The Honorable Richard A. Jones

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ZIXIANG LI, JUN LI, JUN GUO, SHIBAO ZHANG and MING CHANG, on behalf of themselves as individuals and on behalf of others similarly situated, Plaintiffs, v. United States of America; U.S. Department of State; HILLARY RODHAM CLINTON, Secretary of State; U.S. Department of Homeland Security; JANET NAPOLITANO, Secretary of Department of Homeland Security; U.S. Citizenship and Immigration Services; and ALEJANDRO MAYORKAS, Director of Citizenship and Immigration Services, Defendants.	No. C10-00798-RAJ DEFENDANTS' MOTION TO DISMISS NOTED ON MOTION CALENDAR: September 3, 2010

This is an action under the Administrative Procedure Act ("APA"). Under the APA, a party may seek judicial review of discrete agency action. *See* 5 U.S.C. § 551(13); 5 U.S.C. §§ 701-706. But a party is not entitled to seek wholesale improvement of a program through court decree. *See Lujan v. National Wildlife Fed'n.*, 497 U.S. 871, 890-91 (1990).

In the present case, plaintiffs challenge the process by which defendant U.S. Department of State ("Department of State") adjudicates visa applications for employment-based third preference ("EB-3") visas and allocates visa numbers, contending that the Department of State is in violation of 8 U.S.C. § 1153(e). As a threshold matter, none of the named plaintiffs has a

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pending visa application and, therefore, lack standing to challenge the Department of State's process. *Id.*, 497 U.S. at 890-91. Moreover, 8 U.S.C. § 1153(e) must be read in connection with the other provisions governing the issuance of visas, including 8 U.S.C. §§ 1151, 1152, 1153(g). Section 1153(e) expressly authorizes the Department of State to make reasonable estimates of demand for visa numbers and to rely on these estimates. As a matter of law, the Department of State's use of a procedure authorized by 8 U.S.C. § 1153(e) cannot be the basis of a claim under the APA. Moreover, as a practical matter, even if this Court finds that the Department of State's estimates of visa demand in fiscal years 2008 and 2009 were inaccurate, there is no way for the Department of State to "re-do" these estimates now. The visa numbers from fiscal years 2008 and 2009 have already been allocated and used by applicants. Therefore, the plaintiffs cannot receive any relief with respect to this claim.

Plaintiffs also challenge the process by which defendant U.S. Citizenship and Immigration Services ("USCIS") adjudicates applications for adjustment of status, contending that it has also acted in violation of 8 U.S.C. § 1153(e). These allegations fail to state a claim because 8 U.S.C. § 1153(e) does not address processing of applications for adjustment of status and does not impose any obligations on USCIS. Instead, the adjustment of status is governed by a different statute – 8 U.S.C. § 1255(a) – which commits the process of adjudication to agency discretion.

For these reasons, as more fully set forth below, plaintiffs' claims should be dismissed as a matter of law under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

STATUTORY AND REGULATORY FRAMEWORK

Under the Immigration and Nationality Act ("INA"), as amended, Congress committed responsibility for the administration of immigration law to different federal entities, including the Department of Labor ("DOL"), the Department of Homeland Security ("DHS") (including, as it relates to this case, USCIS), and the Department of State.[1] As more fully set forth below, DOL

[1] This statutory and regulatory framework is provided in order to provide context for defendants' arguments. References to the administrative record are for illustrative purposes only. Defendants are not seeking dismissal based on this framework or seeking to convert the motion to dismiss into a motion for summary judgment.

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adjudicates applications for labor certification, USCIS adjudicates visa petitions (Form I-140) and applications for adjustment of status (Form I-485), and the Department of State allocates visa numbers. In addition, for aliens outside of the U.S., the Department of State adjudicates applications for immigrant visas (Form DS-230). The Department of State must comply with both the annual worldwide (8 U.S.C. § 1151) and per-country (8 U.S.C. § 1152) limits on the number of employment-based preference visas.

The Statutory Role of the Department of Labor

In the context of EB-3 applications, the first step in obtaining permanent resident status is for an employer to file an application for labor certification with DOL requesting certification that there are no qualified U.S. workers available for the relevant job opening. *See* 8 U.S.C. § 1182. In the context of EB-3 applicants, the priority date is the date that this application is submitted to DOL. *See* 8 C.F.R. § 204(d). DOL has no role in adjudicating applications for adjustment of status or allocating visa numbers.

Once DOL approves the labor certification, the employer may file a Petition for Alien Worker (Form I-140) requesting USCIS to approve the alien in the third preference category. If the alien is located in the U.S., the alien may file an application for adjustment of status (Form I-485) with USCIS once the applicant's priority date becomes current. *See* 8 U.S.C. § 1255(a).[2] USCIS has no control over how long an applicant will wait before filing an application for adjustment of status. If the alien is not located in the United States, the alien may file an application for an immigrant visa (Form DS-230) which will be adjudicated by the Department of State.

[2] Prior to 1952, immigrant status was predicated upon the issuance of an immigrant visa, which could be obtained only at U.S. consular offices abroad. *Landin-Molina v. Holder*, 580 F.3d 913, 915-16 (9th Cir. 2009). Under that rule, an alien already inside this country could acquire immigrant status only by leaving. *Id*. at 916. In 1952, Congress enacted 8 U.S.C. § 1255(a) which authorized a process – "adjustment of status" – whereby certain aliens physically present in the United States could seek lawful permanent resident status without having to depart. *Id*.; *see* Immigration and Nationality Act, Pub.L. No. 82-414, tit. II, ch. 5, § 245, 66 Stat. 163, 217 (1952).

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The Statutory Role of USCIS

Under 8 U.S.C. § 1255(a), the adjudication of applications for adjustment of status is committed to the "discretion" of USCIS,[3] a component agency of DHS, under such regulations as it "may prescribe." 8 U.S.C. § 1255(a).[4] Pursuant to this discretion, USCIS has promulgated 8 C.F.R. § 245.2(a)(5)(ii), which states that USCIS may not approve an application for adjustment of status until the Department of State allocates a visa number. A visa is different from a visa number. A visa is a document issued by the Department of State to aliens seeking admission into the U.S. A visa number is simply a "budgetary device" employed by the Department of State in order to avoid exceeding the worldwide and per-country limits established by Congress. *See* 8 U.S.C. §§ 1151, 1152. When USCIS approves an application for adjustment of status, the Department of State reduces by one the number of visas available (for that category) in the fiscal year. *See* 8 U.S.C. § 1255(b).

Before USCIS approves an application for adjustment of status the applicant must demonstrate to USCIS that he or she is eligible for the benefit. *See* 8 U.S.C. § 1255. Once USCIS determines that the applicant is eligible, this information is entered into the Department of State's computer database (the Immigrant Visa Allocation Management System ("IVAMS")) to request allocation of a visa number.[5]

The Statutory Role of the Department of State

Centralized control of the availability of visa numbers is established in the Department of State. *See* 22 C.F.R. § 42.51; *see also* 8 U.S.C. § 1153(g). The Department of State must comply with the limits on the number of employment-based preference immigrant visas

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[3] As enacted, this authority was committed to the Department of Justice ("DOJ") (specifically, the Immigration and Naturalization Service ("INS")). The Homeland Security Act of 2002 abolished INS and transferred the adjudication of applications for adjustment of status from the Commissioner of INS (and the Attorney General) to the Director of USCIS, an agency within DHS. *See* Pub. Law No. 107-296, 451(b)(1); 471 (Nov. 25, 2002); *see also*, 6 U.S.C. § 271(b)(5); 6 U.S.C. § 557; 6 U.S.C. § 275(a).

[4] Immigration judges (who are part of DOJ) may also grant aliens adjustment of status.

[5] Prior to May 2008, USCIS did not enter this information into the Department of State's computer database unless the applicant's visa number was current. The current practice is to enter the information irrespective of whether a number is current.

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established by Congress. *See* 8 U.S.C. §1151 (setting a worldwide limit); 8 U.S.C. § 1152 (setting a per-country limit).[6] These limits are not quotas – they represent a ceiling on the maximum number of visas that may be issued in a fiscal year. Congress has expressly provided that in allocating visa numbers, the Department of State may "make reasonable estimates." 8 U.S.C. § 1153(g). In relevant part, Section 1153(g) states:

> For purposes of carrying out the Secretary's responsibilities in the orderly administration of this section, the Secretary may make reasonable estimates of the anticipated number of visas to be issued during any quarter of any fiscal year . . . and to rely upon such estimates in authorizing the issuances of visas.

8 U.S.C. § 1153(g).

The Visa Office ("VO") of the Department of State subdivides the annual preference and nationality limitations specified by Congress into monthly allotments.[7] The totals of documentarily qualified applicants are compared each month with the visa numbers available for the next regular allotment. The determination of visa number availability takes into consideration a number of variables, including historical patterns of consular post and USCIS number use and pending waiting lists.

Once the number of available immigrant visas has been determined, the cut-off dates are established and numbers are allocated to applicants. Whenever the total of documentarily qualified applicants in a category exceeds the supply of numbers available for allotment for the particular month, the category is considered to be "oversubscribed" and a visa availability cut-off date is established.

The VO attempts to establish the cut-off dates for the following month on or about the 8th day of each month. The cut-off dates are transmitted to consular posts and USCIS offices, and are also published in the State Department's *Visa Bulletin* and posted online at

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[6] The per-country EB-3 limit for aliens of Chinese nationality was 2,957 and 2,502 for fiscal years 2008 and 2009. Section 1152(a)(2) sets the per-country limit for preference immigrants at 7% of the total annual family-sponsored and employment-based preference limits. 8 U.S.C. § 1152(a)(2). The China EB-3 portion of the per-country limit is reduced by three-hundred under the Chinese Student Protection Act, Pub. L. 1-2-404 (October 9, 1992).

[7] This process is described in more detail in the Department of State's Administrative Record ("DOS A.R.") on pages 4-6.

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www.travel.state.gov. If an applicant is reported documentarily qualified but allocation of a visa number is not possible because of a visa availability cut-off date, the demand is recorded at the VO and an allocation is made as soon as the applicable cut-off date advances beyond the applicant's priority date. There is no need for such applicant to be reported a second time.

For aliens outside of the U.S., the Department of State adjudicates applications for visas. *See* 8 U.S.C. 1152(a)(1)(B) ("Nothing in this paragraph shall be construed to limit the authority of the Secretary of State to determine the procedures for the processing of immigrant visa applications or the locations where such applications will be processed."). The applicant is interviewed by a consular officer. *See* 22 C.F.R. § 42.62. The consular officer may refuse an applicant a visa if the applicant is unable to demonstrate eligibility. *See* 22 C.F.R. § 42.65. An applicant refused a visa, may subsequently be able to demonstrate eligibility by, for example, providing additional documentation. *See* 22 C.F.R. § 42.81(e). In addition, the Department of State maintains waiting lists under 8 U.S.C. § 1153(e)(3).

PLAINTIFFS' ALLEGATIONS

Plaintiffs allege the Department of State and USCIS failed to comply with the law. Specifically, they allege that the Department of State mis-allocated visa numbers in fiscal years 2008 and 2009. They allege that this purported mis-allocation harmed EB-3 applicants of Chinese nationality because the worldwide limit on the number of visas was reached before the per-country limit was reached for Chinese nationality.

Although the Complaint includes a section entitled "Causes of Action," as a technical matter, this section does not allege a cognizable cause of action and instead lists five separate allegations of governmental misconduct. (Dkt. 1 ¶¶ 49-58). Nonetheless, it is clear from the Complaint that plaintiffs are asserting claims under the APA.[8] (*See* Dkt. 1, Prayer for Relief

[8] To be clear, the APA does not confer jurisdiction on the courts. *Staacke v. U.S. Sec'y of Labor*, 841 F.2d 278, 282 (9th Cir. 1988). Rather it merely provides the standard for reviewing agency action once jurisdiction is otherwise established. *Id.*

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¶ 3; Dkt. 18, pp. 1-3). Therefore, in order to be entitled to relief, plaintiffs must be able to state a claim under the APA.[9]

In a section of their Complaint entitled "Prayer for Relief," plaintiffs lists various claims for relief that they seek from the Department of State and USCIS. For organizational purposes, this Motion will analyze the claims against these two entities separately and address each claim for relief in the order listed in the Prayer for Relief. With respect to the Department of State, plaintiffs seek: (i) declaratory and injunctive relief based on their allegation that the Department of State violated the INA by issuing immigrant visas to applicants out of priority date order (Dkt. 1, Prayer for Relief ¶ 3, *see* First Cause of Action); (ii) injunctive relief requiring that immigrant visa numbers be made available for the purported class members so that such individuals can obtain immigrant visas and/or adjust status before the end of the fiscal year (Dkt. 1, Prayer for Relief ¶ 8); and (iii) injunctive relief requiring the Department of State to make public all relevant information contained on the waiting lists maintained under 8 U.S.C. § 1153(e), and all relevant information concerning the system and procedures used for allocating immigrant visa numbers for individuals on the waiting lists (Dkt. 1, Prayer for Relief ¶ 6, *see* Fourth Cause of Action).

With respect to USCIS, plaintiffs seek: (i) injunctive relief requiring the issuance of employment authorization documents and advance parole documents without fee to purported class members (Dkt. 1, Prayer for Relief ¶ 4), (ii) injunctive relief requiring USCIS to provide complete and accurate information to the VO concerning the immigrants eligible to receive immigrant visas, including the number of such eligible immigrants, the preference category, country of chargeability, and priority date of such eligible immigrants (Dkt. 1, Prayer for Relief ¶ 5; *see* Fourth Cause of Action and Fifth Cause of Action), and (iii) injunctive relief requiring USCIS to adjudicate applications for adjustment of status in "proper priority date order" under 8

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[9] A private right of action to enforce an alleged violation of a federal statute must be created by Congress. *Catholic Charities CYO v. Chertoff*, 622 F. Supp. 2d 865, 876 (N.D. Cal. 2008), *affirmed* 2010 WL 675617 (9th Cir. Feb. 25, 2010) (unpublished). Absent an express or implied intent to create a private right of action to enforce a statute and its accompanying remedy, a cause of action does not exist and courts may not create one. *Id*. (finding that the Victims of Trafficking and Violence Protection Act ("VTVPA") provides no private right of action).

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U.S.C. § 1153(e) (Dkt. 1, Prayer for Relief ¶ 7, *see also* Second Cause of Action, Third Cause of Action), and (iv) unspecified relief for allegedly approving applications for adjustment of status even though the VO had not made immigrant visa numbers available (Dkt. 1, Third Cause of Action). Plaintiffs also allege that in October through June of fiscal year 2008, USCIS approved applications for adjustment of status for EB-3 applicants who were not of Chinese chargeability, violation of 8 C.F.R. § 245.2(a)(5)(ii). (Dkt. 1 ¶ 40). It is unclear if plaintiffs seek relief in connection with this allegation.[10]

As a matter of law, under the APA, plaintiffs are not entitled to these or any other types of remedies.

LEGAL STANDARD

Federal courts are courts of limited jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). The burden of establishing that a cause lies within this limited jurisdiction rests upon the party asserting jurisdiction. *Id.; see, e.g., Catholic Charities*, 622 F. Supp. 2d at 876, *affirmed* 2010 WL 675617 (9th Cir. Feb. 25, 2010). A motion to dismiss for lack of subject matter jurisdiction may be a "speaking motion" in which the defendants challenge the existence of subject matter jurisdiction. *See, e.g., Catholic Charities*, 622 F. Supp. 2d at 876, *affirmed* 2010 WL 675617 (9th Cir. Feb. 25, 2010). A motion to dismiss under Rule 12(b)(6) tests for legal sufficiency of the claims alleged in the complaint. *Id*.; *see Twombly v. Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

The judicial review provisions of the APA, 5 U.S.C. §§ 701-706, provide a limited cause of action for parties adversely affected by agency action. 5 U.S.C. § 706(1); *see Oryszak v. Sullivan*, 576 F.3d 522, 525 (D.C. Cir. 2009). Agency action is defined to include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or the

[10] In addition, Plaintiffs' Prayer for Relief requests that this Court assert jurisdiction over the matter (Prayer for Relief ¶ 1), certify a class action (Prayer for Relief ¶ 2), award costs and attorney's fees (Prayer for Relief ¶ 9), and grant any other relief that this Court deems just and proper to "remedy the injuries suffered by the plaintiffs and their class members." (Prayer for Relief ¶ 10). Since plaintiffs cannot state a claim under the APA, there is no basis for asserting jurisdiction, awarding attorney's fees and costs, or granting plaintiffs any relief whatsoever. Defendants are simultaneously filing a response to plaintiffs' Motion for Class Certification. (Dkt. 14).

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failure to act." 5 U.S.C. § 551(13); *see Lujan*, 497 U.S. at 890-91 (because plaintiffs failed to point to a single order or regulation, or even to a completed universe of orders and regulations, there was no agency action on which to base their challenge under the APA). The standard of review is narrow and does not give federal courts the authority to substitute their judgment for that of the agency. *See Motor Vehicles Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983).

In order to establish standing to sue under the APA, a party must establish: (1) injury in fact, (2) causation, and (3) likelihood that a favorable decision will redress the injury. *Renee v. Duncan*, 573 F.3d 903, 908, 912 (9th Cir. 2009) (vacating district court decision because the alleged harm was not redressable); *see Lujan*, 497 U.S. at 883; *Mayfield v. U.S.*, 599 F.3d 964, 970 (9th Cir. 2010) (reversing because declaratory judgment was not likely to redress plaintiffs' injury). A plaintiff must demonstrate standing for each form of relief sought. *Mayfield*, 599 F.3d at 969.

Under 5 U.S.C. § 704, only final agency action is subject to judicial review. *See Western Radio Services Com. v. Glickman*, 123 F.3d 1189, 1196 (9th Cir. 1997); *see, e.g., Franklin v. Massachusetts*, 505 U.S. 788, 796-97 (1992) (census report by the Commerce Department to the President tabulating population by state was not a final agency action); *Lujan*, 497 U.S. at 882 (agency's "land withdrawal review program" was not an agency action, let alone a final agency action, subject to review under the APA); *ONRC Action v. Bur. of Land Mgmt*., 150 F.3d 1132, 1139 (9th Cir. 1998) (refusal to institute a moratorium on certain action pending completion of a study was not final agency action). The APA thus insulates from immediate judicial review the agency's preliminary or procedural steps. *See Western Radio*, 123 F.3d at 1196. In order to constitute final agency action: (1) the action must mark the consummation of the agency's decision-making process; it must not be of a merely tentative or interlocutory nature, and (2) the action must be one by which rights or obligations have been determined or which legal consequences will flow. *Western Radio*, 123 F.3d at 1196.

In addition, because the APA does not apply to agency action committed to agency discretion by law, a plaintiff who challenges such a discretionary action cannot state a claim

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under the APA. *See Oregon Natural Res. Council v. Thomas*, 92 F.3d 792, 796 (9th Cir. 1996) (affirming district court's finding that because plaintiffs could not point to any independent substantive body of law, the agency's decision to sell timber was committed to agency discretion by law); *Heckler v. Chaney*, 470 U.S. 821, 828 (1985) (decision by agency to refuse an enforcement action committed to agency discretion by law); *Catholic Charities*, 622 F. Supp. 2d at 880 (dismissing for failure to state a claim because determination as to the eligibility for "U" visa is committed to USCIS's discretion by law), *affirmed* 2010 WL 675617 (9th Cir. Feb. 25, 2010).

In order to state a claim under 5 U.S.C. § 706(1) for the failure to act, a plaintiff must assert "an agency failed to take a *discrete* agency action that it is *required to take*." *See Norton v. Southern Utah Wilderness Alliance (SUWA)*, 542 U.S. 55, 64 (2004) (emphasis original).[11] The interpretation of a statute by the agency charged with its administration is generally entitled to considerable weight. *ONRC*, 150 F.3d at 1139.

ARGUMENTS

I. Plaintiffs' Claims Under the APA Against the Department of State Should Be Dismissed as a Matter of Law.

1. As a Matter of Law, this Court Should Dismiss Plaintiffs' Claims for Declaratory and Injunctive Relief Based on their Allegations that the Department of State Issued Visas Out of Priority Date Order (Prayer for Relief ¶¶ 3, 7).

Plaintiffs seek declaratory and injunctive relief based on their allegation that the Department of State violated the INA by issuing immigrant visas to applicants out of priority date order. (Dkt. 1, Prayer for Relief ¶¶ 3, 7; *see* First Cause of Action).[12] Since none of the named plaintiffs have a pending application for a visa, they lack standing to challenge the

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[11] The Court explained, "If courts were empowered to enter general orders compelling compliance with broad statutory mandates, they would necessarily be empowered, as well, to determine whether compliance was achieved – which would mean that it would ultimately become the task of the supervising court, rather than the agency, to work out compliance with the broad statutory mandate, injecting the judge into day-to-day agency management." *SUWA*, 542 U.S. at 66-7.

[12] Defendants do not interpret the Complaint as seeking to compel the Department of State to adjudicate applications for adjustment of status. Such an allegation would make no sense because Congress has committed the adjudication of applications for adjustment of status to USCIS, not the Department of State. 8 U.S.C. § 1255(a).

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issuance of visas. Moreover, their position is based on a mistaken view of the law that focuses solely on 8 U.S.C. § 1153(e) and ignores the other provision of the INA regarding visas. To the extent that plaintiffs are challenging the reasonable estimates of visa demand that the Department of State made in fiscal years 2008 and 2009 under 8 U.S.C. § 1153(g), they lack standing to do so because there is no way "re-do" estimates made in prior years. The visa numbers in these two years have already been allocated and used by other applicants. Moreover, plaintiffs cannot state a claim as a matter of law under the APA regarding these estimates because the estimates are committed to agency discretion as a matter of law.

A. The Named Plaintiffs Lack Standing to Challenge the Process By Which the Department of State Issues Visas Because None of the Named Plaintiffs Have a Pending Application for a Visa.

As a threshold matter, the named plaintiffs do not have standing to assert a claim regarding the issuance of a visa, because none of the named plaintiffs has a pending application for an immigrant visa. Instead, all named plaintiffs have pending applications for adjustment of status. As a result, they cannot establish an injury in fact, causation, or the likelihood that a favorable decision will redress the injury with respect to the adjudication of applications for visas. *See Renee*, 573 F.3d at 908. They have simply alleged no basis on which they can assert claims on behalf of applicants with pending visa applications.

B. Plaintiffs Fail to State a Claim that the Department of State Improperly Issued Visas Because they Misconstrue the Law.

As a matter of law, the Department of State cannot issue visas in strictly priority date order because Congress has imposed other limitations on the issuance of visas. The Department of State should not, and cannot, be compelled to ignore these other legal requirements and issue visas in strictly priority date order. *See generally, FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (It is a fundamental canon of statutory construction the words of a statute must be read in their context and with a view to their place in the overall statutory scheme).

The most significant of these limitations is the per-country limit established in 8 U.S.C. § 1152. The Department of State may not issue a visa to an applicant in violation of this limit –

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even if the applicant has the next earliest priority date. This means that applicants of nationalities that are over-subscribed (where demand exceeds their per-country limit) will generally have to wait longer for a visa than an applicant of a nationality that is not over-subscribed. In other words, two applicants who are both eligible and have the same priority date may not be issued visas on the same date if one of the applicants is chargeable to a nationality that is over-subscribed and the other applicant is chargeable to a nationality that is not. This outcome may seem unfair but it is the necessary outgrowth of Congress's decision to impose per-country limits on the issuances of visas. Under §§ 1151, 1152, it is not possible for every country to reach its per-country limit before the worldwide limit is reached.[13]

In addition, the Department of State cannot issue visas in strictly priority date order because it does not issue visas to applicants who are not eligible. *See* 8 U.S.C. § 1153(e). If the applicant with the next earlier priority date is not currently eligible, the Department of State will not issue a visa to the applicant. *See* 8 U.S.C. § 1153(e); *see also*, 22 C.F.R. § 42.65 (regarding refusal of a visa). And the Department of State does not refuse to allocate a visa to an eligible applicant, simply because it is possible that another applicant with an earlier priority date may become eligible in the future. Adopting such an approach would be untenable because it would result in lengthier delays for eligible applicants and potentially result in fewer visas being issued.

Lastly, in allocating visas numbers, the Department of State is permitted to use the process authorized in 8 U.S.C. § 1153(g). Based on its reasonable estimates, the Department of State establishes visa cut-off dates. These cut-off dates are transmitted to consular posts and USCIS offices, and are published online at www.travel.state.gov. Visa numbers are allocated for all documentarily qualified applicants with priority dates before the relevant cut-off date. This is the procedure that the Department of State has developed based on its interpretation of a statute – 8 U.S.C. § 1153(g) – that the Department of State is charged with carrying out. As a result,

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[13] To illustrate, the minimum worldwide EB-3 limit is 40,040 which results in the per-country EB-3 limit being a minimum of 2,803. *See* 8 U.S.C. §§ 1151(d)(1)(A), 1152. Given that there are over 190 countries, not every country will be able to reach their per-country limit. If every country used visa numbers at their per-country limit, 532,570 visa numbers would be used. Since 532,570 far exceeds the worldwide limit established by Congress (40,040) not every country can use visa numbers at their per-country limit. As a result, visa cut-off dates must be used to control visa availability.

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federal courts should defer to the Department of State's interpretation of the statute. *See ONRC*, 150 F.3d at 1139. Moreover, this procedure is necessary because the Department of State does not issue visas from one central location, but instead issues visas from consular posts all over the world. *See* 8 U.S.C. § 1152(a)(1)(B). The Department of State simply does not know in advance who will be found eligible for a visa and does not control the factors that may impact on the pace of adjudication.

C. Assuming *Arguendo* that Plaintiffs Are Challenging the Estimates Under Section 1153(g) that the Department of State Made in Fiscal Years 2008 and 2009, they Lack Standing to do so.

In their Complaint, plaintiffs never expressly state whether they are seeking APA review of the Department of State's estimates under 8 U.S.C. § 1153(g). In fact, plaintiffs make no mention of 8 U.S.C. § 1153(g) at all in their Complaint. If they are challenging the Department of State's estimates, their claim should be dismissed for lack of standing. They have failed to provide any evidence that they were harmed by how the visa cut-off dates were calculated. Even if the Department of State had allocated the maximum number of visa numbers permitted to EB-3 applicants of Chinese chargeability (2,957 in fiscal year 2008, and 2,502 in fiscal year 2009), it does not appear that any of the named plaintiffs would have been allocated a visa number based on their priority date. (*See* DOS A.R. at 9-11). The reason is that there were a significant number of eligible EB-3 applicants of Chinese chargeability who had earlier priority dates in fiscal year 2008 and 2009. (*See* DOS A.R. at 20-21). Demand simply exceeded supply.

More significantly, even if the named plaintiffs (or other purported class members) were harmed by the Department of State's allocation of visa numbers based on its estimates, they have not demonstrated that this harm would likely be redressed by a favorable decision. *See Renee*, 573 F.3d at 908, 912 (alleged harm was not redressable); *Mayfield*, 599 F.3d at 969 (same). There is no way, at the present date, to "re-do" estimates from previous years. Any claim regarding the accuracy of these estimates is now moot. Visa numbers in fiscal year 2008 and 2009 were already allocated based on the visa-cutoff dates established using these estimates. These visa numbers were used by applicants who either came to the United States or were able to adjust status. A decision by a federal court that the Department of State's estimates in these

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years were improper will not redress plaintiffs' alleged harm because such a decision would not result in the reallocation of visas numbers that were already used by other applicants. *See Renee*, 573 F.3d at 908. For this additional reason, plaintiffs lack standing.

In a recognition that the visa numbers for fiscal years 2008 and 2009 were already used by other applicants, plaintiffs seek the issuance of additional EB-3 visa numbers to applicants of Chinese nationality in excess of the limit imposed by Congress. Such relief is barred by statute. *See* 8 U.S.C. § 1152(a). It is undisputed that Congress has established per-country limits on immigrant visas. (Dkt. 15, p. 7). There is no legal basis for an order compelling the Department of State to issue visas in excess of this Congressionally-created limit. Although the APA provides for judicial review of agency action unlawfully withheld (5 U.S.C. § 706(1)), it does not provide injunctive relief compelling an agency to violate a statute. Plaintiffs simply are not entitled to this relief as a matter of law.

D. Assuming *Arguendo* that Plaintiffs Have Standing to Challenge the Department of State's Estimates Under Section 1153(g), this Claim Should be Dismissed Because these Estimates are Committed to Agency Discretion by Law.

Plaintiffs cannot state a claim under the APA regarding the Department of State's estimates in fiscal years 2008 and 2009, because 8 U.S.C. § 1153(g) commits the making of these estimates to agency discretion. *See* 5 U.S.C. § 701(a)(2) (forbidding judicial review "to the extent that . . . agency action is committed to agency discretion by law").[14] There is no substantive law stating how the Department of State may make estimates or what it may rely upon in making its estimates. *See Oregon Natural*, 92 F.3d at 796. As a result, there is no standard by which to measure these estimates, and plaintiffs are not entitled to judicial review of these estimates. *See id*.; *Catholic Charities*, 622 F. Supp. 2d at 880, *affirmed* 2010 WL 675617 (9th Cir. Feb. 25, 2010). In the absence of any legal standard whatsoever, plaintiffs cannot state a claim under the APA with respect to the Department of States' estimates under 8 U.S.C. § 1153(g).

[14] To be clear, the Department of State's position is that its estimates in fiscal years 2008 and 2009 were reasonable. Plaintiffs concede that shortly before April 2009, USCIS demand for immigrant visas "was extremely and unexpectedly high." (Dkt. 15, p. 12).

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2. Plaintiffs Fail to State a Claim for the Issuance of Additional Visas Solely for the Benefit of EB-3 Applicants of Chinese Nationality (Prayer for Relief ¶ 8).

Plaintiffs seeks injunctive relief requiring that immigrant visa numbers be made available for the purported class members so that such individuals can obtain immigrant visas and/or adjust status before the end of the fiscal year. (Dkt. 1, Prayer for Relief ¶ 8). As discussed above, the Department of State is not permitted, let alone required, to issue visas in excess of the per-country limit created by Congress. *See* 8 U.S.C. § 1153. As a result, plaintiffs cannot state a claim for this relief under the APA.[15]

3. Plaintiffs Fail to State a Claim for the Release of Information in the Possession of the Department of State (Prayer for Relief ¶ 6).

Plaintiffs seek injunctive relief requiring the Department of State to make public all relevant information contained on the waiting lists maintained under 8 U.S.C. § 1153(e), and all relevant information concerning the system and procedures used for allocating immigrant visa numbers for individuals on the waiting lists (Dkt. 1, Prayer for Relief ¶ 6, *see* Fourth Cause of Action). In order to state a claim under the APA for the failure to act, a plaintiff must assert "an agency failed to take a *discrete* agency action that it is *required to take*." *SUWA*, 542 U.S. at 64; *see ONRC*, 150 F.3d at 1140 (plaintiff failed to identify a clear statutory duty with which the agency must comply). Because the Department of State is not required by statute to make its waiting lists public under 8 U.S.C. § 1153(e) or any other statute, plaintiffs cannot state a claim for this relief.

Section 1153(e)(3) states, in its entirety, "Waiting lists of applicants for visas under this section shall be maintained in accordance with regulations prescribed by the Secretary of State." 8 U.S.C. § 1153(e)(3). No public disclosure is required. To the extent plaintiffs seek to launch a broad programmatic challenge on the implementation of the record-keeping procedures of the Department of State, such claims are not permitted under the APA. *See Lujan*, 497 U.S. at 882. Rather, judicial review under 5 U.S.C. § 706(1) is limited to discrete agency actions that the agency is required to take. *SUWA,* 542 U.S. at 64. Plaintiffs have failed to specify any discrete

[15] While plaintiffs' applications for adjustment of status are pending they may apply for work and travel authorization.

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agency action that the Department of State is required to take with respect to this relief. *See SUWA,* 542 U.S. at 64; *Lujan*, 497 U.S. at 882. As a result, they cannot state a claim under the APA for the public disclosure of the Department of State's waiting lists.

II. Plaintiffs Fail to State a Claim Under the APA Against USCIS.

As a matter of law, plaintiffs are not entitled to any relief under the APA against USCIS. Therefore, USCIS should be dismissed as a party to this action.

1. Plaintiffs Fail to State a Claim for an Order Compelling USCIS to Excuse the Paying of Filing Fees for Certain Applicants (Prayer for Relief ¶ 4).

Plaintiffs seek injunctive relief requiring the issuance of employment authorization documents and advance parole documents without fee to purported class members. (Dkt. 1, Prayer for Relief ¶ 4). In order to state a claim under the APA for the failure to act, plaintiffs must allege that an "an agency failed to take a *discrete* agency action that it is *required to take*." *See SUWA*, 542 U.S. at 64 (emphasis original). USCIS is not required by law to excuse applicants of Chinese chargeability from paying the required filing fee for employment authorization or advance parole. *See* 8 U.S.C. § 1365(m) (authorizing USCIS to charge filing fees). Therefore, as a threshold matter, plaintiffs' claim for this relief should be dismissed as a matter of law.[16]

2. Plaintiffs Fail to State a Claim for an Order Compelling USCIS to Provide Additional Information to the Department of State or to Employ Certain Record-Keeping Procedures (Prayer for Relief ¶ 5).

Plaintiffs seek injunctive relief requiring USCIS to provide complete and accurate information to the VO concerning the immigrants eligible to receive immigrant visas, including the number of such eligible immigrants, the preference category, country of chargeability, and priority date of such eligible immigrants. (Dkt. 1, Fourth Cause of Action, Fifth Cause of Action). But plaintiffs are unable to point to any statute requiring USCIS to provide any information to the VO or to provide it in any particular format. *See SUWA*, 542 U.S. at 64.

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[16] In addition, purely monetary injuries are generally not a sufficient basis for awarding injunctive relief. *See Colorado River Indian Tribes v. Town of Parker*, 776 F.2d 846, 85001 (9th Cir. 1985). As a result, plaintiffs are not entitled to injunctive relief barring USCIS from charging filing fees to EB-3 applicants of Chinese chargeability.

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While the INA requires the Department of State to maintain waiting lists (8 U.S.C. § 1153), it does not impose any similar requirement on USCIS. To the contrary, the INA commits the adjudication of applications for adjustment of status to agency discretion. *See* 8 U.S.C. § 1255(a). As a result, there is no basis under the APA to require that USCIS provide certain information to the Department of State or to require that it maintain or provide information in a given format. *See SUWA*, 542 U.S. at 64; *see generally*, *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, *Inc.*, 435 U.S. 519, 543 (1978) (administrative agencies should be free to fashion their own rules of procedure).

Assuming *arguendo* that such a requirement did exist, plaintiffs would still not be entitled to this relief as a matter of law for three additional reasons. First, plaintiffs have failed to establish standing with respect to this claim for relief. Even if they were somehow harmed because USCIS did not provide more information to the Department of State in fiscal years 2008 and 2009, they have failed to show that this harm would be redressed by a favorable decision. Nor have they shown that they are likely to suffer this same purported harm in the future. *See Lyon*, 461 U.S. at 111. For these reasons they have failed to establish standing with respect to USCIS's record-keeping procedures.

Second, under Rule 65(d), every injunction must describe in reasonable detail the act or acts restrained or required. Fed. R. Civ. P. 65(d). Since an injunctive order prohibits conduct under threat of judicial punishment, basic fairness requires that those enjoined receive explicit notice of precisely what conduct is outlawed. *See Fed. Election Com'n v. Furgatch*, 869 F.2d 1256, 1263 (9th Cir. 1989) (injunction prohibiting defendant from "future similar violations" of a statute is inadequate because it is susceptible to a number of different interpretations); *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974) (injunction telling defendants not to enforce "the present Wisconsin scheme" is not specific enough). The injunction requiring an agency to provide "complete and accurate" information is too indefinite to be permitted under Rule 65(d). It is simply not proper to hold a defendant in contempt if it makes a mistake in inputting data into a computer system.

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Third, under 5 U.S.C. § 704, only final agency action is subject to judicial review. *See Western Radio*, 123 F.3d at 1196; *see Franklin*, 505 U.S. at 796-97 (census report, compiled by the Department of Commerce for the President, is not subject to judicial review under the APA because it does not constitute final agency action). Here, USCIS provides information about pending applicants for adjustment of status to the Department of State by inputting this information into the Department of State's computer database. Inputting data into a computer database does not constitute agency action under 5 U.S.C. § 551(13). *See Lujan*, 497 U.S. at 882. But even if it did, it is not final agency action because it is a procedural step and does not mark the consummation of USCIS's decision-making process. *See Western Radio*, 123 F.3d at 1196. Like the census report in *Franklin* tabulating population by state, inputting data into the Department of State's computer system does not determine the rights or obligations of the applicant, and no legal consequences flow from this step. *See id.*; *Franklin*, 505 U.S. at 796-97. USCIS merely provides information to another entity for its use. *See Franklin*, 505 U.S. at 796-97. For this additional reason, it is not subject to review under the APA.

3. Plaintiffs Fail to State a Claim for an Injunction Compelling USCIS to Adjudicate Applications for Adjustment of Status in "Proper Priority Date Order" under 8 U.S.C. § 1153(e) (Prayer for Relief ¶ 7).

Plaintiffs seek injunctive relief requiring USCIS to adjudicate applications for adjustment of status in "proper priority date order" under 8 U.S.C. § 1153(e) (Dkt. 1, Prayer for Relief ¶ 7, *see also,* Second Cause of Action, Third Cause of Action). As a matter of law, this is not a proper claim under the APA because 8 U.S.C. § 1153(e) makes no mention of adjustment of status and imposes no obligations upon USCIS. Instead, this provision relates to a different agency, the Department of State, which does not adjudicate applications for adjustment of status. *See* 8 U.S.C. § 1153(e).

The adjudication of applications for adjustment of status is governed by 8 U.S.C. § 1255(a), not 8 U.S.C. § 1153(e). Section 1255(a) commits adjudication to agency discretion and expressly authorizes USCIS to promulgate its own regulations. *Id*. It imposes no requirement that applications for adjustment of status be adjudicated in a particular order. *Id*. Moreover, under the INA, USCIS has no control over when an applicant files an application for

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adjustment of status. As a result, USCIS cannot be compelled to adjudicate applications for adjustment of status in strictly priority date order. Additionally, under 8 C.F.R. § 245.2(a)(5)(ii), USCIS cannot approve an application for adjustment of status until the Department of State allocates a visa number. *See* 8 U.S.C. § 245.2(a)(5)(ii). Therefore, even if an applicant for adjustment of status has an early priority date, USCIS is barred by regulation from approving the application until a visa number becomes available. For these reasons, plaintiffs cannot state a claim against USCIS under the APA based on alleged violations of 8 U.S.C. § 1153(e).[17]

Plaintiffs also allege that in October through June of fiscal year 2008, USCIS violated 8 C.F.R. § 245.2(a)(5)(ii) by approving applications for adjustment of status for EB-3 applicants who were not from China even though the Department of State had not allocated a visa number. (*See* Dkt. 1 ¶ 40, Third Cause of Action). It is unclear what this allegation means and what relief, if any, plaintiffs seek with respect to this allegation. For this reason alone, this claim should be dismissed.

Plaintiffs could be alleging that applications for adjustment of status were not adjudicated in strictly priority date order. If so, they fail to state a claim that USCIS violated 8 U.S.C. § 1153(e) for the reasons stated above.

Alternatively, plaintiffs could be alleging that USCIS mistakenly approved applications for adjustment of status in the absence of an available visa number. USCIS denies such an allegation, but even if it were true, there is no mechanism to "un-adjudicate" an application. USCIS cannot "take away" one applicant's approved application and somehow provide it to another applicant. For this reason, there is no longer a live case or controversy as to how visa numbers were allocated in fiscal years 2008 and 2009. Furthermore, even if this were possible, plaintiffs would be required to identify and join these other applicants under Rule 19(a) because they are necessary parties who are entitled to be heard by the Court before their approved

[17] Additionally, even if USCIS had a legal duty under 8 U.S.C. § 1153(3), plaintiffs would not be entitled to the relief sought under Rule 65(d) because a requirement to adjudicate in priority date order is too indefinite. *See Furgatch*, 869 F.2d at 1263; *Schmidt*, 414 U.S. at 476.

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applications for adjustment of status were "taken away" and they are potentially subjected to removal. *See* Fed. R. Civ. P. 19(a).

In addition, plaintiffs lack standing to challenge any decision by USCIS to *approve* an application for adjustment of status for another applicant. In order to establish standing, a plaintiff must demonstrate an injury in fact caused by the agency action challenged. *See Renee*, 573 F.3d at 908. If there were no visa numbers available at the time (as plaintiffs allege), then, under 8 C.F.R. § 245.2(a)(5)(ii), USCIS was barred from approving the applications of all applicants, including the named plaintiffs.[18] Even if USCIS accidentally approved some applications, this in no way harmed the plaintiffs because they were not entitled to adjustment of status irrespective of whether USCIS mistakenly approved other applications. If USCIS accidentally violated its regulations for the benefit of some applicants, it does not follow that USCIS is required to deliberately violate its regulations for the benefit of other applicants as well. For this same reason, plaintiffs also cannot establish standing to assert a claim regarding this allegation. *See Renee*, 573 F.3d at 908.

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[18] USCIS does not read plaintiffs' allegations as challenging how USCIS interprets its regulations. To the extent plaintiffs are challenging how USCIS interprets its regulations, its interpretation is controlling unless it is plainly erroneous or inconsistent with the regulation. *Ventura-Escamilla v. I.N.S.*, 647 F.2d 28, 32 (9th 1981); *see Auer v. Robbins*, 519 U.S. 452, 461 (1997).

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WHEREFORE, defendants request that this Court dismiss plaintiffs' complaint and grant such other and further relief as is appropriate.

Respectfully submitted this 30th day of July, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on July 30, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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