

No. 16-15728

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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**JERRID ALLEN,**  
PLAINTIFF-APPELLANT,

V.

**KEVIN MILAS, ET AL.,**  
DEFENDANTS-APPELLEES.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA  
D.C. No. 1:15-cv-705-MCE

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**ANSWERING BRIEF OF THE UNITED STATES**

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PHILLIP A. TALBERT  
United States Attorney

AUDREY B. HEMESATH  
Assistant U.S. Attorneys  
Eastern District of California  
501 I Street, Suite 10-100  
Sacramento, California 95814  
Telephone: (916) 554-2700

Attorneys for Appellees

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### **STATEMENT OF JURISDICTION**

Plaintiff Jerriid Allen sought to invoke the district court's jurisdiction under 28 U.S.C. § 1331. The United States District Court for the Eastern District of California granted the government's motion to dismiss. ER 48-54; CR 11. Allen filed a timely notice of appeal. ER 1; CR 45. This Court has jurisdiction to review the district court's dismissal pursuant to 28 U.S.C. § 1291.

### **ISSUES PRESENTED FOR REVIEW**

1. Whether the doctrine of consular nonreviewability precludes judicial review of the decision of the U.S. consular officer in Germany to refuse a visa to German citizen Dorothea Allen.

### **STATEMENT OF THE CASE**

This case involves a straightforward application of the doctrine of consular nonreviewability. Plaintiff Jerriid Allen is a U.S. citizen. ER 4. Plaintiff is married to Dorothea Allen, a native and citizen of Germany. ER 4. Jerriid Allen filed a petition on behalf of his wife, and is seeking judicial review of the consular officer's refusal of her immigrant visa application.

## **I. Immigration as the Spouse of a U.S. Citizen**

A married couple in which one spouse is a U.S. citizen and one spouse is an alien living abroad must undergo a two-step process to determine whether the alien spouse can immigrate to the United States. First, the U.S. citizen spouse, the “petitioner,” must file an immigrant visa petition: the Form I-130, Petition for Alien Relative, on behalf of his alien spouse. 8 U.S.C. § 1154(b). This I-130 petition is filed with United States Citizenship and Immigration Services (USCIS), and seeks to classify the alien relative, the “beneficiary,” under one of the congressionally-created immigrant relative categories under the Immigration and Nationality Act (INA). 8 U.S.C. §§ 1151(b), 1153(a), 1154(a)(1)(A)(i), (a)(1)(B)(i)(I); 8 C.F.R. § 204.1(a)(1). Spouses of U.S. citizens are classified as “immediate relatives” pursuant to 8 U.S.C. § 1151(b)(2)(A)(i).

An approved visa petition is forwarded by USCIS to the Department of State’s National Visa Center, which in turn forwards the petition to the U.S. consulate in the home country of the visa petition beneficiary, that is, the alien spouse. 8 U.S.C. § 1202(a); 22 C.F.R. § 42.61 et seq. At that juncture, the second step in the process



begins abroad: the visa petition beneficiary may apply for an immigrant visa overseas.

An approved I-130 petition does not guarantee that a visa petition beneficiary will be issued a visa, because visa issuance and refusal is entrusted only to consular officers. 8 U.S.C. §§ 1104, 1201(a). The USCIS review of the I-130 petition is limited to the issue of determining whether a qualifying relationship exists such that the beneficiary of the I-130 petition is entitled to apply for an immigrant visa on the basis of that relationship. In approving an I-130 petition, USCIS makes no determination as to whether the beneficiary of the I-130 petition is eligible for or otherwise permitted to obtain an immigrant visa. That determination is left to the consular officer, who must assess whether the beneficiary engaged in conduct or is otherwise ineligible to receive an immigrant visa. 8 U.S.C. §§ 1182(a), 1201(g), 1361. During the visa adjudication, the consular officer is able to evaluate the credibility of the visa applicant, conduct any necessary investigations in the home country, and request any documentation necessary to establish the applicant's

eligibility to receive an immigrant visa. 8 U.S.C. § 1202(d); 22 C.F.R. § 42.65.

United States consular officers have the exclusive authority to issue or refuse visas. 8 U.S.C. § 1201(a). The burden of proof is on the alien to show that she is entitled to the immigrant status claimed, that she is eligible for the visa sought, and that she is not otherwise inadmissible under the INA. 8 U.S.C. § 1361. When a consular officer determines that an alien has not carried her burden of proof, the consular officer must “refuse the visa under [8 U.S.C. § 1182(a)] or [8 U.S.C. § 1201(g)] or other applicable law.” 22 C.F.R. § 42.81(a).

**II. The U.S. Consulate refuses a visa because Ms. Allen has two criminal convictions.**

Returning to the facts of this case, Jerrid Allen filed a Form I-130 Petition for Alien Relative with USCIS on behalf of his wife, Dorothea Allen. ER 8. USCIS approved the petition based on a determination that Jerrid Allen had established a qualifying marital relationship and forwarded the petition to the U.S. Department of State. ER 8.

On October 15, 2013, a consular officer in the U.S. Consulate in Frankfurt, Germany, refused the immigrant visa application of Dorothea Allen. The basis for the refusal was twofold, based on Dorothea Allen's two criminal convictions:

(1) Dorothea Allen was convicted on July 16, 1998 of theft, in violation of paragraphs 242 and 248a of the German criminal code. ER 14. The consular officer identified this as a crime involving moral turpitude, and cited the inadmissibility provision at INA § 212(a)(2)(A)(i)(I) (crime involving moral turpitude). 8 U.S.C. § 1182(a)(2)(A)(i)(I).

(2) Dorothea Allen was convicted on March 20, 1997 of illicit acquisition of narcotics, in violation of paragraphs 29, 25, 1 and 3 of the German criminal code. ER 14. The consular officer identified this as a conviction relating to a controlled substance, and cited the inadmissibility provision at INA § 212(a)(2)(A)(i)(II). 8 U.S.C. § 1182(a)(2)(A)(i)(II).

The law provides that Dorothea Allen can apply for a waiver of the first ground of inadmissibility (the theft conviction), but Congress has not created any legal mechanism to waive the second ground of

inadmissibility (the controlled substances conviction). 8 U.S.C. § 1182(h).

**III. The district court dismisses the lawsuit based on the doctrine of consular nonreviewability.**

Jerrid Allen filed suit seeking review of the consular officer's refusal of the visa. He asserted jurisdiction under the general federal question jurisdiction statute, 28 U.S.C. § 1331, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202. ER 5. He sought a court order declaring the consular refusal of the visa application to be in violation of the APA and ordering the Department of State to immediately issue an immigrant visa to Ms. Allen. Administrative Procedure Act (APA), 5 U.S.C. §§ 701 et seq. He also alleged that the consular decision lacked a facially legitimate and bona fide basis. ER 11.

The government moved to dismiss, arguing both lack of subject matter jurisdiction, as the doctrine of consular nonreviewability precludes subject matter jurisdiction, and failure to state a claim, as the refusal met the facially legitimate and bona fide standard. Fed. R. Civ. P. 12(b)(1) & (6). The district court granted the government's motion to dismiss for failure to state a claim. ER 48-

54. The court assumed without deciding that the refusal of Ms. Allen's visa application implicated Mr. Allen's liberty interest in marriage, and proceeded to conclude that the refusals were facially legitimate and bona fide. ER 48-54.

### **SUMMARY OF ARGUMENT**

This Court should affirm the dismissal. Mr. Allen challenges an actual decision made by the consular officer. He expressly abandons the constitutional argument he made before the district court. AOB at 13-18. What remains is an argument that goes to the heart of what is insulated from judicial review by the doctrine of consular nonreviewability. Allen's claims of legal error are inapposite. There is no error in the decision of the consular officer, but even if there were, the doctrine of consular nonreviewability would still bar judicial review of the visa refusal.

### **STANDARD OF REVIEW**

This Court reviews dismissal under Federal Rules of Civil Procedure 12(b)(6) de novo. *Naffe v. Frey*, 789 F.3d 1030, 1035 (9th Cir. 2015).

## ARGUMENT

### I. Circuit precedent forecloses Allen’s argument that APA review exists to challenge consular decisions.

The doctrine of consular nonreviewability is a common law doctrine with deep historical roots. Under the doctrine, federal courts lack subject matter jurisdiction to review a consular officer’s issuance or refusal of a visa. *Li Hing of Hong Kong, Inc. v. Levin*, 800 F.2d 970, 970-71 (9th Cir. 1986). The doctrine of consular nonreviewability also precludes the Court from reviewing the findings of a consular officer under the guise of the APA, which the doctrine of consular nonreviewability predates. *Li Hing*, 800 F.2d at 971; *see also Bruno v. Albright*, 197 F.3d 1153, 1160-62 (D.C. Cir. 1990).

The doctrine of consular nonreviewability is broad, and precludes the judicial review of a consular officer’s visa decision even if the allegation is that the consular officer erred. *Li Hing*, 800 F.2d at 970-71; *Loza-Bedoya v. INS*, 401 F.2d 343, 347 (9th Cir. 1969); *Capistrano v. Dept of State*, 267 Fed. Appx. 593, 594-95 (9th Cir. 2008). Allen’s argument that there is legal error in the decision of the consular officer, and that that legal error provides a hook for jurisdiction under the APA, is foreclosed by this circuit precedent. To

create an avenue for judicial review of consular decisions on the basis of alleged legal error, this Court would have to revisit its prior decisions en banc.

The Supreme Court has repeatedly recognized the principle that “the power to exclude aliens is inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers – a power to be exercised exclusively by the political branches of government.” *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972); see also *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950) (“[I]t is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien.”); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (“over no conceivable subject is the legislative power of Congress more complete than it is over” the admission of aliens) (quotations omitted).

This principle gives rise to the doctrine of consular nonreviewability. *Li Hing*, 800 F.2d at 970 (“Exercising jurisdiction over this case would, therefore, violate the long-recognized judicial

nonreviewability of a consul's decision to grant or deny a visa.").

This doctrine holds that a "consular official's decision to issue or withhold a visa is not subject either to administrative or judicial review." *Id.* at 971.

When Congress passed the INA, it mandated that an alien shall apply for a visa with the consular officer in her country, essentially conferring upon those officials the exclusive discretionary authority to issue and refuse visas. 8 U.S.C. §§ 1104(a)(1), 1201(g)(1). Given the extensive historical deference to consular visa decisions, "Congress could safely assume that aliens residing abroad were barred from challenging consular visa decisions in federal court unless legislation specifically permitted such actions." *Bruno*, 197 F.3d at 1159-62.

In discussing the doctrine of consular nonreviewability, the Ninth Circuit has noted the history of the INA, and Congress's rejection of a proposal to create a "semijudicial board, similar to the Board of Immigration Appeals, with jurisdiction to review consular decisions pertaining to the granting or refusal of visas." *Ventura-Escamilla v. INS*, 647 F.2d 28, 30-31 (9th Cir. 1981) (quoting



H.R.Rep. No. 82-1365 (1952)). The INA expressly precludes even the Secretary of State from reviewing consular officer visa determinations. 8 U.S.C. § 1104(a) (granting the Secretary of State control over administration and enforcement of the immigration laws “relating to (1) the powers, duties, and functions of diplomatic and consular officers of the United States, except those powers, duties, and functions conferred upon the consular officers relating to the granting or refusal of visas.”).

Allen challenges an actual decision made by the consular officer. His claims of error are precisely what is insulated from judicial review by the doctrine of consular nonreviewability.

*Ventura-Escamilla*, 647 F.2d at 30 (“Essentially the relief sought is a review of the Consul’s decision denying their application for a visa. Such a review is beyond the jurisdiction of the Immigration Judge, the BIA and this court.”); *Loza-Bedoya*, 410 F.2d at 347; *Braude v. Wirtz*, 350 F.2d 702, 706 (9th Cir. 1965). The doctrine of consular nonreviewability is a near-total bar to judicial review of consular officer decisions. The district court correctly held that to the extent that the court may have jurisdiction, it was only to confirm that the

refusal was facially legitimate and bona fide.<sup>1</sup> ER 48-54. Because Allen has now abandoned his constitutional challenge to the consular officer's refusal, that narrow slice of judicial review has gone away. AOB at 13-18. What remains of Allen's arguments are entirely barred by the doctrine of consular nonreviewability.

There is no error in the decision of the consular officer in this case. But, even if there were, the doctrine of consular nonreviewability would still be a bar to this Court's jurisdiction. *Loza-Bedoya*, 410 F.2d at 347 ("Though erroneous this Court is without jurisdiction to order any American consular officer to issue a visa to any alien whether excludable or not."). The Ninth Circuit is part of the consensus that the consular nonreviewability bar is not lifted for an allegation of error. *Centeno v. Shultz*, 817 F.2d 1212,

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<sup>1</sup> The district court correctly applied *Kerry v. Din*, 135 S. Ct. 2128 (2015), consistent with the Ninth Circuit's subsequent interpretation in *Cardenas v. United States*, 826 F.3d 1164 (9th Cir. 2016). ER 48-54. The district court found that the consular officer cited a statutory basis for the refusal, and no further review is available. ER 48-54; *Din*, 135 S. Ct. at 2140-41 (concurring opinion of Justice Kennedy). But Allen has now abandoned his constitution claim, and the facially legitimate and bona fide standard at issue in those cases is no longer applicable in this appeal.

1213 (5th Cir. 1987) (no jurisdiction where allegation was consul’s decision not authorized by the INA); *Burrafato v. Dept’ of State*, 523 F.2d 554, 557 (2d Cir. 1975) (no jurisdiction where allegation was State Department failed to follow its own regulations); *Chun v. Powell*, 223 F.Supp.2d 204, 206 (D.D.C. 2002) (holding that consular nonreviewability applies “where the decision is alleged to have been based on a factual or legal error.”).

Allen now faults the district court for applying the *Mandel* “facially legitimate and bona fide” standard of review.<sup>2</sup> But Allen asked for this type of review in his complaint. ER 11 ¶ 21. Now before this Court, Allen is expressly disavowing any type of constitutional challenge to the consular decision. AOB at 13-18. Allen is arguing only that there is legal error in the refusal. AOB at 18-21. Allen rejects application of the “facially legitimate and bona

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<sup>2</sup> The district court found that the *Mandel* “facially legitimate and bona fide” standard is met where Allen was provided with a citation to the statutory basis for the refusal. ER 53; *Bustamante v. Mukasey*, 531 F.3d 1059, 1062-63 (9th Cir. 2008). That standard was met here when the consular officer cited the two grounds of inadmissibility that arise from Ms. Allen’s criminal convictions. INA §§ 212(a)(2)(A)(i)(I) (crime involving moral turpitude) & (II) (controlled substance); 8 U.S.C. §§ 1182(a)(2)(A)(i)(I) & (II).

fide” standard to his case. AOB at 13. Allen then goes on to make the striking argument that while only the narrow “facially legitimate and bona fide” review is available for constitutional claims, full APA review should be available for claims of legal error.<sup>3</sup> AOB at 22.

This argument makes no sense. There cannot be minimal review available for constitutional claims but wide open review for legal claims. *Mandel* (and *Bustamante* and *Din*) limited judicial review to constitutional claims by U.S. citizen spouse petitioners relating to consular decisions. Since Allen now concedes he is not making a constitutional claim, that small window of review is closed. Not even the “facially legitimate and bona fide” standard of review applies in this case. There is no judicial review whatsoever available to raise a nonconstitutional challenge to the decision of the consular officer. *Loza-Bedoya* 410 F.2d at 347; *Li Hing*, 800 F.2d at 970; *Ventura-Escamilla*, 647 F.2d at 30.

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<sup>3</sup> Further, Allen does not appear to challenge the district court’s finding that the refusal was facially legitimate and bona fide; rather, he merely asserts that he should be entitled to APA review.

Notwithstanding the precedential force of *Li Hong*, *Loza-Bedoya*, and *Ventura-Escamilla*, Allen argues that there are cases in which this Court has reviewed alleged errors of law in the decision of consular officers. But none of these cases involves the decision of a consular officer to issue or refuse a visa, which is the scope of the doctrine of consular nonreviewability. Allen cites: *ASSE Int'l, Inc. v. Kerry*, 803 F.3d 1059 (9th Cir. 2015), a case challenging the State Department's imposition of sanctions against an exchange program sponsor. AOB at 18-19. *ASSE Int'l* was not about a visa adjudication by a consular officer, and the doctrine of consular nonreviewability was not discussed. 803 F.3d at 1079.

Next, Allen cites *Singh v. Clinton*, 618 F.3d 1085 (9th Cir. 2010), and *Patel v. Reno*, 134 F.3d 929 (9th Cir. 1997), two cases from the broader category of cases that challenge the authority of the consul to take or fail to take action. AOB at 19-20. These cases establish that there may be mandamus relief available where the claim is one of consular inaction—but Allen makes no such allegation in this case. Instead he is challenging the meat of the decision by the consular officer. *Singh* and *Patel* have no bearing on this case.

Next, Allen cites *Wong v. Department of State*, 789 F.2d 1380 (9th Cir. 1986). AOB at 20-21. *Wong* involved a challenge to the State Department's revocation of a visa; the Ninth Circuit held that the doctrine of consular nonreviewability does not apply to visa revocations—it applies only to the consul's initial decision to grant or refuse a visa. *Li Hing*, 800 F.2d at 970. Allen's is not a case involving the revocation of a visa that she previously held, so any jurisdiction that could be available to challenge a visa revocation is not available here.

Finally, Allen cites *Braude*, 360 F.2d at 703. AOB at 21. *Braude* is one of the earliest articulations in this circuit of the doctrine of consular nonreviewability: “we are constrained to hold that no right of judicial review exists on the part of these nonresident aliens of determinations made by the executive branch acting pursuant to Congressional directive.” 350 F.2d at 706. *Braude* does go on to analyze the would-be visa sponsors' claims under the APA, ultimately holding that the sponsors lacked standing to bring suit. 350 F.2d at 707. The precedent set in *Braude* is therefore that these

visa sponsors lack standing to bring suit—not that the APA is a back door means for reviewing the merits of a visa refusal.

The law on this question has been settled for at least 30 years in the Ninth Circuit. *Ventura-Escamilla*, 647 F.2d at 32 (“We repeat: This court is without power to substitute its judgment for that of a Consul, acting pursuant to valid regulations promulgated by the Secretary, on the issue of whether a visa should be granted or denied.”). The APA does not provide a cause of action to assert a claim otherwise barred by the doctrine of consular nonreviewability. *Bruno*, 197 F.3d at 1158-60. Only by ignoring the Ninth Circuit cases directly on point—*Li Hing*, *Ventura-Escamilla*, *Loza-Bedoya*—and analogizing to peripheral cases can Allen advance the argument that somehow, after all these years, APA review is now available to challenge the decision of the consular officer on the refusal of a particular visa.

## CONCLUSION

The government respectfully requests that this Court affirm the district court's dismissal of this lawsuit.

Respectfully submitted,

PHILLIP A. TALBERT  
United States Attorney

/s/ Audrey B. Hemesath  
\_\_\_\_\_  
AUDREY B. HEMESATH  
Assistant United States Attorney



**STATEMENT OF RELATED CASES**

The government is not aware of any related cases.

### **CERTIFICATE OF COMPLIANCE**

Pursuant to Ninth Circuit Rule 32(a)(5)(A), I certify that the Answering Brief of the United States is proportionately spaced, has a typeface of 14 points or more, and contains 3,227 words.

DATED: January 17, 2017

/s/ Audrey B. Hemesath

AUDREY B. HEMESATH

Assistant United States Attorney

**CERTIFICATE OF SERVICE**

When All Case Participants are Registered for the  
Appellate CM/ECF System

I hereby certify that on January 17, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Audrey B. Hemesath

AUDREY B. HEMESATH

Assistant United States Attorney