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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

JANAN VARGHESE JACOB, et al., Plaintiffs, v. JOSEPH R. BIDEN JR., et al., Defendants.	Case No. 3:21-cv-261-EMC Immigration case **PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR EXPEDITED DISCOVERY** Hon. District J. Edward M. Chen

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Plaintiff's Reply to Defendants' Opposition to Plaintiffs' Motion for Expedited Discovery

I. Introduction

Plaintiffs submitted a Motion for Expedited Discovery on January 29, 2021, (ECF 37-1) seeking a narrow and carefully tailored expedited discovery tied directly to the substance of their Motion for Preliminary Injunction and Renewed Motion for Class Certification. ECF 16; ECF 31. The requested discovery is in the form of five interrogatories to be answered separately and fully in writing under oath, by February 11, 2021, in accordance with the procedures and as specified in Rules 26 and 33 of Federal Civil Procedure, and any orders of this Court and will serve to inform the Court of the full causes of the suspension of processing due to the Defendants' No Visa Policy for Beneficiary Plaintiffs that are subjected to the Presidential Proclamation 10014 and the extent of the backlog this suspension has caused. (ECF 37-2). This set contained the following fives interrogatories:

(1) Provide the number of documentarily qualified immigrant visa applications currently at the National Visa Center.

(2) Provide the number of DV-2021 visa applications currently at the Kentucky Consular Center.

(3) Provide the number of DV-2021 visa applications currently at US Embassies and Consulates.

(4) Provide the number of documentarily qualified immigrant visa applications currently at US embassies and consulates by Post.

(5) Provide the number of interviews conducted since the implementation of Defendants' No Visa Policy for individuals subjected to the suspension of entry.

In its opposition, Defendants' advanced three arguments. First they allege that Plaintiffs' request should be denied because discovery outside of the administrative record is generally not permitted in an Administrative Procedure Act (APA) case relying on the non-reviewability of an agency's decision doctrine, *i.e.* the Consular nonreviewability doctrine (A). Alternatively, Defendants allege that Plaintiffs did not satisfy the burden to show "good cause" to obtain an expedited discovery before the conference under Federal Rule of Civil Procedure 26(f)(B). Lastly, Defendants allege that because they are filing in parallel a motion to dismiss, transfer and consolidate this case with *Anunciato et al. v. Biden et al.*, 3:20-cv-07869-RS that they anticipate will be granted, it is a reason for this Court not to proceed with a discovery request in a pending preliminary injunction motion before it. They add that President Biden may take a position on PP10014 and its extension mooting the case according to their misunderstanding of the mootness doctrine (C).

For reasons below, these arguments are contrary to precedent and unconvincing.

II. ARGUMENT

A. Consular Nonreviewability Does Not Preclude Judicial Scrutiny of Agency Action Withheld or the Implementation of Agency Policies or an Expedited Discovery Request in an APA Case

Defendants mischaracterize the consular nonreviewability doctrine. *First*, the consular nonreviewability doctrine does not preclude judicial review of the implementation of Defendants' policies and procedures. *Mulligan v. Schultz*, 848 F.2d 655 (5th Cir 1988) (judicial review is appropriate to consider a challenge to the Secretary's authority to place temporal limits on processing non-preference applications); *Amidi v. Chertoff*, No. 07CV710 (AJB), 2008 WL 2662599, at 3 (S.D. Cal. Mar. 17, 2008)(consular determinations that do not relate to the actual grant or denial of a visa have been deemed to be subject to judicial review). The

Ninth Circuit and its courts have also consistently held that when a "suit challenges the authority of the consul to take or fail to take an action as opposed to a decision taken within the consul's discretion, jurisdiction exists" for judicial review. *Patel v. Reno*, 134 F.3d 929, 931-2 (9th Cir. 1997); *Rivas v. Napolitanio*, 714 F.3d. 1108 (9th Cir. 2013); *El-Arbi v. Poulos*, No. CV076646GAFPLAX, 2008 WL 11342690, at 3 (C.D. Cal. Apr. 3, 2008).

Here Plaintiffs do not seek the judicial review of refusal decisions of visa which should be obvious because the basis of Plaintiffs' grievance is that consular officers have not adjudicated their applications because of their no visa policy according to which they cannot adjudicate or issue a visa or review for a national interest exemptions Plaintiffs' applications because of their implementation of the entry ban that is PP10014 and its last extension on December 31, 2020 PP10131. This entry ban is based on the fallacy that immigrants take jobs from Americans, a discriminatory fallacy which has been addressed by Congress when it enacted the INA. Similarly, *Bellion Spirits, LLC v. United States*, 335 F. Supp. 3d 32, 43 (D.D.C. 2018), *Chiayu Chang v. U.S. Citizenship & Immigration Servs*., 254 F. Supp. 3d 160, 161 (D.D.C. 2017) do not apply here as there is no record based decision challenged.

Therefore, consular nonreviewability does not preclude this judicial review and a fortiori does not preclude an expedited discovery request whose purpose is not to challenge directly the merit of the implementation but to have the Administration numbers behind the effects of Defendants' implementation and an exact measure of the extent of the commensurable hardship Plaintiffs' suffers because of this implementation to help in the determination of the preliminary injunction.

B. Expedited discovery under the APA prior to a Rule 26(f) Conference is Required because Plaintiffs have "good cause" to Require those Relevant and Reasonable Interrogatories Expeditiously in Preparation of the Preliminary Injunction Hearing

Good cause exists when the need for expedited discovery, in consideration with the administration of justice, outweighs the prejudice to the responding party. See *Am. LegalNet, Inc. v. Davis*, 673 F. Supp. 2d 1063, 1066 (C.D. Cal. 2009) (internal quotations and citations omitted). To determine the reasonableness of a requested discovery a court should also examine the request by considering a non-exhaustive set of factors: (1) whether [a temporary restraining order or] a preliminary injunction is pending, (2) the breadth of the discovery requests, (3) the purpose for requesting the expedited discovery, (4) the burden on the defendant of compliance with the requested discovery, (5) how far in advance of the typical discovery process the request was made. *Am. LegalNet, Inc*., 673 F. Supp. 2d at 1067 (quoting *Disability Rights Council of Greater Wash*., 234 F.R.D. at 6).

1. A preliminary injunction motion is pending

The Good Cause standard may be satisfied when a party seeks a preliminary injunction. ; See *Qwest Commc'ns Int'l, Inc. v. WorldQuest Networks, Inc.,* 213 F.R.D. 418, 419 (D. Colo. 2003). In the context of a pending preliminary injunction expedited discovery may be ordered if it would better enable the court to judge the **parties interests** and respective chances for success on the merits at a preliminary injunction hearing. *Yokohama Tire Corp. v. Dealers Tire Supply, Inc*., 202 F.R.D. 612, 613 (D. Ariz. 2001). (emphasis added). Courts in this District have frequently applied the Good Cause and Reasonableness test when assessing motions for expedited discovery in preparation for a ruling on a motion for a time-limited order such as a preliminary injunction. See e.g. *United States WeChat Users Alliance v. Trump* (N.D.Cal. Sep.

10, 2020, No. 20-cv-05910-LB) 2020 U.S.Dist.LEXIS 165981 ; *Synopsys, Inc. v. Innogrit, Corp*. (N.D.Cal. Apr. 23, 2019, No. 19-CV-02082-LHK) 2019 U.S.Dist.LEXIS 68935 ; *Washington v. Lumber Liquidators, Inc.* (N.D.Cal. May 5, 2015, No. 15-cv-01475-JST) 2015 U.S.Dist.LEXIS 58894 ; *Kremen v. Cohen* (N.D.Cal. Dec. 7, 2011, No. 5:11-cv-05411-LHK) 2011 U.S.Dist.LEXIS 141273.) Here Plaintiffs seek this expedited discovery in the context of a pending preliminary injunction to better enable the court to judge their interests.

2. The Breadth of the Expedited Discovery Requested is Reasonable as Regard the Motion for Class Certification

It is the burden of a proposed class to obtain class action certification, to satisfy the prerequisites of Rule 23(a), which are:(1) the class is so numerous that joinder of all members is impracticable;(2) there are questions of law or fact common to the class;(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and(4) the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a)(1)-(4). Here the purpose of highlighting numerosity goes to the first prerequisite i.e. "the class is so numerous that joinder of all members is impracticable" and these interrogatories will help the Court finding that the numerosity requirement is satisfied. See *Ehret v. Uber Techs., Inc.*, 148 F. Supp. 3d 884, 890 (N.D. Cal. 2015) (Chen, J) (describing the numerosity requirement). As it pertains to a class certification motion, it is not overly broad to request data about all potential members of the class such as all DV-2021 the world over and all documentarily qualified immigrant visa applicants whose application's adjudication is suspended.

3. The Requested Interrogatories are Relevant to the Plaintiffs Claim and their Purpose is to Sustain those Claims and Show that Defendants Misrepresent that the Sole Cause of the Backlog is Covid-19 Measures

The official numbers sought will confirm clients and public documents sourced assertions in Plaintiffs' complaint that the adjudication of Plaintiffs' category of visa has been suspended due to the no visa policy and that this has caused an enormous backlog of applications and further delay. This information regarding the hardship suffered by Plaintiffs will better enable the court to judge the parties' interest, in other words, they are necessary for the Court to obtain to decide on the irreparable harm Plaintiffs have and will continue to suffer in the absence of an injunction in the pending Preliminary injunction motion. See *Stormans, Inc. v. Selecky,* 586 F.3d 1109, 1127 (9th Cir. 2009) "that [it] is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equity tips in [its] favor, and that an injunction is in the public interest."

Defendants' assertion that their policy is based solely on Covid-19 precautionary measures at posts (ECF 41 p.5) is partially disproven by public press articles such as Yeganeh Torbati and Dara Lind, *Internal Memo Shows Trump Administration Expects Drastic Drop in Demand for U.S. Visas for Years to Come*, ProPublica (August 14, 2020) available at propublica.org/article/the-trump-administration-is-predicting-a-drastic-drop-in-demand-for-u-s-visas-for-years-to-come(last accessed February 4, 2021). The fact that posts, KCC and NVC used Covid-19 to justify their suspension in their communications with Plaintiffs does not prove that it is the sole reason of this backlog but instead shows that it was a convenient pretext orchestrated from the top. To disprove this assertion, it is necessary for Plaintiffs to have the data they request in these fives interrogatories to show that actually the bottleneck is at KCC and NVC that retain documentarily qualified applicants by not sending their files to posts to be

scheduled pursuant to the no visa policy as external sources indicate. As stated in the motion for expedited discovery it will help Plaintiff shows that "Defendants unlawful suspension of adjudication of visa applications subjected to PP 10014 intentionally created a drastic backlog of visa applications. A visa delayed is a visa denied. Defendants understood that they could dramatically reduce immigration to the United States by creating an almost insurmountable backlog that would delay visa adjudications for years to come."

4. The Necessity of this Expedited Discovery for Plaintiffs to Obtain a Relief from the Hardship they are Suffering Outbalances the Administrative Burden it would cause Defendants

Good cause exists when the need for expedited discovery, in consideration with the administration of justice, outweighs the prejudice to the responding party. See *Am. LegalNet, Inc. v. Davis*, 673 F. Supp. 2d 1063, 1066 (C.D. Cal. 2009).

Producing this data is not unduly burdensome for Defendant as by their own admission the information sought is collected in the course of administering visa operation worldwide and it only needs a compiling and coordination by a dedicated separate division whose activity is precisely to compile statistical reports. (ECF 41 p.6). One can doubt that such a division will do the compiling "manually" surely they must have access to a spreadsheet and an advanced understanding of macros.

In any case the burden on the Defendant to produce that data must be balanced with the need of Plaintiffs to show the existence of the no visa policy to obtain an expeditious relief to their current hardships and risk of permanent losses looming on them. At the current pace of adjudication, DV-2021 selectees will lose the ability to immigrate to the United States and Family Plaintiffs will be separated for years to come.

As regards Defendants' claim that those numbers will not help the Court in fashioning a remedy they are based on the faulty premises that this Court can only order supplemental adjudications whereas an order also providing priority scheduling to Plaintiffs have already proven effective in providing relief to Plaintiffs DV 2020 in a similar position of suspension of their application by the same no visa policy in the *Gomez* case. *Gomez v. Trump*, Case No. 20-cv-02128 (APM) (D.D.C. Sep. 30, 2020).

5. The Timing is Appropriate in Light of the Immediate Harm Threatening Plaintiffs

Given the immediacy of the irreparable harm faced by Plaintiffs and the pending Renewed Preliminary Injunction, the Court should find that the timing of Plaintiffs' application is reasonable. *Guttenberg*, 26 F. Supp. 3d at 99 (holding that urgency in seeking expedited discovery would have bolstered Plaintiffs' request).

Ramos v. Wolf, 975 F.3d 872, 901 (9th Cir. 2020) misuse as an authority by Defendants is distinguishable on mainly three relevant grounds here. *First*, the Congress had expressly precluded judicial review of constitutional claims in the challenged Statute's provisions i.e. the Temporary Protected Status (TPS). *Id* at 36-38. This made the claim not reviewable under the APA that does not apply where "statutes preclude judicial review" or where the "agency action" challenged is "committed to agency discretion by law." 5 U.S.C. § 701(a)(1), (2). Here Congress did not expressly or impliedly intend to limit the reviewability of the State Departments implementation of Presidential Proclamations taken pursuant to §1182 (f) INA. *Second*, the TPS did not set forth substantive guidelines on the manner by which the Secretary may reach a TPS determination as regarding a country (not an individual application), conversely here the State's department have a duty to adjudicate documentarily qualified

immigrant visa application under the INA. *Id* at 44. *Third*, the record was filed and a motion to complete the record was pending hence why the Judge Nelson in his concurring opinion found that the supplemental request was untimely. Here no administrative record to complete has been filed yet. The fact that Defendants did not file yet an administrative record should not be allowed to be used to deny the timing appropriateness of Plaintiffs' request as it would allow an administrative agency an unfair advantage in a civil lawsuit to block completion and expedited discovery requests by simply waiting for the last moment to introduce their administrative record.

C. Defendants Seem Not to Understand How the Mootness Doctrine Works

Under article III of the Constitution it is enough for a federal court to adjudicate a case that "a litigant suffers, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision, *Allen v. Wright*, 468 U.S. 737, 750-751 (1984) or with the collateral consequences of Defendant's decisions. *Fiswick v. United States*, 329 U.S. 211, 222 (1946) (where collateral consequences exist, the defendant "has a substantial stake in the judgment"); *Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983).

Here, would President Biden rescind PP10014 and its extension, the effects of those proclamations that is their implementation and the backlog it has generated will remain. President Biden has shown no sign that he considers rescinding PP10014 *Suspension of Entry of Immigrants Who Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak*, since he extended and expanded the regional proclamations which suggest that the prior administration's restrictive policies toward legal immigration will continue. Presidential Proclamation No 10143 *Suspension of*

Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting Coronavirus Disease 2019, 86 FR 7467 (January 25, 2021).

Even if PP10014 is rescinded, Plaintiffs would still have personal stakes in this suit. Their injury of being denied issuance of a visa is directly caused by Defendants' implementation that are a collateral consequence of Presidential Proclamation No. 10014 and its extension i.e. Defendants withheld the adjudication of Plaintiffs' visa applications and now they are in an ever-increasing backlog of immigrant visa applications that have yet to be scheduled for interviews. Plaintiffs' injury needs to be addressed by this Court even if PP10014 is rescinded or enjoined because at the current pace of adjudication, DV-2021 selectees will lose the ability to immigrate to the United States and Family Plaintiffs will be separated for even more years to come.

III. Conclusion

For all the reasons outlined in Plaintiffs' motion for expedited discovery and above, Plaintiffs respectfully request their motion for expedited discovery be granted.

Dated: February 5, 2021
Rancho Santa Margarita, CA

Respectfully submitted,

/s/ Curtis Lee Morrison
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CERTIFICATE OF SERVICE

On the date below, I electronically filed the **PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR EXPEDITED DISCOVERY,** with the Clerk of the United States District Court for the Northern District of California, using the CM/ECF System. The Courts CM/ECF System will send an electronically email all noticed parties to the action who are registered with the Court's CM/ECF System.

Dated: February 5, 2021,
Rancho Santa Margarita, California

/s/ Curtis Lee Morrison
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