizenship, *see Kahane*, 700 F. Supp. at 1165. The basis for dismissal is even more compelling in this case because the mandate that Plaintiffs pursue an alternative adequate remedy is a statutory requirement, *see* 5 U.S.C. § 704, whereas the requirement in *Cartier* was derived from common law, *see* 506 F.2d at 198.[7]

Plaintiffs may argue that they are not required to proceed under 8 U.S.C. § 1503 because they are bringing a system-wide challenge to the manner in which the Department interprets the residence requirement under INA 301(c). It is unclear whether Plaintiffs intend to pursue a system-wide claim, *see* Second Amend. Compl. ¶¶ 63, 70, 86-87, but such a challenge is nevertheless precluded by the express review provision under 8 U.S.C. § 1503. Where Congress provides for a specific review regime, an allegedly aggrieved party cannot circumvent the statute's exclusive review provisions by dressing up his claim as a system-wide challenge to an agency's administration of a program. *See Fornaro v. James*, 416 F.3d 63, 67-69 (D.C. Cir.

[7] Plaintiffs may argue that they do not have an alternative remedy because the plain language of 8 U.S.C. § 1503(a) only applies to persons inside the United States. But the Supreme Court already rejected this contention, and held that persons outside the United States, like Plaintiffs in this case, may avail themselves of a declaratory judgment action under 8 U.S.C. § 1503(a) when allegedly deprived of a right or privilege to United States citizenship by an agency. *See Rusk*, 369 U.S. at 377-79. Appling the holding in *Rusk*, this Court in *Kahane* recognized that a plaintiff in Israel could pursue a declaratory judgment action under 8 U.S.C. § 1503(a) challenging the Department's refusal to allow the plaintiff to withdraw his request to renounce United States citizenship. 700 F. Supp. at 1165. Without conceding the merits of Plaintiffs' claims in this case, it is beyond dispute that they may individually challenge under 8 U.S.C. § 1503 the Department's final decisions relating to the CRBAs even though the Plaintiffs are currently outside the United States.

2005). In this case, Congress channeled all challenges to denials of citizenship claims through individual declaratory judgment actions for a *de novo* determination of whether the aggrieved party is a United States citizen. *See Rusk*, 369 U.S. at 373; *Kahane*, 700 F. Supp. at 1165. An aggrieved party must challenge a discrete, final agency action to seek relief under 8 U.S.C. § 1503, *see Parham v. Clinton*, 374 F. App'x 503, 504 (5th Cir. 2010), and the relief is limited to a declaration that the aggrieved party is a United States citizen, *see Hizam*, 747 F.3d at 108. Thus, the only remedy available to Plaintiffs under the governing statute is an individualized *de novo* determination regarding each of their citizenship statuses, which precludes a system-wide challenge to the manner in which the Department adjudicates applications for citizenship documentation at the administrative level.

B. Statute of Limitations

Even if the Court determines that Plaintiffs are able to state a claim under the APA, five of the Plaintiffs with time-barred claims must be dismissed from this action under Rule 12(b)(1). Plaintiffs Ittai and Nachama Shulem, Yehoshua and Hadasa Mayerson, and Kenton Manning allege final agency actions that occurred more than six years before they filed their complaint on May 2, 2014. *See* ECF No. 1; ECF No. 13 ¶¶ 36, 37, 42. As such, their claims are time-barred by the statute of limitations. *See* 28 U.S.C. § 2401(a).

Every civil action commenced against the United States shall be barred unless the complaint is filed "within six years after the right of action first accrues." 28 U.S.C. § 2401(a). "Unless another statute provides otherwise, civil claims against the United States – including those brought pursuant to the APA – are subject to the statute of limitations contained in 28 U.S.C. § 2401, which allows for civil actions against the United States so long as the complaint is filed within six years after the right of action first accrues." *Mendoza v. Perez*, 754 F.3d 1002,

1018 (D.C. Cir. 2014) (internal quotations and citation omitted). If the Court allows Plaintiffs to proceed with their APA claims, they are subject to the general civil action statute of limitations under 28 U.S.C. § 2401. *See Harris v. FAA*, 353 F.3d 1006, 1009 (D.C. Cir. 2004).[8]

Under the law of this Circuit, 28 U.S.C. § 2401(a) is a condition on the government's waiver of sovereign immunity. *See P & V Enters. v. U.S. Army Corps of Eng'rs*, 516 F.3d 1021, 1026 (D.C. Cir. 2008). Because the statute of limitations is jurisdictional in nature, it cannot be waived by the parties, *see Mendoza*, 754 F.3d at 1018, and serves as an appropriate basis for a motion to dismiss. With regard to APA claims, the D.C. Circuit has explained that "[t]he right of action first accrues on the date of the final agency action." *Harris v. FAA*, 353 F.3d 1006, 1010 (D.C. Cir. 2004). "[W]here no formal review procedures existed, the cause of action accrued when the agency action occurred." *Impro Products, Inc. v. Block*, 722 F.2d 845, 850-51 (D.C. Cir. 1983).

Plaintiffs Shulem, Mayerson, and Manning each allege that they were aggrieved by a final agency action occurring more than six years before they filed their complaint on May 2, 2014. Second Amend. Compl. ¶¶ 36, 37, 42. Plaintiff Shulem alleges that on November 15, 2007, the Department issued a final denial of her application for a CRBA on behalf of her minor child. *Id*. ¶ 36. Plaintiff Mayerson alleges that the Department issued a final denial of her application for a CRBA on February 25, 2008. *Id*. ¶ 37. Similarly, Plaintiff Manning alleges that the Department finally denied his request for determination of United States citizenship on May 24, 2007. *Id*. ¶ 42. Each of these three agency denials occurred more than six years before Plaintiffs filed their complaint on May 2, 2014, which requires dismissal of their claims under the six year statute of limitations. *See* 28 U.S.C. § 2401(a); *Harris*, 353 F.3d at 1010.

[8] The INA has a five-year statute of limitations for declaratory judgment actions relating to citizenship claims, *see* 8 U.S.C. § 1503(a), which likewise bars the Shulems', the Mayersons', and Mr. Manning's claims, as well as those of Mr. and Mrs. Becker.

C. Failure to State a Claim Under the APA

Even if the remaining Plaintiffs' APA claims were not precluded by the alternative adequate remedy requirement, *see* 5 U.S.C. § 704, they still fail to state a cause of action under the APA because they do not present any plausible claim that the Department's denials of their applications for CRBAs were arbitrary and capricious or otherwise contrary to law, *see* 5 U.S.C. § 706(a)(2).

1. Standard of Review

When considering a motion to dismiss under Rule 12(b)(6), the Court must accept as true all well-pleaded facts and allegations in the complaint. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). The Court need not, however, accept a plaintiff's legal conclusions. *Id*. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id*. (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Only a complaint that states a plausible claim for relief survives a motion to dismiss. *Id*. at 1950 (citing *Twombly*, 550 U.S. at 556). The facts alleged must allow the Court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *See Rollins v. Wackenhut Services, Inc*., 703 F.3d 122, 129-130 (D.C. Cir. 2012).

Because the entire case on review under the APA is a question of law, there is no inherent barrier to reaching under a 12(b)(6) motion to dismiss the merits of a plaintiff's claim that the agency acted contrary to law. *See Marshall County Health Care Authority v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993). In ruling on a motion to dismiss, the Court may consider the facts alleged in the complaint, documents attached as exhibits or incorporated by reference in the complaint, and matters about which the Court may take judicial notice. *See Hassan v. Holder*, 793 F. Supp. 2d 440, 445 (D.D.C. 2011).

Under the APA, the Court may review a challenge to a final agency action by an aggrieved party, *see* 5 U.S.C. §§ 702, 704, but the Court may only set aside a final agency action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A). The arbitrary and capricious standard of review governs the Court's review of an agency's decision in the absence of an alternative standard in the agency's organic statute. *See Friedman v. Sebelius*, 686 F.3d 813, 827 (D.C. Cir. 2012). This is a "deferential" standard, *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007), which "presume[s] the validity of agency action," *Southwestern Bell Tel. Co. v. FCC*, 168 F.3d 1344, 1352 (D.C. Cir. 1999), and precludes the Court from substituting its judgment for that of the agency, *see Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1105 (D.C. Cir. 2009). The Court "will not disturb the decision of an agency that has examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Americans for Safe Access v. DEA*, 706 F.3d 438, 449 (D.C. Cir. 2013) (quotations and citation omitted).

2. Plaintiffs Do Not Allege Sufficient Facts

With the exception of Kayla and Chana Sitzman, Plaintiffs fail to allege any particularized facts relating to their or their parents' time in the United States or whether they (or one of their parents) had a residence in the United States before the birth of their children outside the United States. For example, Plaintiff Manning provides no factual allegations regarding the basis for his alleged right to United States citizenship. *See* Second Amend. Compl. ¶¶ 20, 41-42. He merely alleges that he received a final decision from the Department on May 24, 2007, denying his claim for citizenship under 8 U.S.C. § 1401(c). *Id*. ¶ 42. Similarly, all of the United States citizen parents fail to allege any facts regarding their activities or residence in the United

States before the birth of their children overseas. *Id*. ¶¶ 2-19, 30, 43-44. The only factual allegations that any of the Plaintiffs other than Kayla and Chana Sitzman make regarding their activities in the United States relate to the defects that the Department found in two applications for CRBAs. Plaintiffs Mr. and Mrs. Chacoty allege that the Department denied their applications on behalf of their children because they did not provide evidence showing that "the United States was ever the place of general abode." *Id*. ¶ 45. Plaintiff Issachar Spector alleges that the Department denied his application because he failed to show that he had a "'residence' in the United States prior to the child's birth." *Id*. ¶ 46. Neither Plaintiff Manning nor the United States citizen parent Plaintiffs provide enough factual allegations to make out a plausible claim for relief under the INA or the APA.

The statute provides that a person born abroad to United States citizen parents must show that at least one parent "has had a residence in the United States or one of its outlying possessions, prior to the birth of such person" to establish United States citizenship. 8 U.S.C. § 1401(c); 7 FAM § 1133.3-1(a)(2). Congress defined the term "residence" in the INA as "the place of general abode," which means a person's "principal, actual dwelling place in fact, without regard to intent." 8 U.S.C. § 1101(a)(33). Because the statute distinguishes between physical presence and residence, *see* 8 U.S.C. §§ 1401(c), (g), the Department has determined, consistent with longstanding Department policy, that a person's residence in the United States is not established solely by the length of time a person spends in a place, but necessarily implicates "the nature and quality of the person's connection to the place," which requires consular officers to apply a "fact-specific test" to the circumstances in each application for a CRBA. *See* Dep't of State Cable, 12 State 3735, ¶ 2**.**

Plaintiffs challenge the Department's interpretation as inconsistent with the statutory definition of residence, *see* Second Amend. Compl. ¶¶ 43, 52, 63, 72, but they fail to allege any facts that arguably demonstrate they had a residence in the United States before the birth of their children overseas, *id*. ¶¶ 2-20, 30, 41-44. Although the government disputes Plaintiffs' reading of the statutory definition, even if the controlling definition were beyond dispute, Plaintiffs fail to marshal sufficient facts to show that they fall within the definition of residence. *See United Steel, Paper and Forestry, Rubber, Manufacturing v. PBGC*, 707 F.3d 319, 324 (D.C. Cir. 2013) (even when the statutory definition is not in dispute, the court must determine whether the facts fit within a statutory definition). Without alleging any facts by which the Court can determine whether the Plaintiffs fall within the statutory definition, they necessarily fail to state a plausible claim for relief based on an alleged arbitrary and capricious agency action. *See Rollins*, 703 F.3d at 129-130. Thus, Plaintiff Manning's claims and the claims of the United States citizen parent Plaintiffs (other than Kayla and Chana Sitzman) must be dismissed for failure to allege sufficient facts for a cause of action under the APA.

3. The Department's Interpretation Controls

Unlike the other Plaintiffs, the Sitzmans might allege sufficient facts for a claim under the APA based on their exhibits, *see* ECF Nos. 2-1, 2-2, but their claims nevertheless fail as a matter of law because they cannot show that the Department's interpretation of the statute is unreasonable. *See* 5 U.S.C. § 706(a)(2); *Nat'l Mining Ass'n v. Kempthorne*, 512 F.3d 702, 709 (D.C. Cir. 2008) (agency's interpretation controls as long as it is reasonable).[9] Thus, the Court should dismiss Plaintiffs' APA claims under Rule 12(b)(6). *See Marshall County Health Care Authority*, 988 F.2d at 1226-27.

[9] The legal defect with the Sitzmans' case applies with equal force to the other Plaintiffs, which warrants dismissal of their claims as an alternative to their failure to allege sufficient facts to state a claim under the APA.

In matters of statutory interpretation, the Court applies the two-part test under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984). The first step of this familiar inquiry is considering "the text, structure, purpose, and history of an agency's authorizing statute" to determine whether a provision reveals congressional intent about the precise question at issue. *Hearth, Patio & Barbecue Ass'n v. Dep't of Energy*, 706 F.3d 499, 503 (D.C. Cir. 2013) (internal quotation marks omitted). If the Court cannot readily divine Congress's clear intent, it must defer to the agency's interpretation of the statute so long as it is "based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843.

The *Chevron* framework controls in this case because the Department acted pursuant to an express delegation of authority in issuing its interpretation through the consular cable and corresponding FAM sections. *See* Dep't of State Cable, 12 State 3735. Congress delegated to the Department the responsibility to determine the nationality of persons outside the United States, including establishing regulations and taking other actions necessary to carry out this authority. *See* 8 U.S.C. § 1104(a). An express delegation arises when "Congress has expressly delegated to [an agency] the authority to prescribe regulations containing such classifications, differentiations, or other provisions as, in the judgment of the [agency], are necessary or proper to effectuate the purposes of [the authorizing statute], to prevent circumvention or evasion thereof, or to facilitate compliance therewith." *Household Credit Servs., Inc. v. Pfennig*, 541 U.S. 232, 238–39 (2004) (internal quotation marks omitted). The delegation of authority under 8 U.S.C. § 1104(a) indicates that Congress intended the Department to fill in the interstices of the statute with interpretive decisions having the force and effect of law, which decisions warrant *Chevron* deference. *See Nat'l Ass'n of Clean Air Agencies v. EPA*, 489 F.3d 1221, 1229 (D.C. Cir. 2007).

Even if the controversy in this case did not turn on the Department's interpretation in the consular cable and the FAM guidance, at least two of the Plaintiffs' citizenship claims were resolved by the Deputy Assistant Secretary's formal adjudication through a hearing on the record. *See* 22 C.F.R. §§ 51.71(a)-(c); Second Amend. Compl. ¶ 49; ECF Nos. 2-1, 2-2. Because the Department announced its interpretation through the Deputy Assistant Secretary after a formal hearing on the record, the *Chevron* framework controls the evaluation of the Department's statutory interpretation. *See BP West Coast Products, LLC v. FERC*, 374 F.3d 1263, 1272-73 (D.C. Cir. 2004); *In Re Lyon County Landfill*, 406 F.3d 981, 984 (8th Cir. 2005).

(a) The Statute Clearly Distinguishes Residence and Physical Presence

Before addressing the Department's interpretation of the ambiguous aspects of the definition of residence, the Plaintiffs' initial argument that physical presence in the United States alone is sufficient to establish a residence under INA 301(c), *see* Second Amend. Compl., ¶¶ 63, 73, 75, is easily defeated by the plain meaning of the statute. Although the statutory definition of residence is ambiguous in several respects, on the issue of physical presence in relation to residence, the statute clearly precludes Plaintiffs' position. As the Department explained in its cable to all consular posts, the statute distinguishes between physical presence and residence, *see* 8 U.S.C. §§ 1401(c), (g), which indicates that Congress intended to distinguish the two concepts. *See* Dep't of State Cable, 12 State 3735, ¶ 7. The distinction that the Department elaborated is well recognized by the Courts in the context of the INA. *See United States v. Arango*, 670 F.3d 988, 997 (9th Cir. 2012); *De Rodriguez v. Holder*, 724 F.3d 1147, 1151 (9th Cir. 2013). Because Congress did not use the term "physical presence" as a requirement for establishing citizenship under INA 301(c), as it had done in other contexts, the legislature intended "residence" under INA 301(c) to mean something more than simply being physically present in the United States.

See Dean v. United States, 556 U.S. 568, 573 (2009) ("when Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that congress acts intentionally and purposely in the disparate inclusion of exclusion"). Thus, Congress's distinction between residence and physical presence undercuts Plaintiffs' reading of the term residence as equivalent to physical presence alone.

(b) The Remaining Elements of the Residence Definition Are Ambiguous

Setting aside the clear distinction between physical presence and residence under the INA, which defeats Plaintiffs' claims to citizenship, their additional argument that the statute is unambiguous regarding the remaining elements of the residence definition fails. Congress left an ambiguity for the Secretary to resolve in administering the statute based on the legislature's open-ended use of the term "residence" as "principal, actual dwelling place in fact" to be further determined by the objective facts in each particular case.

Under the INA, a person born abroad to two married United States citizen parents must show that at least one parent "has had a residence in the United States or one of its outlying possessions, prior to the birth of such person" to establish United States citizenship. 8 U.S.C. § 1401(c). Congress defined the term "residence" in the INA as "the place of general abode," which means a person's "principal, actual dwelling place in fact, without regard to intent." 8 U.S.C. § 1101(a)(33). This definition of residence and the stated congressional purpose in adopting the definition only establish that Congress rejected the common law concept of "domicile" in determining a person's residence. *See Arango*, 670 F.3d at 997. Under the common law, a domicile is the person's place of residence accompanied with positive proof of an intention to remain there for an unlimited time. *See Mitchell v. United States*, 88 U.S. 350, 352 (1874); *Shafer v. Children's Hospital Society*, 265 F.2d 107, 112-13 (D.C. Cir. 1959).

Because "intent" cannot be a factor in determining residence under the INA, Congress meant to displace the general common law concept of domicile, which indicates that the legislature left it to the Department to determine the permutations of the definition through the empiric process of administration by applying the broad statutory definition to the facts of each individual case. *See Board v. Hearst Publications*, 322 U.S. 111, 124-131 (1944); *cf. Christ the King Manor v. HHS*, 730 F.3d 291, 306 (3d Cir. 2013) (an agency's application of law to facts is reviewed under the *Chevron* framework).

Stripped of the intent requirement, the statute nevertheless mandates that a "residence" is determined in terms of a person's "principal, actual dwelling place in fact." Congress did not further qualify the scope of "residence" beyond directing the agency to determine the facts surrounding a person's dwelling place, which renders the term's connotation ambiguous because the qualities constituting its significance are left open. Congress did not address the issue of what type of relationship to the United States is sufficient to establish a residence, nor did Congress direct the agency to consider specific factors in determining whether a person has established a dwelling place in the United States. *See* 8 U.S.C. § 1101(a)(33). The statute is silent about these relevant issues, and this lack of clarity regarding the precise connotation of the term "residence" indicates that Congress left an ambiguity for the agency to resolve. *See White Stallion Energy Center v. EPA*, 748 F.3d 1222, 1243 (D.C. Cir. 2014) (ambiguity arises from a statutory phrase's two possible connotations); *Port of Seattle v. FERC*, 499 F.3d 1016, 1032 (9th Cir. 2007) (same).

Plaintiffs intimate that the statue clearly allows a person to establish a residence by his or her mere physical presence in the United States as a visitor. *See* Second Amend. Compl. ¶¶ 63, 73, 75. But as the Department explained in its cable to all consular posts, the statute

distinguishes between physical presence and residence, *see* 8 U.S.C. §§ 1401(c), (g), which indicates that Congress did not intend to conflate the two concepts. *See* Dep't of State Cable, 12 State 3735, ¶ 7. The distinction that the Department elaborated is well recognized by the Courts in the context of the INA. *See Arango*, 670 F.3d at 997; *De Rodriguez v. Holder*, 724 F.3d 1147, 1151 (9th Cir. 2013). Congress's distinction between residence and physical presence, as recognized by the Secretary, undercuts Plaintiffs' reading of the term residence as equivalent to physical presence alone, but it still leaves unanswered the question of what relationship a person must have to the United States for purposes of establishing a "principal, actual dwelling place in fact."

The only certainty that the statutory definition provides, based on the text and legislative history, is that Congress intended to direct the agency to make a fact-specific inquiry into a person's relationship to a place in the United States to determine whether he or she established a residence or principal dwelling place, and that residence is something more than physical presence. Congress's definition is a codification of judicial construction of the term "residence" as elaborated in *Savorgnan v. United States*, 338 U.S. 491 (1950). *See Arango*, 670 F.3d at 997. In that case, the Court held that residence must be determined in terms of the objective facts surrounding a person's connection with a place irrespective of the person's wishes or reasons for remaining in a place. *Savorgnan*, 338 U.S. at 505-06. By resting the meaning of residence on further elaboration based on the objective facts in each case, Congress left open the interstices of the concept to the empiric process of administration. *See Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941); *National Min. Ass'n v. Mine Safety & Health Admin.*, 116 F.3d 520, 530 (D.C. Cir. 1997) (court defers to an agency's reasonable interpretation of an open-ended statutory term). Moreover, the statute does not directly address the appropriate level of factual specificity

that is necessary to demonstrate that a person has a residence in the United States beyond ensuring that the person has a principal, actual dwelling place here, which leaves an ambiguity for the agency to resolve. *See Cement Kiln Recycling Coalition v. EP*A, 493 F.3d 207, 217-18 (D.C. Cir. 2007) (when Congress does not indicate the level of specificity expected of the agency, it is entitled to broad deference in picking the suitable level).

(c) The Department's Interpretation Is Reasonable

Because there is an ambiguity in the statute for the Secretary to resolve in determining the citizenship of individuals outside the United States, the Court must uphold the Secretary's resolution of the ambiguity as long as the agency's interpretation is not arbitrary and capricious. *See Judulang v. Holder*, 132 S. Ct. 476, 484 n.7 (2011); *Agape Church v. FCC*, 738 F.3d 397, 410 (D.C. Cir. 2013). Under this "deferential standard," *Illinois Public Telecom. Ass'n v. FCC*, 752 F.3d 1018, 1024 (D.C. Cir. 2014), a "reasonable" interpretation is good enough under *Chevron* step two, *see Nat'l Mining Ass'n v. Kempthorne*, 512 F.3d 702, 709 (D.C. Cir. 2008). Even if the Plaintiffs had a "better" reading of the statute, which they do not, the Secretary's interpretation still controls as long as it is reasonable. *See Gentiva Healthcare Corp. v. Sebelius*, 723 F.3d 292, 295 (D.C. Cir. 2013).

The Department's cable to all consular posts, *see* Dep't of State Cable, 12 State 3735, and the Deputy Assistant Secretary's interpretation through a formal adjudication, *see* ECF No. 2-2, are reasonable because they take into account the statutory distinction between physical presence and residence and advance the legislative purpose of ensuring that a residence is tied to a person's objective relationship to the United States. *See Alaska Dep't of Health & Social Serv. v. Centers for Medicare & Medicaid Serv.*, 424 F.3d 931, 942 (9th Cir. 2005) (agency's

interpretation that is consistent with the text and purpose of the statute warrants *Chevron* deference).

Based on the text and structure of the statute, the Department determined that a residence requires something more than mere physical presence in the United States. The Department's cable and the Deputy Assistant Secretary's final administrative decision reiterated that a significant distinction between the two concepts turns on the manner in which a person spends time in the United States. *See* Dep't of State Cable, 12 State 3735, ¶ 8. The distinction is reasonable because it stems from Congress's use of the two concepts in different contexts under the INA, *see* 8 U.S.C. §§ 1401(c), (g), which is well-recognized by the courts, *see Arango*, 670 F.3d at 997; *De Rodriguez*, 724 F.3d at 1151. Since Congress recognized that a residence is distinct from physical presence, the Department reasonably determined that a residence is not established solely by the length of time a person spends in a place, but necessarily implicates "the nature and quality of the person's connection to the place," which requires consular officers to apply a "fact-specific test" to the circumstances in each application for a CRBA. Dep't of State Cable, 12 State 3735, ¶ 2.

The Department's interpretation also takes into account Congress's purpose in adopting the definition of residence as a person's "principal, actual dwelling place in fact." Congress's definition is a codification of judicial construction of the term "residence," as elaborated in *Savorgnan v. United States*, 338 U.S. 491 (1950). *See Arango*, 670 F.3d at 997. In that case, the plaintiff departed the United States to accompany her foreign national husband in Italy where she lived with him for four years. *Savorgnan*, 338 U.S. at 506. Although the plaintiff may have intended to return to the United States, she established a residence overseas because her "principal dwelling place" or "place of general abode" was in Italy where she established a home

with her husband. *Id*. Because the Court determined that the plaintiff's home was in Italy, she no longer resided in the United States. *Id*.

The Department's interpretation of a "residence" tracks the analysis in *Savorgnan*. Underscoring the irrelevance of a person's intent, the Secretary advised consular officers that "[r]esidence is not a state of mind that travels with a person," but depends on the "nature and quality of a person's connection" to the United States. Dep't of State Cable, 12 State 3735, ¶ 2. Just as the *Savorgnan* Court reasoned, *see* 338 U.S. at 505, the Department re-affirmed that the person's wishes and reasons for being in the United States have no bearing on the essential question, but turn on whether the person in fact established a principal dwelling place in the United States where the person lived and conducted normal daily activities, as opposed to a mere sojourn or visit to the United States, *see* Dep't of State Cable, 12 State 3735, ¶¶ 3-4. Like the guiding analysis in *Savorgnan*, the Department determined that a person can show a residence if he or she had a home at some point in time in the United States. *Id*. Thus, the Department's interpretation is reasonable because it comports with the legislative purpose in adopting the definition of residence, as reflected in *Savorgnan*.

Moreover, the Department's interpretation is consistent with the established connection between a residence and a home. *See* Restatement (First) of Conflict of Laws § 13 (1934). A home is "a dwelling place of a person, distinguished from other dwelling places of that person by the intimacy of the relation between the person and the place." *Id*. The concept of a home as a "dwelling place" tracks Congress' use of these terms in defining a residence as a "principal, actual dwelling place in fact." 8 U.S.C. 1101(a)(33). Moreover, the concept of a home turns on a consideration of a number of objective facts in point of a person's relationship to a place, *see* Restatement (First) of Conflict of Laws § 13, comment a, which involves the same focus on

objective facts for determining residence under the INA, *see Savorgnan*, 338 U.S. at 505. The connection of a residence with a home also respects Congress's directive to exclude considerations of intent, or the common law definition of domicile, because a person may have more than one home or dwelling place in addition to a domicile. *See* Restatement (First) of Conflict of Laws § 12, comment b, § 24, comment a(2).

Finally, the plain language of the Department's cable, and the plain language of the FAM, shows a clear directive to exclude considerations of intent from the determination of residence. *See* Dep't of State Cable, 12 State 3735, ¶ 2; 7 FAM 1133.5(a)-(b). As such, Plaintiffs' contention that the Department impermissibly imported an intent requirement into the definition of residence, *see* Second Amend. Compl. ¶¶ 43, 63,70, is undercut by the Department's explicit directive and its focus on the objective facts in each particular case. The Department's interpretation does not rely in any way on a person's subjective motives or state of mind, which is consistent with the statutory exclusion of an intent element in the governing definition. *See* 8 U.S.C. § 1101(a)(33); *Savorgnan*, 338 U.S. at 505. Thus, Plaintiffs' allegation that the Department's interpretation is outside the bounds of the statute fails.

4. The FAM Codifies a Longstanding Department Interpretation

Plaintiffs also allege that the interpretation of "residence" under INA 301(c) in the FAM has not risen to the level of Department policy or guidance because various consulates are not following the FAM. *See* Second Amend. Compl. ¶¶ 77-86. Based on the supposed discrepancy in interpretations at various consular posts, Plaintiffs appear to allege that the Department's interpretation is inconsistent and not entitled to any deference. This argument fails for two reasons.

First, the FAM provisions relating to the meaning of "residence" under INA 301(c) reflect a longstanding interpretation carried over from the Department's prior interpretation of similar language in the predecessor statute. *See* 7 FAM 1134.3-2(a) (updated April 1, 1998). The Department has always interpreted the meaning of "residence" and "place of general abode" to exclude visits to the United States. *Id*. The Department referred to this longstanding interpretation when it issued the cable further elaborating the meaning of residence under INA 301(c), *see* Dep't of State Cable, 12 State 3735, ¶ 2, and it further stated that the guidance "does not constitute in any respect a change in interpretation," *id*. ¶ 1. Thus, Plaintiffs' argument that the FAM provisions interpreting INA 301(c) represent a change in policy fails.

Second, the FAM provisions reflect the Department's further elaboration of its longstanding policy, which it transmitted through a cable to all consular officers. *See* Dep't of State Cable, 12 State 3735; 7 FAM § 1133.5. By statute, the Secretary determines the citizenship of persons outside the United States, *see* 8 U.S.C. § 1104(a), and the Secretary delegated to consular officers the authority to execute the Department's interpretations and directives through the adjudication of applications for CRBAs, *see* 22 C.F.R. §§ 50.2, 50.7. Even if Plaintiffs are correct that some consular officers refuse to follow the Department's interpretation of the statute or the corresponding FAM provisions, their refusal would at most reflect impermissible conduct outside the scope of the consular officers' authority. The Department is not bound by the actions of subordinate employees acting outside the scope of their authority. *See Saulque v. United States*, 663 F.2d 968, 976 (9th Cir. 1981). Nor is the Department bound to uphold, adopt, or repeat errors made by subordinate employees who misinterpret the law.

Moreover, it is irrelevant that the hearing officer in the Sitzmans' case disagreed with the legal interpretation of the Department when he overturned the consulate's cancellation of the

Sitzmans' CRBAs. *See* ECF No. 2-1 at 4. Subordinate employees, including hearing officers and administrative law judges, are bound by an agency's policy statements and interpretive rules that are not promulgated through notice and comment rulemaking. *See Croplife v. EPA*, 329 F.3d 876, 882 (D.C. Cir. 2003); *see also* Admin. Conf. of the United States, Recommendation 92-7, 57 Fed. Reg. 61,759, 61,763 (ACUS) (Dec. 29, 1992). The subordination of agency employees to the agency's legal interpretation carries more significance where a higher level agency official has directly spoken on the question of law at issue in an adjudication. *See Iran Air v. Kugelman*, 996 F.2d 1253, 1260 (D.C. Cir. 1993). As the Deputy Assistant Secretary explained in the Sitzmans' case, the hearing officer's recommendation was based on an incorrect interpretation of the statute. *See* ECF No. 2-2 at 3. The hearing officer mistakenly conflated the distinct concepts of residence and physical presence, contrary to the Department's longstanding policy. *Id*. The hearing officer's mistake, and any similar mistake made by other consular officers, simply reflects a legally erroneous decision that does not bind the Department. *See Iran Air*, 996 F.2d at 1260.[10]

Plaintiffs' reliance on any mistaken interpretation by subordinate Department employees is foreclosed by the decision in *Iran Air*. In that case, the D.C. Circuit held that a regulated party could not rely on an ALJ's interpretation of the statute that directly contradicted the Under Secretary of Commerce for Export Administration's interpretation. *Id*. at 1256, 1260. Although the issue in *Iran Air* was whether the ALJ's decision was subject to further review by the agency, the court relied on the underlying principle that the agency cannot be stripped of its ability to decide legal issues just because an ALJ is empowered to adjudicate a claim involving a question

[10] Moreover, the hearing officer's mistaken interpretation of the law did not constitute the agency's final decision, but rather a recommendation to the Deputy Assistant Secretary. *See* 22 C.F.R. § 51.71 ("The Department will name a hearing officer, who will make findings of fact and submit recommendations based on the record of the hearing as defined in § 51.72 to the Deputy Assistant Secretary for Passport Services in the Bureau of Consular Affairs.").

of law. *Id*. at 1260. Thus, Plaintiffs cannot avoid the denials and revocations in their cases based on legally erroneous interpretations by consular posts or subordinate employees that cut contrary to the Department's and the Deputy Assistant Secretary's interpretation.

Because the Department's reasonable interpretation of the statute controls, Plaintiffs cannot rely on any decisions or recommendations that are inconsistent with the Department's official interpretation and its longstanding policy. Plaintiffs cannot show that the Department's interpretation is arbitrary and capricious or that any particular agency decision following the Department's interpretation in their cases was inconsistent with the statute, and as such, they fail to state a claim as a matter of law under the APA. *See* 5 U.S.C. § 706(a)(2).

CONCLUSION

Plaintiffs' APA claims fail because they have an alternative adequate remedy under the INA for individual declaratory judgment actions relating to their separate citizenship claims. In addition to this defect, five of the Plaintiffs' claims are barred by the statute of limitations, and the remaining Plaintiffs fail to show as a matter of law that the Department's interpretation of the statute is unreasonable and that the Department's decisions were arbitrary and capricious or otherwise contrary to law. Thus, all of the Plaintiffs' claims must be dismissed.

Respectfully,

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CERTIFICATE OF SERVICE

I certify that on October 10, 2014, I electronically filed the foregoing DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS with the Clerk of Court by using the CM/ECF system, which will provide electronic notice and an electronic link to this document to the following attorney of record:

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