

No. 11-35412

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

ZIXIAN LI, *et al.*,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA, *et al.*,

Defendants-Appellees.

ON APPEAL FROM THE WESTERN DISTRICT OF WASHINGTON

BRIEF FOR DEFENDANTS-APPELLEES

TONY WEST
Assistant Attorney General
Civil Division

ELIZABETH J. STEVENS
Assistant Director
Office of Immigration Litigation - DCS

AARON S. GOLDSMITH
Senior Litigation Counsel
Office of Immigration Litigation - DCS
U.S. Department of Justice
P.O. Box 868, Ben Franklin Station
Washington, DC 20044
Telephone: (202) 532-4107
Attorneys for Defendants-Appellees

TABLE OF CONTENTS

INTRODUCTION.....	1
JURISDICTION.....	3
ISSUES PRESENTED.....	4
STATEMENT OF THE CASE.....	5
STATUTORY BACKGROUND.....	7
The Statutory Role of the Department of Labor.....	7
The Statutory Role of USCIS.....	8
The Statutory Role of the Department of State.....	9
FACTUAL BACKGROUND.....	12
STANDARD OF REVIEW UNDER THE APA.....	14
SUMMARY OF LEGAL ARGUMENTS.....	17
ARGUMENTS.....	19
1. The District Court Correctly Found That There Is No Live Case Or Controversy Regarding The Establishment Of Visa Cut-Off Dates And Allocation Of Visa Numbers In Fiscal Years 2008 And 2009.....	19
2. The District Court Properly Dismissed Plaintiffs’ Claims For Prospective Relief Because Plaintiffs Did Not Allege That USCIS Or DOS Failed To Take Discrete Agency Action That They Were Required To Take.....	29
A. Standard For Stating a Claim Under 5 U.S.C. § 706(1).	30

B.	None Of The Remedies Sought By Plaintiffs Constitute Discrete Agency Action.....	31
C.	Plaintiffs Failed To State A Claim Because They Failed To Identify A Legal Duty For The Remedies Sought.....	32
D.	Plaintiffs Are Estopped From Reviving On Appeal Their Claim That Applications Must Be Adjudicated In Strict Priority Date Order.	35
E.	There Is No Basis For An Injunction Barring USCIS Or DOS From Allocating Visa Numbers To Applicants For Adjustment of Status Who Are Not On DOS’s Waiting Lists.	37
3.	There Are Additional Reasons Why Plaintiffs Lack A Personal Interest In The Claims Asserted	39
A.	Jun Guo, Shibao Zhang, And Ming Chang Lack Any Personal Stake In This Litigation.....	39
B.	Zixian Li And Jun Li Have Failed To Establish That The Relief Sought Will Redress Any Purported Injury They Have Suffered.	40
	CONCLUSION.....	42
	STATEMENT WITH RESPECT TO ORAL ARGUMENT	
	STATEMENT OF RELATED CASES	
	CERTIFICATE OF COMPLIANCE	
	CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

CASES

<i>Bell v. Atlantic Corp. v. Twombly</i> , 550 U.S. 544 (2007).	17
<i>Botany Worsted Mills v. U.S.</i> , 278 U.S. 28 (1929).	23
<i>Campesinos Unidos, Inc. v. U.S. Dep't of Labor</i> , 803 F.2d 1063 (9th Cir. 1986).	18, <i>passim</i>
<i>Chrysler Corp. v. Brown</i> , 441 U.S. 281, 311 (1979).	25
<i>Cook Inlet Treaty Tribes v. Shala</i> , 166 F.3d 986 (9th Cir. 1999).	20, 39
<i>Florida Power & Light Co. v. Lorion</i> , 470 U.S. 729 (1985).	15
<i>Forest Guardians v. Babbit</i> , 174 F.3d 1178 (10th Cir. 1999).	30
<i>Foster v. Carson</i> , 347 F.3d 742 (9th Cir. 2003).	20
<i>Gardner v. U.S. Bureau of Land Mgmt.</i> , 638 F.3d 1217 (9th Cir. 2011).	17
<i>Graves v. Romney</i> , 502 F.2d 1062 (8th Cir. 1974).	35
<i>Heckler v. Chaney</i> , 470 U.S. 821 (1985).	28

Hells Canyon Pres. Council v. U.S. Forest Serv,
593 F.3d 923 (9th Cir. 2010). 15, *passim*

Iddir v. INS,
301 F.3d 492 (7th Cir. 2002). 22, 27, 28

Los Angeles v. Lyons,
461 U.S. 95 (1983). 20, 39

Lujan v. Nat’l Wildlife Fed’n,
497 U.S. 871 (1990). 16, 31, 32

Man-Seok Choe v. Torres,
525 F.3d 733 (9th Cir. 2008). 33, 36

Mayfield v. U.S.,
599 F.3d 964 (9th Cir. 2010). 3, *passim*

Motor Vehicle Mfr. Ass’n v. State Farm Mut. Auto., Ins.,
463 U.S. 29 (1983). 14

North County Alliance, Inc. v. Salazar,
573 F.3d 738 (9th Cir. 2009). 17

Norton v. Southern Utah Wilderness Alliance (SUWA),
542 U.S. 55 (2004). 2, *passim*

Omni Capital Intern., Ltd. v. Rudolf Wolffe & Co.,
484 U.S. 97 (1987). 25

PPG Indus., Inc. v. U.S.,
52 F.3d 363 (D.C. Cir. 1995). 15, 21

Patterson v. Shumate,
504 U.S. 753 (1992). 23

Paunescu v. INS,
76 F. Supp. 896 (N.D. Ill. 1999). 26

Powell v. McCormack,
395 U.S. 486 (1969). 20

Salt Pond Associates v. U.S. Army Corps of Engineers,
815 F. Supp. 766 (D. Del. 1993). 14

Save Our Heritage, Inc. v. Fed. Aviation Admin.,
269 F.3d 49 (1st Cir. 2001). 15

Silva v. Bell,
605 F.2d 978 (7th Cir. 1979). 26, 27

Sullivan v. Little Hunting Park, Inc.,
396 U.S. 229 (1969). 35

Swann v. Charlotte-Mecklenburg Bd. of Ed.,
402 U.S. 1 (1971). 35

U.S. v. Carlson,
900 F.2d 1346 (9th Cir. 1990). 36

Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc
435 U.S. 519 (1978). 14

Vietnam Veterans of America v. C.I.A., No. C 09-0037 CW,
2011 WL 2149356 (N.D. Cal. May 31, 2011). 17

W. Radio Services Co. v. Glickman,
123 F.3d 1189 (9th Cir. 1997). 21

Wagner v. Prof'l Engineers in California Gov't,
354 F.3d 1036 (9th Cir. 2004). 36, 37

STATUTES

5 U.S.C. § 551(13). 14, 32

5 U.S.C. § 702 14

5 U.S.C. § 705..... 14

5 U.S.C. § 706(1)..... 1, *passim*

5 U.S.C. § 706(2)..... 28

5 U.S.C. § 706(2)(A). 1, *passim*

6 U.S.C. § 271(b)(5). 8

6 U.S.C. § 275(a). 8

6 U.S.C. § 557..... 8

8 U.S.C. § 1151..... 2, *passim*

8 U.S.C. § 1151(b)(2). 12

8 U.S.C. § 1151(c)(1)(A)..... 11, 12, 22

8 U.S.C. § 1151(c)(1)(B)(ii). 11, 12

8 U.S.C. § 1151(c)(3)(C). 11, 12, 22, 23

8 U.S.C. § 1151(c)(4)..... 12

8 U.S.C. § 1152..... 9, *passim*

8 U.S.C. § 1153(e). 5, 33

8 U.S.C. § 1153(g)..... 10, *passim*

8 U.S.C. § 1182..... 7

8 U.S.C. § 1255..... 9

8 U.S.C. § 1255(a). 8, 34

8 U.S.C. § 1255(b)..... 9

REAL ID ACT OF 2005:

Section 502..... 24

REGULATIONS

8 C.F.R. § 204.5..... 37

8 C.F.R. § 204.5(d)..... 7

8 C.F.R. § 245.1..... 33

8 C.F.R. § 245.2..... 34

8 C.F.R. § 245.2(a)(5)(ii)..... 8, 34

22 C.F.R. § 42.51..... 9, 38

22 C.F.R. § 42.51(c)..... 24

INTRODUCTION

This action is brought by five individuals who filed applications for adjustment of status with U.S. Citizenship and Immigration Services (“USCIS”). (Dkt. 1, ¶¶ 8-12). As of this date, USCIS has adjudicated the applications of three of these individuals (Jun Guo, Shibao Zhang, and Ming Chang) but has been unable to adjudicate the applications of the remaining two applicants (Zixian Li and Jun Li) because their respective priority dates are not yet current.

Plaintiffs-Appellants (collectively “Plaintiffs”) assert claims against both USCIS and the Department of State (“DOS”) under the Administrative Procedure Act (“APA”) 5 U.S.C. §§ 706(1), 706(2)(A). Plaintiffs argue, under 5 U.S.C. § 706(2)(A), that DOS was arbitrary and capricious in estimating the demand for visa numbers in fiscal years 2008 and 2009 and in establishing visa cut-off dates in these years. (*See* Dkt. 30, pp. 5-6, Dkt. 1, ¶¶ 36, 38, 39, 44, and 58). As a result, Plaintiffs contend visa numbers in these two years were mis-allocated and the effects of this mis-allocation continue to the present. (*See* Dkt. 1, ¶¶ 36, 39).

The district court dismissed this claim because there is no longer a live case or controversy with respect to the allocation of visa numbers in fiscal years 2008 and 2009. (Dkt. 39, pp. 6-8). The visa numbers for these two years have already

been allocated and DOS cannot exceed the annual numeric limits established by Congress. *See* 8 U.S.C. §§ 1151, 1152. Plaintiffs argue that there is a live case or controversy because DOS has the authority, even without express congressional authorization, to recapture visa numbers from previous years to redress the purported mis-allocation of visa numbers in fiscal years 2008 and 2009. (*See* Dkt. 39, p. 6). The district court rejected this argument because it is contrary to both the language and legislative history of the applicable provisions of the Immigration and Nationality Act (“INA”). (*See* Dkt. 39, pp. 6-7). At issue on appeal is whether this ruling is correct. If DOS lacks the authority to recapture visa numbers from previous years, then Plaintiffs’ claim regarding the alleged mis-allocation of visa numbers in fiscal years 2008 and 2009 must be dismissed for lack of standing.

Plaintiffs also assert claims for agency action unlawfully withheld or unreasonably delayed under 5 U.S.C. § 706(1) of the APA. The district court dismissed these claims because Plaintiffs failed to allege that either USCIS or DOS failed to take any discrete action required by law. (Dkt. 39, pp. 3, 5); *Norton v. Southern Utah Wilderness Alliance (SUWA)*, 542 U.S. 55, 64-65 (2004). On appeal, Plaintiffs continue to be unable to identify any specific statutory provision imposing a duty upon USCIS or DOS that either agency purportedly violated.

Plaintiffs have identified several benefits that they would like, but they cannot identify any statute that *requires* USCIS or DOS to confer these benefits. For this reason, the district court properly dismissed Plaintiffs' claims against USCIS and DOS under 5 U.S.C. § 706(1).

JURISDICTION

USCIS and DOS agree that Plaintiffs timely noticed their appeal under Fed. R. App. P. 4(a)(1)(B). USCIS and DOS dispute that federal courts have jurisdiction over Plaintiffs' claims. Moreover, even if the district court had jurisdiction over Plaintiffs' claims when this action was commenced, the claims of Plaintiffs Jun Guo, Shibao Zhang, and Ming Chang are moot because USCIS has now approved their applications for adjustment of status. *See Mayfield v. U.S.*, 599 F.3d 964, 969 (9th Cir. 2010).

ISSUES PRESENTED

1. Federal courts cannot order an agency to violate the law. Congress set annual numerical limitations on the number of visa numbers DOS can issue, but did not create any exceptions to these limitations. The district court found that, absent express Congressional authorization, DOS lacks the authority to exceed these annual numerical limitations by recapturing visa numbers from prior years and allocating them in the present year. Did the district court err in reaching this decision?

2. Section 706(1) of the APA provides that federal courts can compel agency action unlawfully withheld or unreasonably delayed if the agency action is discrete and legally required. Plaintiffs seek injunctive relief under this section but cannot identify any legal authority that requires USCIS or DOS to provide the relief sought. Did the district court err in finding that Plaintiffs have failed to state a claim for relief under 5 U.S.C. § 706(1)?

3. In order to establish standing, a litigant must establish an injury, caused by defendants' conduct, that will likely be redressed by a favorable decision. Did Plaintiffs satisfy these requirements?

STATEMENT OF THE CASE

On May 12, 2010, Plaintiffs commenced this action. (Dkt. 1). On June 18, 2010, Plaintiffs filed a motion for class certification and for preliminary injunction seeking, *inter alia*, that DOS make 2,324 visa numbers available to purported class members. (Dkts. 14, 15). On July 30, 2010, USCIS and DOS moved to dismiss and filed responses to Plaintiffs' motions. (Dkts. 20, 22, and 23). On the same day, per the local rules, USCIS and DOS each filed, under seal, an administrative record. (Dkts. 21). DOS's administrative record included the relevant waiting list that it was maintaining. (*See id.*).

On August 30, 2010, Plaintiffs filed a response to the motion to dismiss of USCIS and DOS. (Dkt. 30). In this response, Plaintiffs clarified that they were not taking the position that "every single visa number has to be used in 'strictly priority date order' Rather, Plaintiffs allege that during FY 2008 and FY 2009 the cutoff dates published in the Visa Bulletin were established in violation" of the law to the detriment of the purported class members. (Dkt. 30, pp. 5-6).¹ They further clarified that they "are not objecting to the process by which DOS adjudicates applications for immigrant visas. . . . Rather, Plaintiffs are objecting

¹ In other parts of the same filing, Plaintiffs appear to take the position that USCIS is required, under 8 U.S.C. § 1153(e), to grant applications for adjustment of status in priority date order. (Dkt., p. 13).

that **immigrant visa numbers** have been misallocated.” (Dkt. 30, p. 4 (emphasis original); *see also* Dkt. 30, p. 5 (recognizing that visa numbers cannot be allocated in a strictly priority date order because of the per-country limits but contesting the relevance of this to their claims)).

On September 27, 2010, the district court held oral argument on USCIS’s and DOS’s motion to dismiss. At this hearing, Plaintiffs clarified their position arguing that DOS could recapture “unused” visa numbers from prior years. (Transcript of Oral Argument, p. 10, ln. 18 through p. 12, ln. 16; Dkt. 35, p. 1).

On October 5, 2010, by stipulation, the district court ordered supplemental briefing on the issue of whether DOS has the authority to recapture visa numbers. (Dkt. 35). Both parties submitted supplemental briefing on this issue that were supported by sworn declarations. (Dkts. 36, 38).

On March 16, 2011, the district court dismissed this action. (Dkt. 39). Plaintiffs did not seek leave to amend their pleading or file a motion for reconsideration. Instead, they instead filed a notice of appeal. (Dkt. 41).

STATUTORY BACKGROUND

Under the Immigration and Nationality Act (“INA”), as amended, Congress delegated responsibility for the administration of immigration law to different federal entities, including the Department of Labor (“DOL”), the Department of Homeland Security (“DHS”) (including USCIS), and DOS. As more fully set forth below, DOL adjudicates applications for labor certification, USCIS adjudicates visa petitions (i.e., Form I-140) and applications for adjustment of status (Form I-485), and the Department of State allocates visa numbers.²

The Statutory Role of the Department of Labor

This action concerns applications in the employment-based third preference category (“EB-3”), including professionals, skilled works and other workers. (Dkt. 1, ¶ 1). In this context, 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. The priority date is the date that the application for labor certification is submitted to DOL. *See* 8 C.F.R. § 204.5(d).

² DOS also adjudicates applications for immigrant visas (Form DS-230). But the processing of visas has no bearing on this case because none of the Plaintiffs filed immigrant visa applications and Plaintiffs are not challenging the process by which DOS adjudicates immigrant visa applications. (*See* Dkt. 30, p. 4).

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 appropriate preference category. (Dkt. 39, p. 3). If the alien is located in the United States, 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). 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 DOS.

The Statutory Role of USCIS

The adjudication of applications for adjustment of status is committed to the discretion of USCIS. 8 U.S.C. § 1255(a).³ Pursuant to its regulations, USCIS may not approve an application for adjustment of status until DOS allocates a visa number. 8 C.F.R. § 245.2(a)(5)(ii). A visa is different from a visa number. A visa

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. *See* Pub. L. No. 107-296, 451(b)(1), 471 (Nov. 25, 2002); *see also* 6 U.S.C. §§ 271(b)(5), 557, 275(a). Immigration judges (who are part of DOJ) continue to have the authority to grant aliens adjustment of status as well.

is a document issued by DOS to aliens seeking admission into the United States. A visa number is simply a “budgetary device” used by DOS to avoid exceeding numerical limits established by Congress. *See* 8 U.S.C. §§ 1151, 1152. A visa number is not a physical object given to a particular applicant for adjustment of status.

Before USCIS approves an application for adjustment of status the applicant must demonstrate to USCIS that the applicant is eligible for the benefit. *See* 8 U.S.C. § 1255. Once USCIS determines that the applicant is eligible, this information is entered into DOS’s computer database (the Immigrant Visa Management System (“IVAMS”)) to request allocation of a visa number.⁴ (Dkt. 39, p. 4). Once USCIS approves an application for adjustment of status, DOS reduces by one the number of visas available (for that category) in the fiscal year. 8 U.S.C. § 1255(b).

The Statutory Role of the Department of State

Centralized control of the availability of visa numbers is established in DOS. *See* 22 C.F.R. § 42.51. DOS must comply with the limits on the number of

⁴ Prior to May 2008, USCIS did not enter this information into DOS’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. (Dkt. 22, p. 8 n. 9).

employment-based preference immigrant visas established by Congress. *See* 8 U.S.C. § 1151 (setting a worldwide limit); 8 U.S.C. § 1152 (setting a per-country limit). These limits are not quotas – they represent a ceiling on the maximum number of visas that may be issued in a fiscal year. Significantly, Congress has expressly provided that in allocating visa numbers DOS may “make reasonable estimates.” 8 U.S.C. § 1153(g). In relevant part, 8 U.S.C. § 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 of DOS subdivides the annual preference and nationality limitations specified by Congress into monthly allotments. (*See* Dkt. 39, p. 4). The totals of documentarily-qualified applicants are compared each month with the visa numbers available for the next regulator allotment. (*Id.*). The determination of visa number availability takes into consideration a number of variables, including historical patterns of consular post and USCIS number use. (*Id.*).

Once the number of available immigrant visas has been determined, DOS establishes the cut-off dates and allocates numbers to applicants. (*Id.*). 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. DOS attempts to establish the cut-off dates for the following month on or about the 8th day of each month. (*Id.*, p. 5). The cut-off dates are transmitted to consular posts and USCIS offices, and are also published in DOS’s *Visa Bulletin*. 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 by DOS and an allocation is made as soon as the applicable cut-off date advances beyond the applicant’s priority date.

Any unused employment-based visa numbers are incorporated into the formula for determining the limit on the number of family-based visa numbers in the following fiscal year. *See* 8 U.S.C. § 1151(c)(3)(C). But there are situations in which these unused employment-based visa numbers are not actually used in the following fiscal year due to a Congressionally-created minimum on the number of family-based visa numbers. *See* 8 U.S.C. § 1151(c)(1)(B)(ii). This outcome is the result of the formula created by Congress. Specifically, the limit on family-based visa numbers is calculated by subtracting from 480,000 the number of certain categories of aliens processed in preceding years. *See* 8 U.S.C. § 1151(c)(1)(A).

These categories include immediate relatives issued visas in the preceding year, aliens born to an alien lawfully admitted for permanent residence during a temporary visit abroad, and parolees processed in the second preceding year. *See id.*; *see also*, 8 U.S.C. §§ 1151(b)(2); 1151(c)(4). The number of unused employment-based visas from the prior fiscal year is then added to this number to calculate the total number of family-based visa numbers available. *See* 8 U.S.C. § 1151(c)(3)(C). But another provision establishes 226,000 as the minimum number of family-based visa numbers available in a given year. 8 U.S.C. § 1151(c)(1)(B)(ii). Since in many years the number of family-based visa numbers that would have been available under the calculations set forth in 8 U.S.C. § 1151(c)(1)(A) (which includes unused employment-based visa numbers from the prior fiscal year) was less than 226,000, these employment-based visa numbers remain essentially unused.

FACTUAL BACKGROUND

Plaintiffs' allegations focus on alleged violations of the law that purportedly occurred during fiscal year 2008 and 2009 and DOS's estimates of demand for visa numbers in those two years. (*See* Dkt. 39, pp. 2, 5, 8). In the context of their motion for preliminary injunction, Plaintiffs contended that demand for visa numbers in 2009 was "extremely and unexpectedly high." (Dkt. 15, p. 12).

Plaintiffs further allege that DOS lacked accurate information from USCIS concerning the number of applications pending and concerning USCIS's demand for immigration visa numbers. (Dkt. 1, ¶¶ 35, 44; Dkt. 15, p. 12). USCIS countered that the higher rate of demand for EB-3 visas was caused by efforts to reduce a backlog on FBI name checks. (Dkt 22-1, ¶ 17).⁵ The district court never answered the question of which parties' explanation for the higher demand in these two years is correct. (*See* Dkt. 39, p. 8). Thus, this issue is not before this Court.

⁵ There were essentially three steps taken to reduce this backlog. First, beginning on February 4, 2008, USCIS implemented a new policy that allowed for the request of a visa number and final adjudication of an application for adjustment of status without a FBI name check, if the request for the name check had been pending for 180 day or more and the application was otherwise "approvable." (Dkt. 22-1, ¶ 17, USCIS Administrative Record ("A.R.") 434-35). This enabled USCIS to request visa numbers for a significant number of cases that had been pending solely due to a lack of a response from the FBI as to the name check. (Dkt. 22-1, ¶ 17). Second, Congress appropriated an additional \$20 million to USCIS and the FBI in December 2007. Title IV of Div. E, Consolidated Appropriations Act, 2008, Pub L. 110-161 (Dec. 26, 2007). As a result, the FBI succeeded in substantially eliminating its backlog of applicants with pending background checks. Third, in fiscal years 2008 and 2009, USCIS hired a significant number of new adjudicators and shifted existing resources and personnel to work at clearing the employment-based applications for adjustment of status backlog. (Dkt. 22-1, ¶ 20).

STANDARD OF REVIEW UNDER THE APA

The APA authorizes suit by “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.” 5 U.S.C. § 702; *see SUWA*, 542 U.S. at 61 (explaining this requirement); 5 U.S.C. § 551(13) (defining agency action). The APA authorizes claims under 5 U.S.C. §§ 706(2)(A) and 706(1).⁶

Section 706(2)(A) of the APA provides that a “reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.” *See Motor Vehicle Mfr. Ass’n v. State Farm Mut. Auto, Ins.*, 463 U.S. 29, 41 (1983). This standard of review is narrow; a federal court should not substitute its own judgment for that of the agency. *Id.* at 43; *see also Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 543 (1978) (absent constitutional constraints or extremely compelling circumstances, the

⁶ An additional provision of the APA, 5 U.S.C. § 705, that is not at issue on appeal, authorizes courts to issue preliminary injunctions to “postpone the effective date of an agency action” or to “preserve status or rights pending conclusions of the review proceedings.” *See Salt Pond Associates v. U.S. Army Corps of Engineers*, 815 F. Supp. 766, 775-76 (D. Del. 1993). This provision does not authorize courts to issue preliminary injunctions that alter the status quo or dictate specific terms and conditions to an agency. *See Salt Pond*, 815 F. Supp. at 775-76.

administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties). If the record before the agency does not support the agency action, the proper course, except in rare circumstances, is to remand to the agency. *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985); *see PPG Indus., Inc. v. U.S.*, 52 F.3d 363, 365 (D.C. Cir. 1995) (“Under settled principles of administrative law, when a court reviewing agency action determines that an agency made an error of law, the court’s inquiry is at an end: the case must be remanded to the agency for further action consistent with the corrected legal standards.”). Federal courts will not disturb an agency decision under 5 U.S.C. § 706(2)(A) for harmless error. *See Save Our Heritage, Inc. v. Fed. Aviation Admin.*, 269 F.3d 49, 61-2 (1st Cir. 2001) (agency missteps may be disregarded where it is clear that a remand would accomplish nothing beyond further expense and delay).

Section 706(1) of the APA grants federal courts the power to “compel agency action unlawfully withheld or unreasonably delayed.” *See Hells Canyon Pres. Council v. U.S. Forest Serv.*, 593 F.3d 923, 932 (9th Cir. 2010) (applying the holding in *SUWA*). This provision does not give federal courts license to compel agency action whenever the agency is withholding or delaying an action a court

thinks the agency should take. *Id.* Instead, federal courts' ability to compel agency action is carefully circumscribed to where an agency has ignored a specific legislative command. *Id.*; see *SUWA*, 542 U.S. at 62-63. A federal courts' ability to compel agency action under 5 U.S.C. § 706(1) is subject to two constraints:

- (1) It is limited to "discrete" actions, such as rules, orders, licenses, sanctions, and relief; and
- (2) The purportedly withheld action must not only be "discrete," but also "legally *required*" in the sense that the agency's legal obligation is so clearly set forth that it could traditionally have been enforced through a writ of mandamus.

Id. (emphasis original); see generally *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 879 (1990) (litigants cannot seek wholesale improvement of a program by court decree). Thus, a statute requiring an agency to establish regulations by a date certain, may support a judicial decree for the prompt issuance of regulations, but not a judicial decree setting forth the contents of those regulations. *SUWA*, 542 U.S. at 65.

In sum, a claim under 5 U.S.C. § 706(1) can only proceed where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*. *Hells Canyon*, 593 F.3d at 932; see *SUWA*, 542 U.S. at 65, 71 (statute

mandating that agency preserve wilderness and manage public lands in accordance with land use plans is insufficient to establish such a duty); *Gardner v. U.S. Bureau of Land Mgmt.*, 638 F.3d 1217, 1222 (9th Cir. 2011) (statute directing agency to achieve broad objective of preventing unnecessary or undue degradation of public lands is insufficient to establish such a duty); *see also Vietnam Veterans of Am. v. C.I.A.*, No. C 09-0037 CW, 2011 WL 2149356, *4 (N.D. Cal. May 31, 2011) (internal memoranda cited insufficient to support a claim because agency was not legally bound take discrete action).

In order to state a claim, plaintiffs must provide the grounds for their entitlement to relief, sufficient to give defendants fair notice of their claim and the grounds upon which they rest. *See Bell v. Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Questions of law raised in motions to dismiss under Fed. R. Civ. P. 12(b)(1) and 12(b)(6) are reviewed *de novo*. *See North County Alliance, Inc. v. Salazar*, 573 F.3d 738, 740 (9th Cir. 2009); *see also Mayfield*, 599 F.3d at 969 (dismissal for lack of jurisdiction reviewed *de novo*).

SUMMARY OF LEGAL ARGUMENTS

Plaintiffs allege that DOS mis-allocated visa numbers in fiscal years 2008 and 2009. (Dkt. 1, ¶ 44). Specifically they allege that during these two years “the cutoff dates published in the Visa Bulletin” were established in violation of the

law. (Dkt. 30, p. 6). They allege that, as a result, EB-3 applicants of Chinese nationality (such as Plaintiffs) were harmed because the worldwide limit on the number of visas was reached before the per-country limit was reached for applicants of Chinese nationality. Significantly, none of the Plaintiffs filed applications for immigrant visas with DOS and Plaintiffs are not challenging how DOS adjudicates such applications. (See Dkt. 30, p. 4 (“Plaintiffs are not objecting to the process by which DOS adjudicates applications for immigrant visas. . . . Rather, Plaintiffs are objecting that **immigrant visa numbers** have been misallocated.”)).

The district court properly dismissed these claims because there is no longer a live case or controversy with respect to the allocation of visa numbers in fiscal years 2008 and 2009. *See Campesinos Unidos, Inc. v. U.S. Dept. of Labor*, 803 F.2d 1063, 1067-68 (9th Cir. 1986). The visa numbers for these two years have already been allocated and DOS cannot exceed the annual numeric limits established by Congress. *See* 8 U.S.C. §§ 1151, 1152. If a federal court remanded the matter back to DOS to re-calculate its estimates and establish new visa-cutoff dates this would not provide Plaintiffs with any meaningful relief. *See Mayfield*, 599 F.3d at 969.

On appeal, Plaintiffs also seek to compel a variety of remedies under 5 U.S.C. § 706(1) unrelated to the allocation of visa numbers in fiscal year 2008 and 2009. (Appellants' Op. Br., p. 37). As a matter of law, Plaintiffs are not entitled to these remedies because these remedies are not "discrete" actions that are legally required in the sense that they could have traditionally been enforced through a writ of mandamus. *See Hells Canyon*, 593 F.3d at 932; *SUWA*, 542 U.S. at 64. Additionally, Plaintiffs' request for an injunction requiring USCIS to adjudicate applications for adjustment of status in priority date order is contrary to their position in the district court that visa numbers did not need to be used in strictly priority date order. (Dkt. 30, p. 5 ("Plaintiffs do not claim that every single visa number has to be used in 'strictly priority date order'")).

ARGUMENTS

1. The District Court Correctly Found That There Is No Live Case Or Controversy Regarding The Establishment Of Visa Cut-Off Dates And Allocation Of Visa Numbers In Fiscal Years 2008 And 2009.

Judicial review of administrative action, like all exercises of the federal judicial power, is limited by the requirement that there be an actual, live controversy to adjudicate." *Campeanos*, 803 F.2d at 1067-68. In order to establish standing, a plaintiff must establish a concrete particularized injury, a casual connection between the injury and the wrong, and a likelihood that the

injury will be redressed by a favorable decision. *Mayfield*, 599 F.3d at 969; *see, e.g., Los Angeles v. Lyons*, 461 U.S. 95, 102, 105-6, 111 (1983) (plaintiff lacked standing to seek injunction regarding police chokehold policy because he could not allege that he faced a realistic threat from the policy in the future).

Standing, and the related doctrine of mootness, restrict judicial power to the decisions of actual cases and controversies, so that our elected government retains the general power to establish policy. *See Cook Inlet Treaty Tribes v. Shala*, 166 F.3d 986, 990 (9th Cir. 1999). Mootness has been characterized as “the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).” *Id.* (citation omitted); *see generally Powell v. McCormack*, 395 U.S. 486, 496-97 (1969) (a case is moot when the issues presented are no longer “live” or when the parties lack a legally cognizable interest in the outcome).

If there is no longer a possibility that an appellant can obtain relief for his claim, that claim is moot and must be dismissed for lack of subject matter jurisdiction. *Foster v. Carson*, 347 F.3d 742, 745 (9th Cir. 2003) (courts cannot undo what has already been done). For example, in *Campesinos*, this Court dismissed a challenge to the allocation of government funds as moot due to the fact that the funds had already been distributed and this Court could not award

meaningful prospective relief because it was not permitted to award plaintiffs a preference in future funding periods. 803 F.2d at 1065, 1067-68.

Here, Plaintiffs contend that, under 5 U.S.C. § 706(1), the cut-off dates established by DOS in fiscal years 2008 and 2009 were arbitrary and capricious. (Dkt. 30, pp. 6-7).⁷ But if a federal court set-aside these cut-off dates under and remanded the matter back to DOS (the only remedy available under 5 U.S.C. § 706(1)), DOS would not be able to grant Plaintiffs any meaningful relief because the visa numbers for these two years have already been used. *See Campesinos*, 803 F.2d at 1067-68 (dismissing as moot); *PPG Indus.*, 52 F.3d at 365 (on the remedy of remand).

⁷ Neither the district court nor DOS read Plaintiffs' complaint as seeking to compel DOS to provide a copy of its waiting list under 5 U.S.C. § 706(1). (*See* Appellants' Op. Br., p. 14 ("These waiting lists . . . are maintained by the Visa Office of the Department of State")). Such a claim would not make any sense given that DOS has already filed a copy of its waiting list with the district court as part of DOS' Administrative Record ("DOS AR") 37-146. (*See* Dkts. 4 (entry of filing), 26, p. 2, n. 2). Moreover, even if Plaintiffs were making such a claim, it would have to be dismissed for lack of standing because Plaintiffs cannot (i) show a casual connection between such a failure and any injury they suffered or (ii) that if DOS were ordered to maintain a waiting list it will redress any injury. *See Mayfield*, 599 F.3d at 969. Additionally, only final agency actions can be challenged under 5 U.S.C. § 706(1). *See W. Radio Services Co. v. Glickman*, 123 F.3d 1189, 1196 (9th Cir. 1997) (action must mark the consummation of the agency's decision-making process and be one by which rights or obligations have been determined). DOS's waiting list is not a final agency action because it is only a preliminary step taken in establishing visa cut-off dates and allocating visa numbers. *See id.*

Congress has established annual numerical limits on the number of visa numbers. *See* 8 U.S.C. § 1151 (setting a worldwide limit); 8 U.S.C. § 1152 (setting a per-country limit). In deciding cases, courts are bound by these statutes. *See* U.S. Const., art. VI, cl. 2 (“This Constitution, and the Law of the United States which shall be made in Pursuance thereof . . . shall be the Supreme Law of the Land, and the Judge in every State shall be bound thereby”); *see generally Iddir v. INS*, 301 F.3d 492, 500-501 (7th Cir. 2002) (federal courts unable to compel agency action barred by law). There is no mechanism by which DOS can undo the allocations it previously made. *See Cook*, 347 F.2d at 745. Thus, if DOS is bound by the annual numerical limitations established by Congress, there is no live case or controversy and the district court properly dismissed Plaintiffs’ claim for lack of subject matter jurisdiction. *See Campesinos*, 803 F.2d at 1067-68; *Mayfield*, 599 F.3d at 969.

Plaintiffs argue that DOS is not bound by the annual numerical limitations established by Congress, because DOS can recapture “unused” visa numbers⁸

⁸ As a technical matter, the “unused” visa numbers, by statute, are used to calculate the limit on the number of family-based visa numbers in the following fiscal year. *See* 8 U.S.C. § 1151(c)(3)(C). But as a result of the formula established by Congress, these numbers may not actually increase the total number of family-based visa numbers in the following fiscal year. *See* 8 U.S.C. § 1151(c)(1)(A). It is in this sense that the visa numbers are “unused.”

from previous years and use them in the present year, thereby, providing Plaintiffs with meaningful relief. (Appellants' Op. Br., pp. 30-35). Thus, according to Plaintiffs, DOS can allocate more visa numbers in a given fiscal year than the maximum number established by Congress.

There are two flaws with Plaintiffs' argument regarding recapture. First, although the INA creates an express limit on the number of visa numbers that can be issued in any given year, it does not contain any statutory exception to these limits.⁹ See 8 U.S.C. §§ 1151; 1152. It is a general rule of statutory construction that courts will not imply exceptions to statutory bars. See, e.g., *Patterson v. Shumate*, 504 U.S. 753, 759 (1992) (“[T]his court itself vigorously has enforced ERISA’s prohibition on the assignment or alienation of pension benefits, declining to recognize any implied exceptions to the broad statutory bar.”); *Botany Worsted Mills v. U.S.*, 278 U.S. 28, 29 (1929) (“When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.”). Because the INA does not authorize DOS to recapture visa numbers from prior years, in order to accept Plaintiffs’ argument regarding recapture, this Court would need to violate

⁹ See also, U.S. Citizenship and Immigration Services Ombudsman Annual Report 2008 submitted by Plaintiffs to the Court at Dkt. 15-2, Exhibit 11, p. 63, n. 82 (“Absent special legislation, such as the American Competitiveness in the Twenty-First Century Act, unused visa numbers cannot be reclaimed”).

this rule of statutory interpretation and find an implicit exception to an express numerical limits found in 8 U.S.C. §§ 1151; 1152.

In a very limited number of situations, such as when an immigrant is deported or an immigrant visa is revoked, a visa number can be recaptured by DOS. *See* 22 C.F.R. § 42.51(c). But even in these situations, DOS is required to reallocate the visa numbers “within the fiscal year in which the visa was issued.” *Id.* Neither statute nor regulation authorize DOS to take a visa number from one year and allocate it in another year.

Second, Plaintiffs’ argument regarding recapture is contrary to recent legislative history.¹⁰ On two occasions, Congress expressly authorized DOS to

¹⁰ On October 17, 2000, Congress enacted Section 106(d) of the American Competitiveness in the Twenty-First Century Act of 2000 (Title I of Pub. L. 106-313). This legislation authorized the recapture of unused visa numbers from fiscal years 1999 and 2000, creating a “pool” of 130,107 numbers which could be allocated to applicants in the employment-based first, second, and third preference categories once the annual employment-based numerical limits had been reached.

On May 11, 2005, Congress enacted Title V, Section 502 of the REAL ID Act of 2005 (Division B of Pub. L. 109-13). This legislation authorized the recapture of 50,000 employment-based visa numbers that were unused in fiscal years 2001 through 2004. *See* Pub. L. 109-13, Section 502 amending Section 106(d)(2)(B) of the American Competitiveness in the Twenty-First Century Act of 2000 (“MAXIMUM.-- The total number of visas made available under paragraph (1) from unused visas from the fiscal year 2001 through 2004 may not exceed 50,000”). Recaptured visa numbers were made available to employment-based immigrants described in the Department of Labor’s Schedule A (occupations exempt from labor certification) and their accompanying spouses and children. *See* Pub. L. 109-13, Section 502.

recapture visa numbers from previous years. The negative implication of this congressional action is that it is Congress' understanding that DOS cannot recapture visa numbers from prior years without express authorization. *See generally, Omni Capital Intern., Ltd. v. Rudolf Wolffe & Co.*, 484 U.S. 97, 106 (1987) (Congressional authorization of nationwide service of process under some provisions in an Act but not under another provision argues forcefully that it was not Congress' intent to permit nationwide service of process under a provision that did not authorize such service). This understanding is confirmed by looking to the floor statements of one of the sponsors of the 2005 amendment authorizing recapture:

Mr. President this is an amendment to recapture unused EB-3 visas These visas go out of existence and cannot be recaptured except by an act of Congress. They have already been authorized. We need to recapture the unused visas from 2001 to 2004, add to the number of nurses we can bring to our country, as well as the EB-3 engineers and educated workforce that are waiting in the wings.

151 Cong. Rec. S3887 (daily ed. Apr. 19, 2005) (statement of Sen. Hutchinson).¹¹

¹¹ Plaintiffs are correct that the remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history. (Appellants' Op. Br., p. 33 n. 13 citing *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979)). But in *Chrysler*, the legislator's remark was contradicted by reports of both Houses as well as other members of Congress. *See Chrysler*, 441 U.S. at 311. In contrast, here, Plaintiffs' have failed to cite any legislative history contradicting the sponsor's explanation of the 2005 amendment.

If Plaintiffs are correct that DOS has the authority to recapture visa numbers without congressional authorization, then the 2000 and 2005 authorizations served no purpose at all. In fact, if DOS has the inherent authority to recapture an unlimited number of visa numbers without congressional authorization, the effect of the 2005 authorization was the exact opposite of what its sponsor intended because it limits the number of visa numbers that can be recaptured to 50,000. *See* Division B of Pub. L. 109-13.

In sum, both statutory language and legislative history indicate that DOS does not have the authority to recapture visa numbers from prior years absent congressional authorization. As a result, Plaintiffs' claims against DOS are moot because DOS cannot grant meaningful relief with respect to the purported misallocation of visa numbers in fiscal years 2008 and 2009. *See Campesinos*, 803 F.2d at 1067-68.

Plaintiffs' position that DOS can recapture visa numbers without congressional authorization is based primarily on *Silva v. Bell*, 605 F.2d 978 (7th Cir. 1979).¹² But in *Silva*, the U.S. Court of Appeals for the Seventh Circuit

¹² Plaintiffs also cite *Paunescu v. INS*, 76 F. Supp. 896, 902-3 (N.D. Ill. 1999), for the proposition that a court can order DOS to procure visa numbers after the end of a fiscal year. (Appellants' Op. Br., p. 39). But in *Paunescu*, the district court ordered adjudication before the end of the fiscal year. 76 F. Supp. 2d at 898, 901. This distinction was dispositive in the view of the U.S. Court of Appeals for

never addressed the question of whether DOS can recapture visa numbers without congressional authorization. 605 F.2d at 989-90. As noted by the district court, in *Silva* the governmental defendants conceded that visa numbers had been mis-allocated and was in the process of altering its allocation policies when Congress amended the INA to impose a limitation on the total number of immigrant visas available during a fiscal year to natives of any one state in the Western Hemisphere. *See Silva*, 675 F.3d at 981. The governmental defendants designed and subsequently restructured a program to recapture and reissue mis-allocated visa numbers and the plaintiffs challenged the methodology for this re-allocation. *Id.* at 983. Thus, the question in *Silva* was not whether recapture was possible, but how it should be conducted. *See id.* at 983, 989-90. For this reason alone, *Silva* is not persuasive.¹³

the Seventh Circuit. *See Iddir v. INS*, 301 F.3d 492, 501 (7th Cir. 2002) (holding that because of “the statutory deadline set by Congress, the INS lacks the statutory authority to award the relief sought by the plaintiffs” after the end of the fiscal year). Referencing *Paunescu*, the *Iddir* Court noted, “It would be a different case had the district court ordered the INS to adjudicate the appellants’ status *while* the INS maintained the statutory authority to issue the visas.” 301 F.3d at 501 n. 2.

¹³ Additionally, it is unclear exactly what the Seventh Circuit meant in the use of the term “recapture” given that *Silva* did not involve DOS’s current procedures, the use of visa cutoff dates, or allegations that DOS’s estimates under 8 U.S.C. § 1153(g) were inaccurate. *Silva*, 605 F.2d at 989-90.

Lastly, the Seventh Circuit subsequently clarified that if litigants seek relief barred by statute, their claims must be dismissed. *See Iddir*, 301 F.3d at 500-1. It is true that *Iddir* is different from the present case because it involved a different visa program (the Diversity Visa Program). But the principle from *Iddir* is nonetheless applicable – when Congress creates a limitation on a visa program, federal courts cannot order relief in violation of that limitation. *Iddir*, 301 F.3d at 494, 500. To the extent *Silva* suggests otherwise, it is no longer good law. *See id.*

In sum, because DOS cannot recapture visa numbers from one year for use in another year, Plaintiffs’ claims against DOS under the APA (5 U.S.C. § 706(2)) are moot. Even if a court were to find that DOS was arbitrary and capricious in establishing visa cut-off dates in fiscal years 2008 and 2009 and remand the matter back to DOS to re-calculate these cut-off dates, this remedy would not provide meaningful relief to the Plaintiffs because the visa numbers for these two years have already been allocated. There is simply no live case or controversy with respect to the establishment of cut-off dates in fiscal years 2008 and 2009.¹⁴

¹⁴ Even if federal courts had jurisdiction over Plaintiffs’ claims against DOS, Plaintiffs failed to state a claim because the making of “reasonable estimates” under 8 U.S.C. § 1153(g) is committed to DOS’s discretion. *See generally Heckler v. Chaney*, 470 U.S. 821, 828 (1985) (decision by agency to refuse an enforcement action committed to agency discretion by law). Thus, if this Court reverses it should remand to the district court for a determination of whether Plaintiffs stated a claim against DOS under 5 U.S.C. § 706(2)(A).

2. The District Court Properly Dismissed Plaintiffs' Claims For Prospective Relief Because Plaintiffs Did Not Allege That USCIS Or DOS Failed To Take Discrete Agency Action That They Were Required To Take.

Plaintiffs seek the following injunctive relief under 5 U.S.C. § 706(1) of the

APA:

- (i) Prohibiting the allocation of visa numbers to individuals who are not on waiting lists,
- (ii) Prohibiting USCIS from granting adjustment of status out of priority date order,
- (iii) Requiring USCIS or DOS to make public, on an ongoing basis, copies of the waiting lists, so that Plaintiffs can monitor visa allocation, and
- (iv) Waiving the fees for Plaintiffs for renewals of employment authorization and advance parole documents.

(Appellants' Op. Br., p. 37).

Plaintiffs argue that there is "no reason" a court cannot grant this relief.

(*Id.*). But the question before this Court is not whether USCIS or DOS are barred by law from providing these remedies. Rather it is whether these remedies constitute discrete agency action that USCIS and DOS have a clear duty to provide

to the Plaintiffs. *See Hells Canyon*, 593 F.3d at 932. As more fully set forth below, Plaintiffs have failed to state a claim under 5 U.S.C. § 706(1) because they have failed to allege that either USCIS or DOS unlawfully withheld or delayed any discrete agency action required by law. *See id.*

A. Standard For Stating a Claim Under 5 U.S.C. § 706(1)

A federal courts' ability to compel agency action under 5 U.S.C. § 706(1) is constrained to review of (i) "discrete" actions, such as rules, orders, licenses, sanctions, and relief, (ii) "legally *required*" in the sense that the agency's legal obligation is so clearly set forth that it could traditionally have been enforced through a writ of mandamus. *Hells Canyon*, 593 F.3d at 932; *see SUWA*, 542 U.S. at 64-5; *see generally Forest Guardians v. Babbit*, 174 F.3d 1178, 1191 (10th Cir. 1999) (finding a clear statutory duty).

In *Hells Canyon*, plaintiffs argued that the Forest Service's refusal to close a trail to motorized use was remediable as "agency action unlawfully withheld or unreasonably delayed" under 5 U.S.C. § 706(1). 593 F.3d at 932. This Court rejected this argument, explaining that allowing plaintiffs' claim to proceed would invite this Court to do something – adjust the western boundary of the wilderness area – not clearly mandated by statute. *Id.* ("Nothing in either act requires the Forest Service to use any particular topographical feature as the boundary.").

Although plaintiffs were correct that, by statute, the Forest Service has an obligation to prohibit the use of motorized vehicles in wilderness areas, there was no statutory basis for compelling the Forest Service to adopt plaintiffs' preferred boundary of the wilderness area. *Id.* at 932-33.

In contrast, in *Forest Guardians*, Congress imposed an unambiguous, non-discretionary duty on the Secretary of the Interior to designate the critical habitat for the Rio Grande silvery minnow by a statutory deadline. 174 F.3d at 1181, 1186, 1191. It was undisputed that the Secretary of the Interior failed to meet this deadline. *Id.* at 1181. As a result, the matter was remanded to the district court with instructions that it determine a date certain by which the Secretary of the Interior would be required to make such a designation. *Id.* at 1193. Significantly, the appellate court did not order some other relief, wholly apart and separate from the Secretary of the Interior's statutory duty to designate the critical habitat. *See id.*

B. None Of The Remedies Sought By Plaintiffs Constitute Discrete Agency Action.

As the district court correctly noted, an APA claim must be based upon a plaintiff's identification of a "particular 'agency action' that causes it harm." (Dkt. 39, p. 5 n. 2 *citing Lujan*, 497 U.S. at 891). An agency action is defined as

an agency “rule, order, sanction, relief or the equivalent or denial thereof, or failure to act.” *SUWA*, 542 U.S. at 62 *citing* 5 U.S.C. § 551(13).

Here, Plaintiffs are not seeking to compel USCIS or DOS to issue a “rule, order, sanction, relief” or other discrete agency action that they have unlawfully withheld or delayed. *See* 5 U.S.C. § 706(1). Rather they seek to challenge “the procedures used” by USCIS and DOS in allocating visa numbers. (Appellant’s Op. Br., p. 2). Plaintiffs seek to improve (as they see it) agency procedures, including specific demands to make the process more transparent. (*See* Appellants’ Op. Br., p. 37). But the APA does not authorize a litigant to seek wholesale improvements of programs by court decree. *See Lujan*, 497 U.S. at 892. Because Plaintiffs do not seek any discrete action from USCIS or DOS, they have failed to state a claim under U.S.C. § 706(1). *See Hells Canyon*, 593 F.3d at 932; *see also Western*, 123 F.3d at 1196 (regarding final agency action).

C. Plaintiffs Failed To State A Claim Because They Failed To Identify A Legal Duty For The Remedies Sought.

Even assuming *arguendo* that the remedies sought by Plaintiffs constitute discrete agency action, Plaintiffs cannot identify any statute stating that USCIS or DOS were “legally *required*” to provide these remedies. *See Hells Canyon*, 593 F.3d at 932. Plaintiffs have not, and cannot, cite any statute requiring, for

example, DOS to make its waiting list public or requiring USCIS to waive its filing fees for Plaintiffs. (*See* Appellants’ Op. Br., p. 37). Even if the district court thought it would be a good idea for DOS to make its waiting lists public or for USCIS to waive these fees for Plaintiffs (or for other applicants of Chinese nationality) it could not order this relief under 5 U.S.C. § 706(1) because these remedies are not “legally required.” *See Hells Canyon*, 593 F.3d at 932. In the absence of a legal obligation, a federal court may not order relief under 5 U.S.C. § 706(1). *Id.* For this reason alone, the district court’s decision to dismiss Plaintiffs’ claims for prospective relief should be affirmed.

The only statute relied upon by Plaintiffs – 8 U.S.C. § 1153(e) – does not clearly require, or even mention, any of the remedies sought by Plaintiffs. (*See* Dkt. 39, p. 5 n. 2).¹⁵ In fact, 8 U.S.C. § 1153(e) does not even address the adjudication of applications for adjustment of status or impose any obligations on

¹⁵ On appeal, Plaintiffs’ also cite a regulation 8 C.F.R. § 245.1. As a threshold matter, Plaintiffs are not permitted to assert a new claim on appeal. *See Man-Seok Choe v. Torres*, 525 F.3d 733, 741 n. 9 (9th Cir. 2008). Moreover, 8 C.F.R. § 245.1 does not address the approval of applications for adjustment of status. Instead, it governs whether an applicant is eligible to file an application for adjustment of status, directing that DOS’s Visa Bulletin “will be consulted to determine whether an immigrant visa is immediately available.” *See* 8 C.F.R. § 245.1. This regulation does not address the order in which USCIS is to adjudicate applications for adjustment of status.

USCIS.¹⁶ The adjudication of applications for adjustment of status is governed by a different provision – 8 U.S.C. § 1255(a). This provision commits adjudication of applications for adjustment of status to the “discretion” of USCIS (subject to certain constraints regarding eligibility). It provides no direction as to the process by which applications for adjustment of status must be adjudicated.

Section 1255(a) also authorizes USCIS to promulgate regulations regarding the adjudication of applications for adjustment of status. Pursuant to this authority, USCIS has promulgated 8 C.F.R. § 245.2 stating, in relevant part, that USCIS may not approve an application “until an immigrant visa number has been allocated by the Department of State.” 8 C.F.R. § 245.2(a)(5)(ii). The regulation does not address the order in which USCIS adjudicates applications for adjustment of status. To the contrary, it makes clear that the allocation of visa numbers is committed to DOS and merely limits USCIS’s ability to approve applications until a certain condition is set, namely that DOS has allocated a visa number.

In response, Plaintiffs cite a number of non-APA cases standing for the proposition that courts have broad authority to grant equitable relief. (Appellants’

¹⁶ Section 1153(e) relates to the adjudication of visa applications by DOS. None of the Plaintiffs have filed a visa application and Plaintiffs advised the district court that “Plaintiffs are not objecting to the process by which DOS adjudicates applications for immigrant visas.” (Dkt. 30, p. 4). As a result, this provision has no bearing on the present action.

Op. Br., pp. 30, 32, 33 *citing Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969) (housing discrimination); *Graves v. Romney*, 502 F.2d 1062, 1064 (8th Cir. 1974) (same); *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 15 (1971) (educational discrimination)). These cases are not relevant because they do not address what remedies are available under the APA. Moreover, these cases predate *SUWA* by decades and, thus, offer no guidance on how the Court's holding in *SUWA* should be interpreted in the context of this action.

In sum, it is not enough for Plaintiffs to request that this Court can order some prospective relief that they would like USCIS or DOS to provide. In order to state a claim under 5 U.S.C. § 706(1), Plaintiffs must allege that USCIS or DOS unlawfully withheld or unreasonably delayed some discrete agency action that they were legally required to provide. *See Hells Canyon*, 593 F.3d at 932.

D. Plaintiffs Are Estopped From Reviving On Appeal Their Claim That Applications Must Be Adjudicated In Strict Priority Date Order.

At the district court level, Plaintiffs explained that they:

[D]o not claim that every single visa number has to be used in 'strictly priority date order', without regard to whether the applicant properly responds to agency instructions and/or requests Rather, Plaintiffs allege that during FY 2008 and FY 2009 the cutoff dates published in the Visa Bulletin were established in violation of § 203(3), to the detriment of class members.

(Dkt. 30, pp. 5-6). On appeal, Plaintiffs argue that they are entitled to an injunction “prohibiting USCIS from granting adjustment of status out of priority date order.” (Appellant’s Op. Br., p. 37).

Judicial estoppel precludes a party from taking one position and then seeking an advantage by taking an incompatible position. *Wagner v. Prof’l Engineers in California Gov’t*, 354 F.3d 1036, 1044 (9th Cir. 2004) (litigants judicially estopped from pursuing their claim that union improperly charged them for certain activities when they took the position before the district court that they were not pursuing a “chargeability” claim); *see generally*, *Man-Seok*, 525 F.3d at 741 n. 9 (“Because this argument was raised for the first time on appeal, it is waived.”); *U.S. v. Carlson*, 900 F.2d 1346, 1349 (9th Cir. 1990) (as a general rule an issue may not be raised for the first time on appeal).¹⁷

Here, Plaintiffs are taking inconsistent positions. Plaintiffs’ request for an injunction barring USCIS from “granting adjustment of status out of priority date order” is inconsistent with their contention that visa numbers do not need to be

¹⁷ This Court has recognized three exceptions to this general rule: (1) if there are exceptional circumstances why the issue was not raised in the district court, (2) if the new issue arises while the appeal is pending because of a change in the law, and (3) the issue presented is purely one of law and the opposing party will suffer no prejudice as a result of the failure to raise the issue in the district court. *Carlson*, 900 F.3d at 1349. None of these three exceptions are applicable here.

used in “strictly priority date order.” (*See* Dkt. 30, pp. 5-6). If a federal court ordered USCIS to adjudicate applications in priority date order, USCIS would necessarily be required to use priority dates in “strictly priority date order.” *See Wagner*, 354 F.3d at 1044. For reasons presented to the district court, including some reasons recognized by Plaintiffs, this is neither legally required nor, in the view of USCIS, even possible.¹⁸ (Dkt. 23, pp. 11-13, 18-19; Dkt. 30, pp. 4-6).

In sum, at the district court level, Plaintiffs waived any claim for an injunction compelling USCIS or DOS to adjudicate applications in priority date order. (*See* Dkt. 30, pp. 5-6). They are estopped from reviving such a claim on appeal.

E. There Is No Basis For An Injunction Barring USCIS Or DOS From Allocating Visa Numbers To Applicants For Adjustment of Status Who Are Not On DOS’s Waiting Lists.

On appeal, Plaintiffs also contend that they are entitled to an injunction “prohibiting the Department of State and USCIS from allocating visa numbers to individuals who are not on waiting lists as required by statute and regulation.” (Appellants’ Op. Br., p. 37). As a threshold matter, this relief does not appear in

¹⁸ To be clear, the priority date is not based on when USCIS receives the applications for adjustment of status. Rather it is the date the corresponding petition for labor certification was filed with DOL. 8 C.F.R. § 204.5. Thus, Plaintiffs, on appeal, seek to bar USCIS from considering applications based on when they are received. (*See* Appellants’ Op. Br., p. 6).

the Prayer for Relief in Plaintiffs' Complaint. (Dkt. 1, pp. 14-6). As a result, Plaintiffs have failed to state a claim for this relief. *See Twombly*, 550 U.S. at 555.

Second, Plaintiffs have failed to identify what "statute and regulation" impose this duty, stating only that this duty is "clear." (Appellants' Op. Br., p. 15 "The Department of State and USCIS regulations do **not** specify the manner in which adjustment applicants in the United States are to be placed on the waiting lists, although it is clear that an immigrant visa number cannot be used for adjustment of status unless the applicant is on the waiting list.") (emphasis added)). In the absence of a legal duty, Plaintiffs cannot state a claim for this relief under 5 U.S.C. § 706(1).

Third, USCIS does not allocate visa numbers. *See* 22 C.F.R. § 42.51; *see also* 8 U.S.C. § 1153(g). As a result, there is no basis for stating a claim against it with respect to the allocation of visa numbers. If what Plaintiffs mean is that USCIS should be barred from approving an application for adjustment of status unless the applicant's name appears on DOS's waiting list, Plaintiffs have failed to explain the legal basis for this claim.

3. There Are Additional Reasons Why Plaintiffs Lack A Personal Interest In The Claims Asserted.

This action involves five applicants seeking adjustment of status. (Dkt. 1, ¶¶ 8-12). In order to show standing a plaintiff must establish (i) an injury in fact that is concrete and particularized and actual or imminent; (ii) a casual connection between the injury and the defendant's conduct; and (iii) a likelihood that the injury will be redressed by a favorable decision. *Mayfield*, 599 F.3d at 969. Past exposure to harmful conduct does not necessarily confer standing to seek injunctive relief if the plaintiff does not continue to suffer adverse effects. *Id.* at 970; *see Lyons*, 461 U.S. at 102, 105, 111.

A. Jun Guo, Shibao Zhang, And Ming Chang Lack Any Personal Stake In This Litigation.

Since this action has commenced, USCIS has adjudicated the applications of three Plaintiffs: Jun Guo, Shibao Zhang, and Ming Chang. These Plaintiffs have already obtained the relief they applied for – adjustment of status. As a result, these three Plaintiffs do not have any personal stake in prospective relief under 5 U.S.C. § 706(1) from USCIS or DOS. *See Lyons*, 461 U.S. at 102, 111; *Cook*, 166 F.3d at 989. Thus, any claim that may have had is moot. *See Carson*, 347 F.3d at 745.

B. Zixian Li And Jun Li Have Failed To Establish That The Relief Sought Will Redress Any Purported Injury They Have Suffered.

With respect to the two remaining Plaintiffs (Zixian Li and Jun Li), there has been no showing that their purported injury will be redressed by the relief sought in this action. *See Mayfield*, 599 F.3d at 969; *Hells Canyon*, 593 F.3d at 929. In *Hells Canyon*, it was undisputed that (i) the Forest Service was required by statute to keep the original 1978 map on file for public inspection, and (ii) that the Forest Service failed to do so because it lost the map. 593 F.3d at 930-1. Nonetheless, plaintiffs lacked standing to seek a declaratory judgment with respect to this statutory violation because federal courts lacked the ability to prescribe a remedy that could alter the fact that the 1978 map had been lost. *See id.*

In this case, even if one accepts that Zixian Li and Jun Li were harmed by the purported mis-allocation of visa numbers in fiscal years 2008 and 2009, there has been no showing of a connection between this purported harm and the relief sought. *See id.* Rather the relief sought is wholly independent of the alleged harm. Put differently, there is no reason to believe that Plaintiffs' proposed restructuring of USCIS's and DOS's procedures would benefit Zixian Li and Jun Li, let alone redress the harm they allegedly suffered in fiscal years 2008 and

2009. *See id.* (although plaintiff suffers an actual, ongoing injury, a declaratory judgment would not likely redress that injury).

Moreover, regardless of what visa cut-off dates DOS established in fiscal years 2008 and 2009, these two Plaintiffs would not have been allocated a visa number based on their priority dates. (*See* DOS A.R., pp. 9-11; Dkt. 1, ¶¶ 38, 44 (alleging that as a result of the unlawful conduct individuals who would have obtained adjustment of status in fiscal years 2008 and 2009 did not obtain this relief)). Even if DOS 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 either Plaintiff would have been allocated an visa number. (DOS A.R., pp. 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. (*Id.*, pp. 20-21).

In sum, Plaintiffs have failed to establish a casual connection between the harm they allegedly suffer, the conduct of USCIS and DOS complained of, and the relief sought. *See Mayfield*, 599 F.3d at 969. For this additional reason, Plaintiffs' claims should be dismissed.

CONCLUSION

For the reasons stated above, USCIS and DOS respectfully request that this Court affirm the decision of the district court or, in the alternative, grant such other and further relief as is appropriate.

November 7, 2011

s/ AARON S. GOLDSMITH
Aaron S. Goldsmith
Senior Litigation Counsel
U.S. Department of Justice
Civil Division
Office of Immigration Litigation
P.O. Box 868
Ben Franklin Station
Washington, D.C. 20044
(202) 532-4107

STATEMENT WITH RESPECT TO ORAL ARGUMENT

USCIS and DOS respectfully request oral argument to the extent such argument may assist in the Court in addressing outstanding factual or legal issues which the Court deems relevant.

STATEMENT OF RELATED CASES

USCIS and DOS know of no related cases, as defined by Circuit Court Rule 28-2.6, pending before this Court.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(c), I certify that the text of the attached answering brief is double spaced, proportionally spaced using Times New Roman 14-point typeface and contains 10,236 words of text.

November 7, 2011

s/ AARON S. GOLDSMITH
Aaron S. Goldsmith
Senior Litigation Counsel
U.S. Department of Justice
Civil Division
Office of Immigration Litigation
P.O. Box 868
Ben Franklin Station
Washington, D.C. 20044
(202) 532-4107

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of November, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeal for the Ninth Circuit by using the appellate CM/ECF system.

s/ AARON S. GOLDSMITH

Aaron S. Goldsmith