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UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO

MADELINE CARDENAS and ROLANDO
MORA-HUERTA,

PLAINTIFFS,

vs.

UNITED STATES OF AMERICA; ERIC H.
HOLDER, United States Attorney
General; JANET NAPOLITANO,
Secretary of the Department of Homeland
Security; HILLARY CLINTON, United
States Secretary of State; THOMAS
ROGAN, Consul General of the United
States, City of Ciudad Juarez,

DEFENDANTS.

Civil No._____.

COMPLAINT

[1] Due Process Violation
[2] Administrative Procedures Act

COME NOW the Plaintiffs, and, for their Complaint against the Defendants,

allege as follows:

COMPLAINT 1

I. INTRODUCTION & FACTUAL BACKGROUND

1. Plaintiff Madeline Cardenas (hereinafter "Plaintiff Cardenas") is a citizen of the United States of America. She was born in Palm Springs, California on September 15, 1989. She resides in Nampa, Idaho.
2. Plaintiff Rolando Mora-Huerta (hereinafter "Plaintiff Mora") is a citizen of Mexico.
3. Plaintiffs are husband and wife. Plaintiffs were married on July 11, 2008.
4. Plaintiff Mora resided in the United States from 2004 until 2009. During that time, Plaintiff Mora's entire criminal history consisted of two misdemeanor offenses (failure to purchase a valid driver's license in violation of I.C. § 49-301(1) and alcohol possession/consumption/purchase by a minor in violation of I.C. § 23-949) and a traffic infraction (speeding in violation of I.C. § 49-654(2)). At no time was Respondent ever sentenced to time in prison.
5. Plaintiff Cardenas filed an immediate-relative petition (Form I-130) on behalf of her husband, Plaintiff Mora, in order that he could become a lawful permanent resident of the United States. The immediate relative petition was approved by Defendant United States Citizenship and Immigration Services on September 29, 2009.
6. Following the approval of Plaintiff Cardenas's I-130, she and Plaintiff Mora appropriately filed all required forms to obtain an immigrant visa.
7. On or about June 8, 2008, Plaintiff Mora was routed into removal proceedings following a routine traffic stop.

8. Pursuant to a request made under the Freedom of Information Act, Plaintiff Mora obtained a copy of a Form I-213 "Record of Inadmissible Alien" dated June 20, 2008 which included the following language:
"MORA was identified as a Sureno gang associate...by Nampa Police Department" and that "MORA was a passenger in a vehicle owned and driven by a [REDACTED] who had identifiers consistent to [sic.] being a member of the Sureno gang...." No other items in Mr. Mora's FOIA-obtained alien file mentioned gang affiliation.
9. When the Petitioner came into the custody of ICE, the agency *sua sponte* allowed him to be released into the community with the payment of a \$5,000 bond. Mr. Mora did not have to seek release on bond from an Immigration Judge.
10. On May 4, 2009, when the Petitioner appeared before an Immigration Judge to resolve his immigration case, he applied for and was granted the benefit of voluntary departure in lieu of a removal order pursuant to 8 U.S.C. § 1229c.
11. At Plaintiff's May 4, 2009 removal hearing, counsel for the Department of Homeland Security did not oppose Plaintiff Mora's request for voluntary departure.
12. At no time during Plaintiff Mora's removal proceedings did counsel for the Department of Homeland Security allege that the Plaintiff was a gang associate or gang member.

13. The Immigration Judge did not make any reference to gang association or membership during any part of Plaintiff Mora's removal proceedings.
14. Plaintiff Mora complied with the terms of the Immigration Judge's voluntary departure order, and returned to Mexico on August 29, 2009.
15. On March 5, 2010, Plaintiff Mora appeared at the U.S. Consulate in Ciudad Juarez for an interview regarding his immigrant visa application. Plaintiff Mora was asked repeatedly by the Consular Officer whether he was in a gang and he repeatedly stated that he was not in a gang. The Consular Officer asked Plaintiff Mora to return approximately three days later, at which point, consular officers took photos of Plaintiff Mora's tattoos, which include the letter "M" for Mora, two tattoos of the letter "R" for Rolando, tattoos of his parents' names and dates of birth, tattoos of Plaintiff Mora's complete name, and finally a tattoo of two faces – one happy and one sad.
16. On July 2, 2010, Plaintiff Mora was denied an immigrant visa. The U.S. Consulate in Ciudad Juarez asserted that Plaintiff Mora was inadmissible to the United States under three different provisions of law: 8 U.S.C. § 1182(a)(3)(A)(ii) (rendering inadmissible "[a]ny alien who a consular officer or the Attorney General knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in – [...] any other unlawful activity...."); 8 U.S.C. § 1182(a)(9)(A)(i) (rendering

inadmissible any alien ordered removed under certain provisions of law); and 8 U.S.C. § 1182(a)(9)(B)(i)(II) (rendering inadmissible for 10 years any alien unlawfully present in the United States for one year or more).

17. On July 13, 2010, Plaintiff Mora sought further information underlying the visa denial from Defendant Department of State (hereinafter "DOS") by submitting an inquiry to the "CDJ Legal" email dropbox.
18. On July 20, 2010, an unidentified official with the Consular Information Unit of the U.S. Consulate General for Ciudad Juarez, Mexico stated in an email to Plaintiff Mora's prior counsel that, "[a]t the time of [Mr. Mora's] June 16, 2008 arrest, Mr. Mora was identified as a gang associate by law enforcement. The circumstances of Mr. Mora's arrest, as well as information gleaned during the consular interview, gave the consular officer sufficient 'reason to believe' that Mr. Mora has ties to an organized street gang. Consequently, Mr. Mora is ineligible for a visa and has no recourse to a waiver."
19. The July 20, 2010 email from the unidentified official with the Consular Information Unit of the U.S. Consulate General for Ciudad Juarez, Mexico further indicated that Defendant State Department revoked its 8 U.S.C. § 1182(a)(9)(A)(i) finding because Plaintiff Mora had never been ordered deported.
20. On September 21, 2010, Plaintiff Mora, through counsel, submitted evidence to Defendant U.S. Consulate General in Ciudad Juarez to establish that he is not and never has been a member of an organized criminal group or gang.

The evidence included a letter from Nampa Police Department Corporal Brandy Sutherland of the Special Investigation Unit assigned to Gangs dated September 13, 2010. The letter's author states that, after conducting a "thorough search of Nampa Police Department records," Corporal Sutherland was "unable to locate any criminal gang documentation or contacts that would indicate Plaintiff Mora was a gang member prior to or at the time of his arrest." Corporal Sutherland's letter also included a discussion of her review of photographs of Plaintiff Mora's tattoos. Corporal Sutherland stated as follows: "Based on my training and experience as a Gang Investigator, the tattoos that are shown do not specifically indicate gang involvement."

21. The September 21, 2010 evidentiary submission to Defendant U.S. Consulate General in Ciudad Juarez also included the (negative) results of a Criminal Records Search performed in the state of Guanajuato, Mexico, a sworn statement from Plaintiff Mora in which he unequivocally denies any gang involvement, photographs of Plaintiff Mora's tattoos, and numerous letters regarding Plaintiff Mora's good moral character.
22. Following a February 2, 2012 inquiry from Plaintiff Mora's present counsel to the Consular Information Unit ("CIU") of the U.S. Consulate General of Ciudad Juarez, Mexico, the CIU stated in an email to undersigned counsel dated February 8, 2012 that the inadmissibility determination of July 2, 2010

was not overturned, notwithstanding a “careful review” of the “additional evidence supplied by Mr. Mora’s previous legal representative....”

23. On April 30, 2012, Plaintiff Mora, through counsel, requested further review of the consular officer’s decision. Specifically, Mr. Mora requested an Advisory Opinion on the legal question of whether the “reasonable ground[s] to believe” standard was correctly applied to the facts of his case.
24. Advisory Opinions are issued by the Visa Office of Defendant State Department. The Visa Office of the Department of State is located in Washington D.C.
25. On June 1, 2012, Defendant State Department sent an email (“Advisory Opinion”) to undersigned counsel in which it indicated that the consular officer’s decision would not be overturned. The Advisory Opinion incorrectly identifies Plaintiff Mora’s name and contains numerous other factual inaccuracies.
26. On June 4, 2012, Plaintiff Mora, through undersigned counsel, sent a reply email to Defendant State Department requesting re-review of the matter because of the numerous factual inaccuracies in the Advisory Opinion. The June 4, 2012 email to Defendant State Department identified the factual errors in the Advisory Opinion and explained why the assertions contained therein were mistaken.
27. Plaintiffs have not received a response from Defendant State Department as of the filing of this complaint.

28. Plaintiff Mora has been residing in Mexico, separated from his U.S. citizen wife, since August 31, 2009. Since Mr. Mora's departure from the United States, Plaintiff Mora has never illegally reentered the United States or attempted to do so. ^{MORA}

II. JURISDICTION AND VENUE

29. This Court has federal question jurisdiction over this matter pursuant to 28 U.S.C. § 1331 as it raises claims under the Constitution of the United States, the Immigration and Nationality Act (INA), 8 U.S.C. § 1101 *et seq.*, and the Administrative Procedures Act ("APA"), 5 U.S.C. § 701 *et seq.*

30. Jurisdiction is further alleged pursuant to 28 U.S.C. § 1361.

31. This Court is competent to adjudicate this case, notwithstanding the so-called doctrine of consular non-reviewability, because Defendants' decision on Plaintiff Mora's immigrant visa application was not supported by a facially legitimate and bona fide reason. *See Kleindienst v. Mandel*, 408 U.S. 753 (1972); *Bustamante v. Mukasey*, 531 F.3d 1059 (9th Cir. 2008).

32. The only indications in Plaintiff's entire FOIA-obtained alien file that makes reference to Plaintiff's alleged gang affiliation are the statements contained on Form I-213. According to Form I-213, the identification of Plaintiff as a gang member was made by the Nampa Police Department following a routine traffic stop.

33. After the I-213 was created, a Corporal with the Special Gang Investigation Unit of the Nampa Police Department wrote a letter stating that the Nampa

Police Department had, in effect, no reason to believe that Plaintiff Mora was a gang associate or that his tattoos specifically indicate gang involvement.

34. Defendants' denial of Plaintiff's Immigrant Visa application cannot have been based on a good faith determination that Plaintiff Mora is a gang member because the very entity responsible for generating the accusation subsequently withdrew from the accusation and indicated, in effect, that it had no reason to believe Plaintiff Mora was involved in gang activity.

35. Defendants' application of the 8 U.S.C. § 1182(a)(3)(A)(ii) inadmissibility ground to Plaintiff Mora's Immigrant Visa application is not based on a facially legitimate or bona fide reason.

36. There is no evidence in the record to support a finding that Plaintiff Mora is inadmissible pursuant to 8 U.S.C. § 1182(a)(3)(A)(ii).

37. Defendants application of the 8 U.S.C. § 1182(a)(3)(A)(ii) inadmissibility ground to Plaintiff Mora's Immigrant Visa application was done in bad faith.

38. Defendants exceeded their authority by applying the 8 U.S.C. § 1182(a)(3)(A)(ii) inadmissibility ground to Plaintiff Mora's Immigrant Visa application.

39. Defendants misinterpreted 8 U.S.C. § 1182(a)(3)(A)(ii) when it applied this provision of law to Plaintiff Mora.

40. In finding Plaintiff Mora inadmissible pursuant to 8 U.S.C. § 1182(a)(3)(A)(ii), Defendants acted contrary to law.

41. Because Defendants found Plaintiff Mora inadmissible pursuant to 8 U.S.C. § 1182(a)(3)(A)(ii) without any facially legitimate or bona fide reason, this Court may review the evidence in the record to determine whether it is legally sufficient to sustain the 8 U.S.C. § 1182(a)(3)(A)(ii) inadmissibility finding.
42. Defendants' actions cause Plaintiff Cardenas emotional and financial hardship.
43. Defendants' actions cause Plaintiff Mora emotional and financial hardship.
44. Defendants' actions unlawfully infringe upon Plaintiff Cardenas's liberty interest to make personal choices with regard to marriage and family matters free from unjustifiable government interference in violation of Plaintiff Cardenas's right to substantive due process guaranteed by the Fifth Amendment of the United States Constitution.
45. Plaintiff Mora has acquired a constitutionally protected due process interest in the processing of his application for Lawful Permanent Resident status.
46. Defendants' actions unlawfully infringe upon Plaintiff Mora's interest in having his application for Lawful Permanent Resident status adjudicated in a manner consistent with his constitutional protected due process interests.
47. Defendants' actions unlawfully infringe upon Plaintiff Mora's interest in having his application for Lawful Permanent Resident status adjudicated consistent with law.

48. The injury suffered by Plaintiff Cardenas is caused by the application of the 8 U.S.C. § 1182(a)(3)(A)(ii) inadmissibility ground to Plaintiff Mora.

49. The injury suffered by Plaintiff Mora is caused by the application of the 8 U.S.C. § 1182(a)(3)(A)(ii) inadmissibility ground to him.

50. There is no waiver for a finding of inadmissibility pursuant to 8 U.S.C. § 1182(a)(3)(A)(ii).

51. So long as the 8 U.S.C. § 1182(a)(3)(A)(ii) inadmissibility ground is applied to Plaintiff Mora, he will not be admitted to the United States as a Lawful Permanent Resident and he will continue to suffer injury.

52. The injury suffered by Plaintiff Cardenas is likely to be redressed if she prevails in this lawsuit.

53. The injury suffered by Plaintiff Mora is likely to be redressed if he prevails in this lawsuit.

54. Venue is proper in the District of Idaho under 28 U.S.C. § 1391(e)(3). This case is a civil action in which a defendant is an officer or employee of the United States or any agency thereof; Plaintiff Cardenas resides in Nampa, Idaho; and this action does not involve real property.

55. Plaintiffs have taken all administrative acts available to seek redress for their injuries.

III. PARTIES

56. Plaintiff Cardenas is a United States Citizen whose permanent place of residence is in Nampa, Idaho.

57. Plaintiff Mora is a citizen and national of Mexico and is the spouse of Plaintiff Cardenas.

58. Plaintiff Mora currently resides in Iramuco, Guanajuato, Mexico.

59. Defendant United States of America is sued in its official capacity pursuant to 5 U.S.C. § 703.

60. Defendant Eric Holder is the Attorney General of the United States, and is sued in his official capacity.

61. Defendant Janet Napolitano, the Secretary of the Department of Homeland Security ("DHS"), is the highest ranking official within the DHS. The Secretary is responsible for DHS implementation of the Immigration and Nationality Act ("INA") and for ensuring compliance with applicable federal laws, including the APA. The Secretary is sued in her official capacity.

62. Defendant Hillary Clinton, Secretary of State, is the highest ranking official within the Department of States ("DOS"). The Secretary is responsible for the implementation of the INA and for ensuring compliance with applicable federal laws, including the APA. The Secretary is sued in her official capacity. The Secretary maintains offices inside the United States as well as abroad.

63. Defendant Thomas Rogan is the Consul General of the United States for Ciudad Juarez, Mexico, and he is being sued in his official capacity.

IV. CLAIMS FOR RELIEF

First Claim for Relief – Due Process Violation

64. The allegations contained in paragraphs 1 through 63 are repeated and realleged as if fully set forth herein.
65. Plaintiff Cardenas has a protected liberty interest in the Consulate's decision on Plaintiff Mora's Immigrant Visa application.
66. The Due Process Clause of the United States Constitution provides that "certain substantive rights – life, liberty, and property – cannot be deprived except pursuant to constitutionally adequate procedures." *Cleveland Bd. of Educ. V. Loudermill*, 470 U.S. 532, 541 (1985).
67. The freedom to make personal choices in "matters of marriage and family life" is an established liberty interest protected by the Due Process Clause. *Bustamante*, 531 F.3d at 1062 (citing *Cleveland Bd. of Educ. V. LaFleur*, 414 U.S. 632, 639-40 (1974)).
68. Plaintiff Cardenas continues to suffer from Defendant's legal wrong.
69. Plaintiff Cardenas's seeks a declaratory judgment that her due process rights were violated by Defendants when they improperly refused her husband's visa application based on 8 U.S.C. § 1182(a)(3)(A)(ii).
70. Plaintiff Cardenas seeks a declaratory judgment that Plaintiff Mora is not inadmissible pursuant to 8 U.S.C. § 1182(a)(3)(A)(ii) under any constitutionally permissible standard of proof.

Second Claim for Relief – Administrative Procedures Act

71. The allegations contained in paragraphs 1 through 70 are repeated and realleged as if fully set forth herein.
72. Defendants' factual finding that Plaintiff Mora is inadmissible under 8 U.S.C. § 1182(a)(3)(A)(ii) is unsupported by substantial evidence and the facts in violation of 5 U.S.C. § 706(2)(E) and (F).
73. Defendants' determination that Plaintiff Mora is inadmissible under 8 U.S.C. § 1182(a)(3)(A)(ii) constitutes an arbitrary and capricious agency action in violation of 5 U.S.C. § 706(2)(A).
74. Defendants' factual finding that Plaintiff Mora is inadmissible under 8 U.S.C. § 1182(a)(3)(A)(ii) is the result of the agency's failure to investigate in violation of 5 U.S.C. § 706(2)(A).
75. Plaintiffs seek a declaratory judgment that Plaintiff Mora is not inadmissible pursuant to 8 U.S.C. § 1182(a)(3)(A)(ii).

V. PRAYER FOR RELIEF

The Plaintiffs request the Court to grant the following relief:

- A. Declare that Plaintiff Mora is not inadmissible pursuant to 8 U.S.C. § 1182(a)(3)(A)(ii);
- B. Enjoin Defendants from barring Plaintiff Mora's admission into the United States under 8 USC § 1182(a)(3)(A)(ii);
- C. Award reasonable costs and attorneys' fees; and
- D. Grant such other relief as the Court may deem just and proper.

Dated this 6th day of July 2012

_____/s_____
Maria E. Andrade
Andrade Legal
Attorney for Plaintiffs