



U.S. Department of Justice

Civil Division

39-82-7161

Washington, D.C. 20530

August 7, 2012

The Honorable Molly C. Dwyer, Clerk
Office of the Clerk
United States Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103

Re: *Li v. United States, et al.* (Docket No. 11-35412)

Dear Ms. Dwyer:

Appellees hereby submit this letter of supplemental authority pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure.

At oral argument on July 9, 2012, opposing counsel stated, for the first time,¹ that Plaintiffs were asserting a claim under 5 U.S.C. § 706(1) of the Administrative Procedure Act based on an alleged violation of 22 C.F.R. § 42.51(b), a regulation of the Department of State. Even assuming *arguendo* that an alleged violation of a regulation can ever be a basis for a claim under 5 U.S.C. § 706(1), the regulation at issue here – 22 C.F.R. § 42.51 – is on its face an “interpretive rule” that does not have the “force and effect of law” and does not create enforceable rights. *See U.S. v. Am. Production Indus., Inc.*, 58 F.3d 404, 407 (9th Cir. 1995) (Rules of agency organization, procedure, or practice, sometimes called “interpretive rules” do not create enforceable rights); *see also Lowry v. Barnhart*, 329 F.3d 1019, 1022-23 (9th Cir. 2002) (finding that although a particular agency created internal procedures and disclosed them to the public, it “did not create legally enforceable rights”); *U.S. v. Alameda Gateway Ltd.*, 213 F.3d 1161, 1168 (9th Cir. 2000) (finding that it was “clear” that, without regard to the procedure used to promulgate a particular regulation, the regulation was not binding on an agency because it was a general policy statement to agency engineers rather than a substantive rule). This principle applies here even though 22 C.F.R. § 42.51 was promulgated through notice and comment rulemaking.

Thank you for your consideration in this matter.

¹ To be clear, Plaintiffs previously cited 22 C.F.R. § 42.51, but did not identify it as a basis for a claim under 5 U.S.C. § 706(1).

Sincerely,

/s/ Aaron S. Goldsmith
Aaron S. Goldsmith, Esq.
Senior Litigation Counsel
Civil Division
Office of Immigration Litigation
District Court Section
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044
(202) 532-4107
Aaron.Goldsmith@usdoj.gov

cc Robert Pauw, Esq. (Via ECF)
Gibbs Houston Pauw
1000 Second Avenue, Suite 1600
Seattle, Washington 98104