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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	SACV 19-1417 JVS (DFMx)	Date	December 3, 2019
Title	**Shamim Darchini, et al v. Pompeo, et al**		

Present: The Honorable	**James V. Selna, U.S. District Court Judge**

Lisa Bredahl	Not Present
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: **[IN CHAMBERS] Order Regarding Motion to Dismiss**

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Defendants Michael R. Pompeo, Joel D. Nantais, Erin R. Hoffman, Dean M. Kaplan, Daniel E. Mickelson, the U.S. Department of State, Kevin K. McAleenan, and the U.S. Department of Homeland Security ("the Government") moved to dismiss Plaintiffs Shamim Darchini, Amin Sirati, Parto Kavoosian, N.F., Behnaz Kavoosian, Kiyoumars Kavoosian, Ashkan Keshtmand, Tahereh Fereydouni, Manijeh Javdan, Samira Bayramzadeh, Mansour Hardanian, Elaheh Alikhan Zahdeh, Masoud Abdi, Shima Montakhabi, Navid Abdoullahzadeh, Mozhdeh Hafezibakhtiari, Fatemeh Karimi Alamdari, Farshad Amirkhani, Keyvan Parsa, Mahsa Mousaei, Arash Rafii Sereshki, and Bijan Rafii Sereshki's ("Plaintiffs'") Complaint. Mot., Dkt. No. 53. Plaintiffs[1] opposed. Opp'n, Dkt. No. 56. The Government replied. Reply, Dkt. No. 63.

For the following reasons, the Court **GRANTS** the motion.

I. BACKGROUND

Plaintiffs in this action are U.S. citizens and lawful permanent residents ("Petitioner Plaintiffs") and their Iranian national relatives or fiancées who are visa applicants ("Beneficiary Plaintiffs"). Complaint, Dkt. No. 1, ¶ 2. Plaintiffs allege that the Government, through unreasonable delays, has denied them timely adjudication of their case-by-case waivers under Presidential Proclamation 9645, "Enhancing Vetting

[1] There were originally additional plaintiffs, but they voluntarily dismissed their claims on November 13, 2019. Dkt. No. 65.

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Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats," which President Trump signed on September 24, 2017. 82 Fed. Reg. 45161 (2017) ("PP 9645") Id. ¶ 1.

PP 9645 prohibits the entry of immigrants and non-immigrants from Iran. Id. ¶ 4. But it contains a waiver adjudication scheme, which works as follows. An Iranian visa applicant applies for an immigrant or non-immigrant visa and then appears at a U.S. Embassy in Armenia, the United Arab Emirates, or Turkey for an interview. Id. ¶ 146. The visa is denied under PP 9645. Id. ¶ 147. Then, consular officers adjudicate waivers of PP 9645's entry restrictions based on information provided in the visa application and interview. Id.

PP 9645 provides that "a consular officer, or the Commissioner, United States Custom and Border Protection (CBP), or the Commissioner's designee, as appropriate, may in their discretion, grant waivers on a case-by-case basis to permit the entry of foreign nationals for whom entry is otherwise suspended." 82 Fed. Reg. at 45168. "A waiver may be granted only if a foreign national demonstrates to the consular officer's or CBP official's satisfaction that: (A) denying entry would cause the foreign national undue hardship; (B) entry would not pose a threat to the national security or public safety of the United States: and (C) entry would be in the national interest." Id.

Plaintiffs claim that they fulfilled all requirements to obtain family-based or fiancée-based visas, before their applications were refused pursuant to PP 9645. Id. ¶ 3.

Plaintiffs acknowledge that the Proclamation "itself requires the Secretary of State and the Secretary of Homeland Security to adopt guidance establishing when waivers may be appropriate for foreign nationals who would otherwise be banned." Id. ¶ 7. Plaintiffs allege that the Government has a "PP 9645 Brain Trust" team that has "secretly promulgated guidance on the waiver adjudication scheme" that is inconsistent with the text of the proclamation. Id. ¶ 8. The Government, through this "Brain Trust," has "unlawfully extended the authority and discretion - that PP 9645 granted only with individual consular officers - to consular managers, visa chiefs, consular section chiefs, and/or consular management and the Visa Office." Id. ¶ 9.

Plaintiffs claim that Defendants have implemented a policy whereby, if a consular

officer determines that an applicant meets the undue hardship and national interest requirements for a waiver, "the consular officer must email countries-of-concerninquires@state.com and include the facts they believe meet the undue hardship and national interest requirements" and receive guidance from the Visa Office on whether the waiver may be granted (i.e., whether the applicant satisfies the remaining national security and public-safety factor). Id. ¶ 134. Accordingly, if an applicant is "found eligible for a waiver of PP 9645's entry restrictions, the consular officer must seek to obtain concurrence from consular managers, visa chiefs, consular section chiefs, and/or consular management and the Visa Office." Id. ¶ 148. The Government requires this concurrence before the consular officer may issue the applicant a visa, even though that usurpation of consular officer authority is unlawful under PP 9645. Id.

As a result of this scheme, Plaintiffs "suffer a range of ongoing harms," including having their criminal status checks, medical examinations, and security advisor opinions repeatedly expire. Id. ¶¶ 6; 156. They have had to wait an average of 447 days for a waiver since their applications were refused, pursuant to PP 9645. Id. ¶ 12; Table A at 34. Plaintiffs allege that the Government has a "pattern and policy of unreasonable delay in dealing with waiver adjudication," and "unlawfully crafted a waiver adjudication scheme that, in its application, leads to the ongoing untimely and unfair processing of case-by-case waivers." Id. ¶ 11. From December 2017 to March 2019, only 5.1% of visa applicants subject to the travel ban were issued a visa pursuant to the waiver process. Id. ¶ 143.

Because the number of plaintiffs is sizable, the Court highlights just one representative account of their experiences with this waiver process. Plaintiff Shamim Darchini is a United States citizen of Iranian origin who lives in Irvine, California. Id. ¶ 19, 21. Her husband, Amin Sirati, resides in Iran. Id. ¶ 21. Darchini petitioned for an "alien relative" visa for Sirati in 2015. Id. ¶ 23. Sirati had his visa interview in July 2017. Id. ¶ 25. Consideration of Sirati's waiver has been pending since December 8, 2017, when PP 9645 took effect. Id. ¶ 35. Darchini suffers from stress, anxiety, and depression as a result of living apart from her husband. Id. ¶ 30.

On the basis of these factual allegations, Plaintiffs assert four legal claims: violations of the Administrative Procedure Act, 5 U.S.C. §§ 555 and 706; violation of the

Due Process Clause of the Fifth Amendment to the United States Constitution; and for a writ of mandamus. Id. ¶ 166-199.

Plaintiffs moved for a preliminary injunction asking the Court to order the Government to complete its adjudication of the waivers within 15 days of the Court's decision. Dkt. No. 8. The Court declined to issue a preliminary injunction on September 24, 2019. Dkt. No. 42.

II. LEGAL STANDARD

Under Rule 12(b)(6), a defendant may move to dismiss for failure to state a claim upon which relief can be granted. A plaintiff must state "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). A claim has "facial plausibility" if the plaintiff pleads facts that "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

In resolving a 12(b)(6) motion under Twombly, the Court must follow a two-pronged approach. First, the Court must accept all well-pleaded factual allegations as true, but "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Iqbal, 556 U.S. at 678. Nor must the Court "'accept as true a legal conclusion couched as a factual allegation.'" Id. at 678-80 (quoting Twombly, 550 U.S. at 555). Second, assuming the veracity of well-pleaded factual allegations, the Court must "determine whether they plausibly give rise to an entitlement to relief." Id. at 679. This determination is context-specific, requiring the Court to draw on its experience and common sense, but there is no plausibility "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct." Id.

III. DISCUSSION

A. Justiciability

At the outset, the Government argues that PP 9645 "merely governs Executive Branch processing and does not create privately enforceable rights," and that "the APA

does not provide a cause of action to these claims, which are textually committed to agency discretion and subject to the doctrine of consular nonreviewability." Mot., Dkt. No. 53 at 1.

The APA provides that "within a reasonable time, each agency shall proceed to conclude a matter presented to it." 5 U.S.C. § 555(b). Thus, the APA authorizes a reviewing court to "compel agency action unlawfully withheld or unreasonably delayed." Id. § 706(1). But, the APA does not apply if a statute precludes judicial review or "agency action is committed to agency discretion by law." Id. § 701.

In general, "[a]s the APA does not expressly allow review of the President's actions, we must presume that his actions are not subject to its requirements." Franklin v. Massachusetts, 505 U.S. 788, 801 (1992). However, the Ninth Circuit has found that "under certain circumstances, Executive Orders, with specific statutory foundation, are treated as agency action and reviewed under the [APA]." City of Carmel-by-the-Sea v. United States Dep't of Transp., 123 F.3d 1142, 1166 (9th Cir. 1997). Therefore, "an executive order or presidential proclamation may also be subject to judicial review under the APA and treated as agency action when the order or proclamation 'rests upon statute.'" W. Watersheds Project v. Bureau of Land Mgmt., 629 F. Supp. 2d 951, 965 (D. Ariz. 2009) (quoting Legal Aid Soc'y v. Brennan, 608 F.2d 1319, 1330 n.15 (9th Cir. 1979)).

PP 9645 was issued pursuant to INA § 212(f), 8 U.S.C. § 1182. See Trump v. Hawaii, 138 S. Ct. 2392, 2408 (2018) (finding that PP 9645 was a lawful exercise of the discretion granted by § 1182). As Plaintiffs' Complaint concerns the Government's implementation of PP 9645, not the legality of PP 9645 itself, the Government's actions are reviewable under the APA. Hawaii v. Trump, 878 F.3d 662, 680-81 (9th Cir. 2017) ("because these agencies have consummated their implementation of the Proclamation, from which legal consequences will flow, their actions are 'final' and therefore reviewable under the APA"), rev'd and remanded on other grounds by Trump v. Hawaii, 138 S. Ct. 2392; see also Najafi v. Pompeo, 2019 WL 5423467 (N.D. Cal. Oct. 23, 2019).

The Government argues that the President's actions are not subject to APA review. Mot. at 8-10. And the Government points out that PP 9645 states that it does not create "any right or benefit, substantive or procedural" against the United States or its agencies

and that presidential proclamations cannot be enforced against the Executive Branch. Id.

But as the Court earlier reasoned in denying Plaintiffs' preliminary injunction, Plaintiffs are pursuing their APA claims via the theory that the Government is not following its own guidance regarding consideration of waivers and usurping consular officers' authority to grant them. Thus, the Government's argument is not controlling here. See Emami v. Nielsen, 365 F. Supp. 3d 1009, 1019 (N.D. Cal. 2019).

Further, the Government argues that the APA "does not permit review of waiver determinations" under 5 U.S.C. § 701, because the APA does not apply to agency action "committed to agency discretion by law." Mot. at 10. As the Government notes, PP 9645 commits the grant or denial of waivers to the "discretion" of consular and Customs and Border Protection officers. Id., see 82 Fed. Reg. at 45168. Thus, the Government argues, "even if the delegation of discretion were not expressly committed to another branch, governing law offers no standard to guide a reviewing court to impose a timing requirement on this exercise of discretion." Id. at 11.

But Plaintiffs argue that the Government does not have the discretion to refuse to process, withhold decisions, or unreasonably delay considering their waiver requests pursuant to PP 9645. In support of this argument, they point to the State Department's "Operational Q&As on PP. 9645," which states that "every applicant who is subject to the restrictions of the P.P., otherwise eligible for a visa, and to which an exception does not apply" "*must* be considered for a waiver." Opp'n at 10 (emphasis added).

The "must be considered for a waiver" wording in the State Department's "Operational Q&A's" suggests that the Government does not have discretion to never act on Plaintiffs' waiver applications. Therefore, the Court disagrees with the Government that the doctrine of consular non-reviewability precludes judicial scrutiny. Mot. at 12-13. Plaintiffs are challenging systemic practices with respect to the waiver program, not individualized determinations for their specific applications. The Complaint alleges the Government is not abiding by its own guidelines and statements about case-by-case determinations of waiver applications, but instead implementing a policy of blanket denials, by depriving consular officers of the ability to issue waiver decisions. See, e.g., Complaint ¶¶ 9, 134, 170-72. Thus, the Court is not required to review any individual consular officer decisions; instead, what is at stake is "the

authority of the consul to take or fail to take an action as opposed to a decision taken within the consul's discretion." See Patel v. Reno, 134 F.3d 929, 931-32 (9th Cir. 1997). Accordingly, judicial review of Plaintiffs' APA claims is not precluded.

B. Plaintiffs' APA Claims

First, the Government argues that Plaintiffs have failed to allege unreasonable delay under the APA, 5 U.S.C. §§ 555(b) and 706(1). Mot. at 13. To succeed on such a claim, a plaintiff must establish that the agency has a "discrete" duty to act and that the agency unreasonably delayed acting on that duty. Norton v. S. Utah Wilderness All., 542 U.S. 55, 63-65 (2004). "[F]or a claim of unreasonable delay to survive, the agency must have a statutory duty in the first place." San Francisco BayKeeper v. Whitman, 297 F.3d 877, 885 (9th Cir. 2002). Accordingly, "there can be no unreasonable delay" where "the governing statute does not require action by a certain date." Id. at 885-86.

In their Complaint, Plaintiffs allege that the Government has failed to act within a reasonable time because it has "failed to adjudicate Beneficiary Plaintiffs visa waivers within 90 days," although Plaintiffs offer no explanation for this particular deadline. Complaint ¶ 166. But in their Opposition, Plaintiffs do not address the Government's arguments regarding the lack of a statutory requirement. The Court finds that Plaintiffs have not adequately alleged that the Government has unreasonably delayed agency action it is required to take. Therefore, the Court dismisses Plaintiffs' first cause of action under §§ 555(b) and 706(1), without prejudice.

Next, the Government argues that Plaintiffs fail to state a claim under § 706(2)(A) and (D). Mot. at 17-18.

The APA bars federal agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or is conducted "without observance of procedure required by law." 5 U.S.C. § 706(2)(A) and (D). Plaintiffs claim that the Government's alleged requirement that visa and consular section chiefs concur with consular officers' determinations regarding waivers is unlawful under PP 9645. See Complaint ¶¶ 174-181.

The Government argues that Plaintiffs "point to no source of law prohibiting consular-officer consultation with supervisors or other State Department components or federal agencies in making the national-security and public safety assessment," and that the Proclamation "does not define 'consular officer.'" Mot. at 17. The Government further suggest that PP 9645 contemplates agency involvement beyond that of rank-and-file consular officers, because it provides for the Secretary of State and the Secretary of Homeland Security to promulgate "standards, policies, and procedures for: … determining whether the entry of a foreign national would not pose a threat to the national security or public safety of the United States," as Plaintiffs note. See Complaint ¶ 7; Mot. at 18. The Government contends that individual consular officers could not have access to all of the intelligence and national-security information they need to make the waiver adjudications, and so the participation of other officials in the process is appropriate. Id.

Plaintiffs' response is that the Government cannot "make up a new meaning" for the phrase, "consular officer." Opp'n at 14. To this argument, the Government notes that the definition of "consular officer" in federal law "easily encompasses consular officers who are managers and supervisors beyond the one, single, regional, rank-and-file officer before whom an individual Plaintiff visa applicant executed their visa application." Reply at 7; see 8 U.S.C. § 1101(a)(9) ("*any consular, diplomatic, or other officer or employee of the United States* designated under regulations prescribed under authority contained in this chapter, for the purpose of issuing immigrant or nonimmigrant visas . . . ") (emphasis added). The Court agrees with the Government that Plaintiffs' allegations regarding the propriety of officials other than rank-and-file consular officers participating in the waiver adjudication process do not plausibly support their substantive APA claim.

Plaintiffs do not otherwise provide any legal support for their contention that the waiver adjudication process is unlawful.[2] The Court finds that their Complaint fails to

[2] Plaintiffs cite Emami v. Nielsen, 365 F. Supp. 3d 1009, 1019 (N.D. Cal. 2019), in arguing that their claims are justiciable, but do not otherwise rely on the court's reasoning regarding the sufficiency of their substantive APA claim. In that case, the court reasoned that the plaintiffs had stated an APA claim because they adequately alleged, with particularity and specific examples, that the Government had failed to adhere to its own guidelines regarding the waiver program. See id. at 1019-21; see also

plausibly state a claim under §§ 706(2)(A) and (D) and dismisses this cause of action, without prejudice.

C. Fifth Amendment Claim

The Government argues that Plaintiffs fail to state a procedural due process claim, as a matter of law, "because their allegations do not support an inference that any protected liberty or property interest is implicated or that there is some additional process they are entitled to but have been denied." Mot. at 18-19.

The Fifth Amendment provides that "[n]o person shall be ... deprived of life, liberty, or property, without due process of law." But "an unadmitted and nonresident alien . . . has no right of entry into the United States, and no cause of action to press in furtherance of his claim for admission." Kerry v. Din, 135 S.Ct. 2128, 2131 (2015) (Scalia, J., plurality opinion). Plaintiffs have not adequately alleged that they have been denied due process or were owed additional procedural safeguards; their allegations regarding this claim are conclusory. See Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

As Plaintiffs do not directly allege such a deprivation, the question is whether they were deprived of "certain implied 'fundamental rights' " that are understood to be included under the "liberty" prong. See Kerry v. Din at 2133.

Plaintiffs allege that their "fundamental rights" include their right to the "integrity of the family unit." See Complaint ¶ 192. They allege that the Government's policies deprives them "of protected liberty and property interests without due process of law." Id. ¶¶ 193-98. But "the generic right to live with family is far removed from the specific right to reside in the United States with non-citizen family members." See Gebhardt v. Nielsen, 879 F.3d 980, 988 (9th Cir. 2018) (internal citation marks and quotations omitted).

Plaintiffs' inability to allege a procedural or substantive deprivation of an interest protected by the Due Process Clause means their claim must be dismissed. The

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United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954).

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dismissal is without prejudice.

D. Mandamus Claim

The writ of mandamus is "intended to provide a remedy for a plaintiff only if he [or she] has exhausted all other avenues of relief and only if the defendant owes him [or her] a clear nondiscretionary duty." Heckler v. Ringer, 466 U.S. 602, 616-17 (1984); see also Independence Mining Co. v. Babbitt, 105 F.3d 502, 507 (9th Cir. 1997) ("[T]he Supreme Court has construed a claim seeking mandamus . . . in essence, as one for relief under § 706 of the APA.") (internal citations omitted.)

Because the Court has found that Plaintiffs have not adequately alleged that the Government owes them a clear, nondiscretionary duty, the Court grants dismissal of this cause of action. The dismissal is without prejudice.

IV. CONCLUSION

For the foregoing reasons, the Court **GRANTS** the motion. At the hearing, Plaintiffs' counsel declined leave to amend; accordingly, the dismissal is with prejudice.

IT IS SO ORDERED.

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