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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISO DIVISION

FATEHY ABDO ALI MOHAMED,

Plaintiff,

v.

JOSEPH BIDEN[1], in his official capacity as, President of the United States, et al.,

Defendants.

Case No. 3:19-cv-05558-JCS

Hon. Joseph C. Spero

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Judge: Hon. Joseph C. Spero
Date: February 12, 2025
Time: 9:30 A.M.
Location: San Francisco U.S. Courthouse – Zoom videoconference

[1] The current President of the United States is automatically substituted as a defendant in place of the former President of the United States, Donald Trump. *See* Fed. R. Civ. P. 25(d).

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I. INTRODUCTION

As set out in Defendant's Motion to Dismiss (ECF No. 98), Plaintiff's claims challenging the denial of visa applications submitted by his married nieces and nephews should be dismissed under the doctrine of consular nonreviewability and for lack of subject matter jurisdiction. Plaintiff's Opposition (ECF No. 100) fails to raise any *bona fide* arguments to the contrary and, notably, rests on a patently incorrect fact: that Emad Mohamed Abdo Mohamed, Mayada Mohamed Abdo Mohamed, and Lamia Mohamed Abdo Mohamed had visas that a consular officer or other State Department official revoked. This is incorrect. A consular officer did not issue visas to these three applicants, and no visas were subsequently revoked. Aside from being inaccurate, this argument is also a red herring. Even if visas had been issued to these three applicants, consular officers must revoke visas for which applicants are not eligible under the Immigration and Nationality Act ("INA").

In this case, Plaintiff's nieces and nephews got married before the principal applicant—their father Mohamed Abdo Ali Mohamed—was issued a visa. This action rendered them ineligible for derivative visas, a conclusion that was confirmed when they eventually sought visas in August 2024. For these reasons, the remaining claims in this case should be dismissed.

II. ISSUES TO BE DECIDED

1. Whether the doctrine of consular nonreviewability bars judicial review of Plaintiff's first claim under the APA?
2. Whether the doctrine of consular nonreviewability bars judicial review of Plaintiff's second claim under the Fifth Amendment's Due Process clause?
3. Whether Plaintiff's third claim seeking mandamus relief is moot, or, in the alternative, whether the Court lacks jurisdiction over Plaintiff's claim?
4. Whether venue is proper in the U.S. District Court for the Northern District of California?

III. ARGUMENT

A. The Doctrine of Consular Nonreviewability Bars Judicial Review of Plaintiff's APA and Fifth Amendment Claims

The doctrine of consular nonreviewability applies to Plaintiff's APA and Fifth Amendment claims. Mot. to Dis. at 12-16. In his Opposition, Plaintiff first contends that because the named Defendants in this case are not consular officers and because Defendants have a "nondiscretionary duty" to "print" visas, the doctrine of consular nonreviewability does not apply to bar the relief he seeks. Opp'n 8-10. But the relief Plaintiff seeks—an order compelling a consular officer to issue a visa—is the exact type of relief the doctrine of consular nonreviewability bars courts from providing.

The decision to grant a visa application rests *solely* with a consular officer. *See* 8 U.S.C. § 1201(a)(1); 22 C.F.R. §§ 42.71, 42.81. When a visa application has been properly completed and executed, "the consular officer must issue the visa, refuse the visa under [8 U.S.C. § 1182, § 1201(g),] or other applicable law[.]" 22 C.F.R. § 42.81(a). Should a consular officer issue a visa, the "immigrant visa shall be evidenced by a physical visa or by an electronic visa located in the Department's records." *Id.* § 42.73(a). If the consular officer is not satisfied that the applicant is eligible for a visa, the consular officer must refuse to issue a visa. 8 U.S.C. § 1361; *id.* § 1201(g).

The doctrine of consular nonreviewability provides that a consular officer's decision to issue or refuse a visa are not subject to judicial review under the Fifth Amendment, the INA, or the APA. *See Dep't of State v. Muñoz*, 144 S. Ct. 1812, 1820 (2024); *Allen v. Milas*, 896 F.3d 1094, 1104-09 (9th Cir. 2018). The doctrine is rooted in Congress's plenary power over immigration; the Supreme Court has repeatedly recognized that "admission and exclusion of foreign nationals is a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Muñoz*, 144 S. Ct. at 1820 (internal quotation omitted). As the Supreme Court unequivocally found, the "Immigration and Nationality Act (INA) does not authorize judicial review of a consular officer's denial of a visa; thus, as a rule, the federal courts cannot review those decisions." *Id.* To avoid exercising this exclusively political power, the

Judicial Branch developed the doctrine of consular nonreviewability as a justiciability principle barring review of claims touching on a consular officer's decision to issue or deny a visa. *Id.*

Plaintiff next contends that the doctrine does not apply because "this case does not involve a challenge to the discretionary decision of a consular official." Opp'n 8. Instead, he contends that this case is about Defendant's allegedly unlawful refusal to deliver visas to his beneficiaries that were approved, first in September 2015 and then in July 2017. Regarding the September 2015 application, he concedes that no visa was issued because a consular officer found inconsistencies in the principal beneficiary's, Mohamed Abdo Ali Mohamed, documentation. *See* Compl. ¶¶ 153-55. As to the July 2017 application, he does not allege that Mr. Mohamed was issued a visa. *See generally id.* Rather, Plaintiff alleges that in January 2018, a consular officer erroneously denied Plaintiff's beneficiary's pending visa application because of Presidential Proclamation 9645. *Id.* ¶ 163; *id.* Ex. 20. As a factual matter, consular officers *refused* the principal beneficiary's visa applications in September 2015, July 2017, and January 2018. *See* Decl. of Courtney Paterson ¶ 5 (ECF No. 49, Ex. 2). Thus, despite Plaintiff's protests to the contrary, Plaintiff is in fact challenging the consular officers' decisions to refuse visa applications of his principal and derivative beneficiaries. This type of challenge is clearly barred by the doctrine of consular nonreviewability.

Plaintiff cites *Tamjidi v. Blinken*, No. 8:24-CV-00403 HDV JDE, 2024 WL 4328813, at *4 (C.D. Cal. Aug. 27, 2024), for the proposition that the doctrine of consular nonreviewability does not apply in this case. Opp'n 10. Plaintiff misapplies *Tamjidi*. In *Tamjidi*, the plaintiff brought an APA *undue delay* claim challenging a consular officer's alleged delay in adjudicating a visa application. 8:24-CV-00403 HDV JDE, 2024 WL 4328813, at *3-4. The court held that while the doctrine of consular nonreviewability insulated consular officers' final decisions from judicial review, the doctrine did not apply because a consular officer had not yet issued a "final" decision on whether a visa would be issued or refused due to ongoing administrative processing.[2] *Id.* But

[2] Defendants respectfully disagree with this decision, as have other courts within this district. *See, e.g.*, *Morassaei v. United States Dep't of State*, No. SACV 24-823 PA (DFMx), 2024 WL 5047480 (C.D. Cal. Sept. 25, 2024).

pertinent here, a consular officer refused Plaintiff's beneficiary's visa application on January 8, 2018, March 17, 2021, and, with respect to the three remaining derivative beneficiaries, on August 4, 2024. *See* Compl., Ex. 20; Decl. of Courtney Paterson ¶ 5 (ECF No. 49, Ex. 2); Mot. to Dismiss, Ex. 1. Thus, because Plaintiff challenges a consular officer's decisions to refuse visas, the doctrine of consular nonreviewability unequivocally applies in this case.

Moreover, Plaintiff also attempts to circumvent consular nonreviewability by alleging that Presidential Proclamation No. 9645 did not apply to his derivative beneficiaries' visa applications and thus the consular officer's January 8, 2018 decision was invalid. Opp'n 9. Plaintiff's contention that Proclamation No. 9645 did not apply to his beneficiaries is incorrect. According to Section 3(ii) of the Proclamation, the suspension of entry applied to all covered individuals who "*do not have a valid visa* on the applicable effective date under section 7 of this proclamation[.]" 82 Fed. Reg. 45161 § 3(ii) (emphasis added). The effective date was "12:01 a.m. eastern daylight time on October 18, 2017[.]" *Id.* § 7(b). Plaintiff does not allege that his derivative beneficiaries were issued valid visas prior to that time, only that they were awaiting the issuance of a visa. *See generally* Compl. As explained above and in the Declaration of Courtney Paterson dated July 23, 2021, none of Plaintiff's beneficiaries were issued visas that were revoked under the Presidential Proclamation. *See* Decl. of Courtney Paterson ¶ 5 (ECF No. 49, Ex. 2). Accordingly, under the language of the Proclamation, Plaintiff's derivative beneficiaries were not part of the class of individuals exempted from the Proclamation's travel restrictions.

Plaintiff further contends that the doctrine of consular nonreviewability does not apply in this case because Presidential Proclamation No. 9645 "removed any discretion from the consular officer's decision-making[.]" Opp'n 9. First, the consular officer's refusal letter that Plaintiff submitted casts doubt on this characterization because it evidences that a consular officer found Plaintiff's beneficiary ineligible under INA 212(f) in light of Presidential Proclamation No. 9645. *See* Compl., Ex. 20. Second, Plaintiff's cited authority fails to support this claim. Plaintiff cites *Gill v. Mayorkas*, No. C20-939 MJP, 2021 WL 3367246, at *8 (W.D. Wash. Aug. 3, 2021). Opp'n 9. Plaintiff again misreads caselaw. In *Gill*, the plaintiff brought an APA claim against U.S. Customs and Border Patrol ("CBP") challenging a CBP officer's determination to cancel a visa

and deny admission into the United States. 2021 WL 3367246, at *1. CBP argued, *inter alia*, that consular nonreviewability barred judicial review of the CBP officer's decision. *Id.* at *6-7. But the court found the doctrine of consular nonreviewability inapplicable because plaintiff was challenging the decisions and actions of a CBP officer, not a consular officer entrusted with the duty to issue, refuse, or revoke visas. *Id.* at *8. While Defendants respectfully disagree with the decision, it has no applicability here. Unlike the plaintiff in *Gill*, Plaintiff challenges a consular officer's decision to refuse his beneficiary's visa application, which even under *Gill*, is squarely covered by the doctrine of consular nonreviewability.

Lastly, Plaintiff's contention that the Court should review the consular officer's reliance on Presidential Proclamation No. 9645 to deny his derivative beneficiaries' visa applications fails because these claims are moot. Mot. to Dis. at 17-18. On January 20, 2021, Presidential Proclamation No. 10141 revoked Presidential Proclamation No. 9645, the Proclamation at issue in these proceedings. *See* 86 Fed. Reg. 7005 (Jan. 25, 2021). As such, Proclamation No. 9645 is no longer in effect and was not the reason Plaintiff's beneficiaries were refused visas after this date. Since the rescission of Proclamation No. 9645, Defendants provided Plaintiff's beneficiaries ample opportunity to pursue their visa applications and have adjudicated each visa application. *See* ECF No. 64, ECF No. 66, ECF No. 68, ECF No. 70, ECF No. 73, ECF No. 75, ECF No. 77, ECF No. 79, ECF No. 82, ECF No. 84, ECF No. 88, ECF No. 91, ECF No. 93. That Plaintiff's derivative beneficiaries are now ineligible for the visa category they sought because of their decision to marry does not resuscitate these moot claims.

Accordingly, the doctrine of consular nonreviewability applies to bar review of Plaintiff's APA and Fifth Amendment claims because these claims seek judicial review of a consular officer's decision to issue or refuse a visa—relief clearly barred by the doctrine of consular nonreviewability.

1. Plaintiff's APA Claim Fails because a Consular Officer Refused his Derivative Beneficiaries' Visa Applications and these Refusals are not Subject to APA Review

In his Opposition, Plaintiff characterizes his APA claim as a challenge to "Defendants fail[ure] to complete their mandatory, nondiscretionary duty to print and place the approved visas in his family members' passports." Opp'n 10. This claim mischaracterizes Plaintiff's claim as alleged in the Complaint and is premised on a faulty reading of the governing statute and regulation.

Plaintiff contends that his APA claim is valid because he pleaded facts that Defendants failed to complete a mandatory, nondiscretionary duty to issue visas, a claim under 5 U.S.C. § 706(1). Opp'n 10-11. However, in the Complaint, Plaintiff alleges that Defendants have revoked his beneficiary's visa and that this revocation is "final agency action" subject to APA review under 5 U.S.C § 706(2). Compl. ¶¶ 224-27. Plaintiff's argument conflates an APA delay claim with an APA review claim. Regardless of which type of APA claim Plaintiff attempts to bring, both fail.

As already explained above, the doctrine of consular nonreviewability bars any claims seeking review under 5 U.S.C. § 706(2) of a consular officer's decision to refuse a visa. *Allen*, 896 F.3d at 1108. ("[T]he doctrine of consular nonreviewability is a limitation on the scope of our judicial review and thus precludes our review under [5 U.S.C.] § 706."). Thus, Plaintiff's APA claim seeking review of the consular officer's decision to refuse his derivative beneficiaries' visa applications is barred from judicial review under § 706(2) by the doctrine of consular nonreviewability. Nor can Plaintiff circumvent this bar to judicial review by framing the visa refusal as a "revocation" because the INA provides that there is no judicial review of a consular officer's decision to revoke a visa. 8 U.S.C. § 1201(i) ("There shall be no means of judicial review (including review pursuant to section 2241 of title 28 or any other habeas corpus provision, and sections 1361 and 1651 of such title) of a revocation under this subsection[.]"); *see also*, *e.g.*, *Saavedra Bruno v. Albright*, 197 F.3d 1153 (D.C. Cir. 1999) (applying doctrine of consular nonreviewability to challenge of consular officer's visa revocation).

Even if Plaintiff had alleged an APA undue delay claim under 5 U.S.C. § 706(1) challenging a failure to print visas, it too fails. No APA undue delay claim may proceed unless Defendants have failed to take a discrete action that they are required to take. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004).

Plaintiff cites 22 C.F.R. § 42.81(a) in support of his argument that Defendants had a duty to print visas for his beneficiaries. Opp'n 11. But Plaintiff misreads the regulation. Section 42.81(a) provides that when a visa application is properly completed and executed, "the consular officer must either issue the visa, refuse the visa under [8 U.S.C. § 1182, § 1201(g),] or other applicable law[.]" 22 C.F.R. § 42.81(a). The regulation's text does not require a consular officer to "print" an approvable visa. Rather, the regulation requires a consular official to adjudication a visa application by issuing or denying a visa. *See Patel v. Reno*, 134 F.3d 929, 932 (9th Cir. 1997) (finding a consular officer has a nondiscretionary duty to act on a visa application under 22 C.F.R. § 42.81(a)). Plaintiff reads a mandatory duty into the regulation that the text of the regulation does not support and attempts to impose this misreading on Defendants. The INA likewise does not mandate the printing—or the issuance—of a visa by a discrete time; rather, it provides that subject to statute and regulations, "a consular officer may issue an immigrant visa to an immigrant who has made proper application therefor[.]" 8 U.S.C. § 1201(a)(1). As to the cases Plaintiff cites (Opp'n at 11-12), none of the cases involved a mandatory duty to issue a visa, let alone a duty to "print" a visa. *See Patel*, 134 F.3d 929 (involving whether there was a duty to adjudicate a visa application held in abeyance for many years); *Rivas v. Napolitano*, 714 F.3d 1108 (9th Cir. 2013) (involving reconsideration of refusal within on year); *Atiffi v. Kerry*, No. CIV. S-12-3001 LKK, 2013 WL 5954818 (E.D. Cal. Nov. 6, 2013) (involving providing notice of basis for refusal); *Jane Doe 1 v. Nielsen*, 357 F. Supp. 3d 972 (N.D. Cal. 2018) (challenging DHS's compliance with the Lautenberg Amendment in issuing of Notices of Ineligibility); *Emami v. Nielsen*, 465 F. Supp. 3d 991 (N.D. Cal. 2020) (challenging State department policy-level guidance on waivers that allegedly violated regulations); *Gill*, 2021 WL 3367246 (challenging the decisions and actions of a CBP officer, not a consular officer); *Hernandez Castro v. Mayorkas*, No. 2:21-CV-00315-SAB, 2022 WL 1085682 (E.D. Wash. Apr. 11, 2022) (challenging doctor's failure to

consider availability of COVID vaccination impacting visa eligibility and bringing mandamus claim for withheld agency action on reconsideration of visa application).

Here, Plaintiff's beneficiaries received adjudications many times, including most recently on August 4, 2024. *See* Compl., Ex. 20; Mot. to Dismiss, Ex. 1. Thus, Plaintiff cannot maintain an APA delay claim under § 706(1) because the action that can be compelled has occurred.

2. Plaintiff's Fifth Amendment Claim Fails because he has no Protected Interest in Someone Else's Visa Application

Plaintiff argues that he has a property interest in his derivative beneficiaries' visa applications protected by the Fifth Amendment. Opp'n 12. He argues that the failure to print visas deprived Plaintiff of a property interest without the protections of due process. *Id.* Plaintiff has no such property interest and the cases he cites does not support his inaccurate assertion.

Plaintiff's Fifth Amendment claim fails because the Supreme Court held in *Department of State v. Muñoz*, 144 S. Ct. 1812 (2024), that a U.S. citizen has no constitutional right to participate or assert procedural rights with respect to "someone else's" visa application and is "not constitutionally entitled" to a "facially legitimate and bona fide reason" for why that visa was denied. *See* 144 S. Ct. at 1825–28. It explained, "[l]est there be any doubt, *Mandel* does *not* hold that citizens have procedural due process rights in the visa proceedings of others. The Ninth Circuit seems to have read *Mandel* that way, but that is a misreading." 144 S. Ct. at 1826 (emphasis in original) (citing *Kleindienst v. Mandel*, 408 U.S. 753 (1972)). As such, Plaintiff has no due process rights in Emad, Mayada, or Lamia's visa applications and his Fifth Amendment procedural Due Process claim must be dismissed.

Plaintiff attempts to distinguish *Muñoz*, but none of the cited cases support his contention he has a Fifth Amendment Due Process claim in the visa application of another. Plaintiff contends *Ching v. Mayorkas*, 725 F.3d 1149 (9th Cir. 2013) and *Hanan v. U.S. Citizenship and Immig. Servs.*, No. 23-CV-02414-HSG, 2024 WL 4293917 (N.D. Cal. Sep. 25, 2024) establish he has a protected property interest in his derivative beneficiaries' visa applications. Opp'n 13. They do not. *Ching* and *Hanan* involved whether U.S. citizens have property interests in Form I-130

petitions generally presented to the Department of Homeland Security to classify noncitizens as immediate relatives under the INA and do not address immigrant visa applications executed before a consular officer. *See Ching*, 725 F.3d at 1155-56 (finding petitioners had a property interest in the approval of the I-130 petition); *Hanan*, 2024 WL 4293917, at *11-12 (finding *Ching*'s holding controlling post-*Muñoz*). These cases do not support the proposition that a petitioner has a property interest in the beneficiary's application for an immigrant visa, a separate process from the Form I-130 petition and even if they did, the Supreme Court's holding in *Muñoz* would overrule them.

Ching and *Hanan* are inapplicable here and the Supreme Court's holding in *Muñoz* is clear that "citizens [do not] have procedural due process rights in the visa proceedings of others[.]" 144 S. Ct. at 1826. Because Plaintiff's Fifth Amendment Due Process claim is premised on a nonexistent right, his Fifth Amendment Due Process claim fails.

B. The Court can Consider Declarations to Determine Plaintiff's Mandamus Claim is Moot

Plaintiff contends that this Court cannot consider the Declaration of Rachel Hines or the State Department's Consular Electronic Application Center ("CEAC Database") to determine whether his mandamus claim is moot and further contends that his claim is not moot. Opp'n 14-17. Plaintiff's argument once again misses the mark because the Court can consider this evidence and this evidence demonstrates his mandamus claim is moot.

In resolving a factual attack to subject matter jurisdiction, the district court may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). Moreover, a court need not presume the truthfulness of Plaintiff's allegations under a factual attack on jurisdiction. *Id.* Courts regularly consider declarations and government database information to determine whether a claim is moot. *See*, *e.g.*, *Algzaly v. Blinken*, No. 20-cv-03322-JCS, 2021 WL 2531052, at *10 (N.D. Cal. Jun. 21, 2021) (in deciding Rule 12(b)(6) motion, taking judicial notice of State Department attorney-advisor's declaration as public record as statutory basis for denial of visa); *OC Modeling, LLC v. Pompeo*, No. CV 20-1687 PA (MAAx), 2020 WL 7263278, at *1 n. 1 (C.D. Cal. Oct. 7, 2020) (taking judicial notice of the status of plaintiff's visa application as refused on

the CEAC Database). Accordingly, the Court can consider the Declaration of Rachel Hines and the CEAC Database to determine if Plaintiff's mandamus claim is now moot.[3]

Plaintiff argues that dismissal of his mandamus claim based on a lack of subject matter jurisdiction at this stage is inappropriate because the jurisdictional question is "inextricably bound up with the merits" of Plaintiff's claim. Opp'n 14-15. "The question of jurisdiction and the merits of an action are intertwined where a statute provides the basis for both the subject matter jurisdiction of the federal court and the plaintiff's substantive claim for relief." *Safe Air for Everyone*, 373 F.3d at 1039 (internal quotations omitted). Plaintiff fails to demonstrate how his mandamus claim is a claim where the jurisdictional question would persist until the resolution of the merits. Contrary to Plaintiff's contention, courts within this Circuit consistently dismiss mandamus and APA undue delay claims as moot once the agency produces evidence it has acted. *See*, *e.g.*, *Akimenko v. Mayorkas*, Case No. 21-cv-03738-DMR, 2022 WL 1539519, at *3 (N.D. Cal. May 16, 2022) (collecting cases affirming dismissal of mandamus claims as moot after agency action). As explained above, Plaintiff's argument that his mandamus claim is not moot is premised on a misreading of the statute and the regulations seeking to compel action Defendants are not required to take. The evidence Defendants provided demonstrates a consular officer has adjudicated Plaintiff's derivative beneficiaries' visa applications, Plaintiff provides no evidence to refute this and thus Plaintiff can no longer maintain a mandamus action to compel agency action on these applications.

C. Equitable Estoppel Does not Apply

Plaintiff contends that the doctrine of equitable estoppel bars Defendants from relying on the consular officer's August 4, 2024 denial of Emad, Mayada, and Lamia's visa applications. Opp'n 17-18. Not only is this contention based on the faulty factual premise that visas were improperly withheld when in fact the visas were refused, applying equitable estoppel in this case

[3] Once a party presents evidence contesting the factual basis of jurisdiction, as is the case here, "the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) (citation omitted). Plaintiff failed to furnish any evidence satisfying his burden of establishing subject matter jurisdiction in his Opposition.

would be inappropriate because none of the elements are met. In seeking to apply estoppel against the government, a party must show that the potential injustice outweighs the possibility of damage to the public interest and that the elements of estoppel exist. *Salgado-Diaz v. Gonzales*, 395 F.3d 1158, 1166 (9th Cir. 2005). The elements of estoppel "require a showing that (1) the party to be estopped knows the facts; (2) the party intends that his or her conduct will be acted on; (3) the claimant must be ignorant of the true facts; (4) and the claimant must detrimentally rely on the other party's conduct." *Id.*

As a preliminary matter, any alleged injustice does not outweigh the damage to public interest. It is unclear what injustice Plaintiff has suffered. After the recission of Presidential Proclamation 9645, Defendants provided Plaintiff's beneficiaries an opportunity to reapply for visas and adjudicated the applications without regard to the rescinded Presidential Proclamation. *See* ECF No. 64, ECF No. 66, ECF No. 68, ECF No. 70, ECF No. 73, ECF No. 75, ECF No. 77, ECF No. 79, ECF No. 82, ECF No. 84, ECF No. 88, ECF No. 91, ECF No. 93. All of Plaintiff's beneficiaries, including Emad, Mayada, and Lamia, have been afforded this opportunity. That Plaintiff's derivative beneficiaries are no longer eligible for the visa sought because of their decision to marry is not an injustice foisted upon Plaintiff by Defendants. This lack of an injustice must also be weighed against the strong public interest in courts not second guessing the political departments' exercise of a fundamental sovereign attribute embodied by the doctrine of consular nonreviewability. *See Muñoz*, 144 S. Ct. at 1820 (citing *Trump v. Hawaii*, 585 U.S. 667, 702 (2018) (quoting *Fiallo v. Bell*, 430 U.S. 787, 792 (1977)) (internal quotations omitted).

Nor can Plaintiff show the elements required for estoppel. Plaintiff cannot demonstrate the third element because he was aware that his derivative beneficiaries were married, thus he was not "ignorant of the true facts[.]" Plaintiff was represented by counsel, who could have researched derivative visa eligibility. Additionally, Plaintiff cannot show the second and fourth elements because Defendants did not and could not guaranteed the issuance of a visa to an ineligible individual and it is unclear how Defendants' willingness to readjudicate visa applications was to Plaintiff's detriment.

In short, Plaintiff fails to show why the doctrine of equitable estoppel applies here nor can he show all the elements required for estoppel to apply.

D. Plaintiff's Claim Venue is Currently Proper in this District Contradicts the Federal Rules of Civil Procedure and Raises Grave Forum Shopping Concerns

Lastly, Plaintiff contends "venue is proper in the Northern District of California because two of the original plaintiffs in this action *were* domiciled in this district." Opp'n 19 (emphasis added). However, Plaintiff dismissed these plaintiffs before Defendants filed a responsive pleading. *See* ECF No. 96. Under Fed. R. Civ. P. 12(b)(3), a party must challenge improper venue by motion before filing a responsive pleading. That is what Defendants have done here because no remaining plaintiffs are domiciled in this district.

Plaintiff contends that venue remains proper because some plaintiffs resided in this district at the time of filing this action. Opp'n 19-20. That Plaintiff voluntarily dismissed the plaintiffs that allegedly rendered venue proper in this district is, apparently, now irrelevant to a venue challenge. Per Plaintiff's theory of eternally proper venue, to establish venue in a multi-plaintiff suit, a litigant need only name one plaintiff allegedly residing in the district where the complaint is filed, then, before a party can challenge improper venue, the plaintiff can voluntarily dismiss the one plaintiff alleged to reside in the district and yet establish proper venue in-perpetuity. This is an absurd theory of venue leading to forum shopping that the Court should not entertain.

IV. CONCLUSION

The Court should dismiss Plaintiff's Complaint with prejudice because the doctrine of consular nonreviewability bars judicial review of Plaintiff's causes of action challenging the consular officer's refusal of Emad, Mayada, and Lamia's visa applications. Additionally, the Court should dismiss the Complaint with prejudice because Plaintiff's mandamus claim is moot. Finally, the Court should dismiss the Complaint because venue is not proper in this district.

Dated: January 13, 2025

Respectfully submitted,

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LOCAL RULE 7-4(b) CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for Defendants certifies that the attached memorandum of points and authorities complies with the Local Rule 7-4(b) 15-page limit.

Dated: January 13, 2025

/s/ *Malcolm McDermond*
MALCOLM MCDERMOND
U. S. Department of Justice

CERTIFICATE OF SERVICE

I certify that on January 13, 2025, I electronically filed the foregoing Defendants' Reply Memorandum in Support of Defendant's Motion to Dismiss with the Clerk of Court by using the CM/ECF system, which will provide electronic notice pursuant to L.R. 5-1(h)(1) to all attorneys of record via the CM/ECF system.

Dated: January 13, 2025

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